

Conceptualizing Sexual Harassment in the Workplace as a Dignitary Tort

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I. INTRODUCTION

In a number of recent cases, the United States Supreme Court has characterized statutory claims of employment discrimination as tort claims.¹ This is not the first time that the Court has characterized statutory civil rights claims as “sound[ing] basically in tort,”² but these cases are unusual in using that characterization to import substantive rules of tort law into the

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¹ See *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517, 2524–25 (2013) (including federal statutory claims of workplace discrimination as within the scope of “any tort claim”); *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1191 (2011) (characterizing the Uniformed Services Employment and Reemployment Rights Act (USERRA) as a “federal tort” and an “intentional tort”).

² *Curtis v. Loether*, 415 U.S. 189, 195 (1974) (In finding a right to jury trial for a damage claim under Title VIII of the Civil Rights Act of 1968 for racial discrimination in housing, the Court noted that the claim “sounds basically in tort,” in that the statute “merely defines a new legal duty, and authorizes the courts to compensate a plaintiff for the injury caused by the defendant’s wrongful breach.”).

interpretation to be given to statutory terms.³ While it may be too soon to predict with any certainty the eventual effect of this importation of tort concepts into federal statutory anti-discrimination law, it seems likely that the application of tort concepts to claims of employment discrimination will have the effect of narrowing, rather than expanding, the effect and reach of the anti-discrimination laws.⁴

Even before this recent focus on tort law as the foundation for discrimination claims, some scholars have seemed to view sexual harassment claims as a species of tort, resisting the characterization of such claims as a form of employment discrimination.⁵ And courts facing claims of sexual harassment under Title VII in early cases expressed particular resistance to the notion that harassment constituted discrimination by the employer or was directed at employees “because of sex,” instead viewing the conduct to be motivated by “personal proclivity, peculiarity[,] or mannerism” and to be preventable by the employer only by employing “asexual” persons.⁶ Curiously, while early courts viewed sexual harassment not to be

³ See Charles A. Sullivan, *Tortifying Employment Discrimination*, 92 B.U. L. REV. 1431, 1432–33 & n.1 (2012) (noting that while prior characterization of statutory employment discrimination claims as torts was “mostly metaphorical,” the Court in *Staub v. Proctor Hospital* used the characterization in order to import the tort concept of proximate cause into the context of employment discrimination claims).

⁴ *Id.* at 1457 (noting that incorporation of the notion of proximate cause into employment discrimination law is likely to make it harder for plaintiffs to prevail on claims of employment discrimination, even when they can show “cause-in-fact”).

⁵ See Mark McLaughlin Hager, *Harassment as a Tort: Why Title VII Hostile Environment Liability Should Be Curtailed*, 30 CONN. L. REV. 375, 434 (1998). Professor Hager argues that viewing sexual harassment as discrimination under Title VII, particularly harassment consisting of sexual overtures, is anomalous, because such harassment is not based on contempt against women. *Id.* at 379. He also argues that prohibiting harassment under Title VII is wrong as a policy matter because employer liability for harasser conduct causes employers to over-enforce prohibitions against harassment, resulting in harm to the workplace environment, because employers are unfairly held liable for conduct that they do not bear responsibility for and because expecting employers to control harassment in the workplace “encourages a dependent, authoritarian, and passive form of feminism” and therefore “undermines the very dignity and autonomy insulted by harassment.” *Id.* at 417, 424. Professor Hager concedes the difficulties of pursuing harassment under the tort of intentional infliction of emotional distress and suggests the adoption of a new tort of harassment or “tortious infliction of malicious dignitary assault.” *Id.* at 434; see also Ellen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL’Y REV. 333, 345–63 (1990). Professor Paul argues that sexual harassment should not be considered sex discrimination because that would be inconsistent with legislative intent, because she contends that sexual harassment is based on sexual desire rather than animus, because liability is imposed on the employer, who she views as one of the “victims” of harassment, rather than the harasser, see *id.* at 336, 346, and because she believes that it is difficult to distinguish harassment from “intimate private relations.” *Id.* at 357–58. She argues for the adoption of a new tort of sexual harassment modeled on the tort of intentional infliction of emotional distress. *Id.* at 361.

⁶ *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163–64 (D. Ariz. 1975).

discrimination because it was thought to be motivated by sexual desire, the courts seem to have come around to the belief that harassment motivated by sexual desire is classic discrimination “because of sex.” This is reflected in the Supreme Court’s decision in *Oncale v. Sundowner Offshore Services, Inc.*⁷—a case addressing principally same-sex harassment—in which the Court seemed to suggest that most sexual harassment is motivated by sexual desire, which the Court concluded is “because of sex.”⁸

As should be clear from my prior articles,⁹ I do not believe that most sexual harassment is motivated by sexual desire. Nor do I harbor any doubt that sexual harassment occurring in the context of the workplace is a form of employment discrimination on the basis of sex, directed against women and men in the workplace because of their sex and gender, including as a way to express gender hostility and to punish non-conformance with society’s gender norms. Neither do I take issue with holding employers liable for sexual harassment occurring in the workplace under Title VII of the Civil Rights Act of 1964.¹⁰

The Supreme Court’s recent commingling of tort and discrimination concepts and its insistence that statutory discrimination claims are torts, however, raise the issue of what might happen if the lower courts take seriously the Court’s assertion that discrimination claims are torts. If acts of discrimination, including harassment, are tortious, then perhaps those acts should regularly result in tort liability, not only the liability imposed by statute. This issue has particular importance in the area of harassment, in which the courts have taken a number of steps to limit employer liability for harassment,¹¹ thereby often depriving employees of any remedy for even

⁷ *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

⁸ *Id.* at 80–81 (“Courts and juries have found the inference of discrimination easy to draw in most male-female sexual harassment situations, because the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex. The same chain of inference would be available to a plaintiff alleging same-sex harassment, if there were credible evidence that the harasser was homosexual. But harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.”).

⁹ See generally L. Camille Hébert, *Sexual Harassment is Gender Harassment*, 43 U. KAN. L. REV. 565 (1995); L. Camille Hébert, *Sexual Harassment as Discrimination “Because of . . . Sex”: Have We Come Full Circle?*, 27 OHIO N.U. L. REV. 439 (2001).

¹⁰ See 42 U.S.C. §§ 2000e–2000e-17 (2012).

¹¹ Although the Supreme Court’s decisions in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), recognizing vicarious liability on the part of employers for harassment engaged in by supervisors might have been seen as expanding employer liability, the Court has acted since that time to limit the application of those decisions by adopting a quite narrow definition of who constitutes a “supervisor.” See *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2439 (2013). In addition, the lower courts have applied the standard set forth in *Ellerth* and *Faragher* in such a way as to limit, rather than expand, employer liability. See L. Camille Hébert, *Why Don’t “Reasonable Women” Complain About Sexual*

actionable sexual harassment because the courts have declined to extend liability under Title VII to individual harassers.¹² If sexual harassment is a tort, then it would seem appropriate to impose tort liability on the harasser and perhaps the employer as well.

This Article, therefore, addresses the issue of whether sexual harassment in the workplace might be conceptualized as a dignitary tort and what the implications would be of such a conceptualization of a claim of sexual harassment. In fact, my interest in this issue was motivated in large part by my frustration about the way in which courts had been applying the “because of sex” requirement, concluding that explicitly sexual and explicitly sexually denigrating conduct did not constitute “discrimination because of sex.” If courts and judges have a hard time believing that sexually explicit and denigrating harassment is discrimination because of sex, while they insist that they view that behavior as unacceptable and intolerable in the modern workplace,¹³ might they be convinced to impose liability on the perpetrators of such harassment on the ground that the behavior is a tortious violation of the dignitary rights of the women and men on whom that behavior is imposed?

This Article will address the issues involved in conceptualizing sexual harassment as a dignitary tort, first by briefly discussing the approaches taken by certain other legal systems, which characterize sexual harassment not only as a form of sex discrimination but also as a violation of dignity rights of employees, or as only a violation of dignity interests. Next, the Article will explore what type of tort sexual harassment most resembles and explore the potential for relying on that tort claim in order to obtain redress for sexual harassment in the workplace. Finally, the Article will address the possible advantages and disadvantages, both practical and theoretical, of casting sexual harassment claims within the framework of tort. The Article will conclude with a proposal for conceptualizing sexual harassment as a dignitary tort, without losing some of the benefits gained by recognition of the ways in which sexual harassment implicates interests in gender equality in the workplace.

Harassment?, 82 IND. L.J. 711, 713–29 (2007) (discussing the Supreme Court’s decisions in *Ellerth* and *Faragher* and the way in which the standards from those decisions have been interpreted by the lower courts).

¹² See *Dearth v. Collins*, 441 F.3d 931, 933 (11th Cir. 2006) (stating that “relief under Title VII is available against only the employer and not against individual employees whose actions would constitute a violation of the Act” and noting that this was the rule followed by “the majority of our sister circuits”).

¹³ See, e.g., *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764–65 (6th Cir. 2006) (“While the harassment alleged by Vickers reflects conduct that is socially unacceptable and repugnant to workplace standards of proper treatment and civility, Vickers['] claim does not fit within the prohibitions of the law.”); *Dillon v. Frank*, No. 90-2290, 1992 U.S. App. LEXIS 766, at *2, *28 (6th Cir. Jan. 15, 1992) (calling the sexual harassing conduct of the plaintiff’s co-workers “outrageous” and expressing sympathy “with his plight,” but concluding that the conduct was not prohibited under Title VII).

II. EXISTING PROHIBITIONS OF SEXUAL HARASSMENT BASED ON DIGNITARY HARM

One does not have to look far to find a model for the conceptualization of sexual harassment as a type of dignitary tort. The Directives of the European Union define sexual harassment as “where any form of unwanted verbal, non-verbal or physical conduct of a sexual nature occurs, with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment.”¹⁴ Although this prohibition of sexual harassment still views harassment as a form of discrimination,¹⁵ there is no express requirement that the harassing conduct be shown to be motivated by sex or gender; the sexual nature of the conduct appears sufficient to satisfy any such tie to sex discrimination.¹⁶

The EU Directive’s focus on dignity suggests a focus on the individualized effects of harassment and the way in which sexual harassment causes embarrassment, shame, and humiliation on the part of the men and women subjected to that harassment, in part because of the way that harassment intrudes into their physical, psychological, and emotional space.¹⁷ This notion of violation of dignity is a much more “tort-like” concept than we generally find in United States employment discrimination law, under which actionable

¹⁴ Directive 2006/54/EC, of the European Parliament and of the Council of 5 July 2006 on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (Recast), 2006 O.J. (L. 204) 23, 27 [hereinafter Equal Opportunities Directive].

¹⁵ That Directive provides that “[h]arassment and sexual harassment are contrary to the principle of equal treatment between men and women and constitute discrimination on grounds of sex for the purposes of this Directive.” *Id.* at 23. Earlier actions of entities of the European Union that ultimately culminated in the Directive suggest that harassment should be prohibited both because of its effect on dignity of workers and because of its discriminatory nature and effects. In the Resolution of May 29, 1990 by the Council of the European Communities, the Council indicated that “unwanted conduct of a sexual nature, or other conduct based on sex affecting the dignity of women and men at work, including the conduct of superiors and colleagues, is unacceptable and may, in certain circumstances, be contrary to the principle of equal treatment.” Council Resolution (EC) No. 90/C 157/02 of 29 May 1990, 1990 O.J. (C 157) 1, 3.

¹⁶ The apparent link between the sexual nature of the conduct and the notion of discrimination seems to be confirmed by the Directive’s definition of “harassment,” defined as existing “where unwanted conduct related to the sex of a person occurs with the purpose or effect of violating the dignity of a person, and of creating an intimidating, hostile, degrading, humiliating or offensive environment.” Equal Opportunities Directive, *supra* note 14, at 26. While sexual conduct need not be shown to be related to the sex of a person, non-sexual conduct is required to meet this requirement to be within the scope of the Directive. *See id.*

¹⁷ *See* Kathrin Zippel, *The European Union 2002 Directive on Sexual Harassment: A Feminist Success?*, 7 COMP. EUR. POL. 139, 147 (2009) (suggesting that a focus on dignity rather than discrimination “individualize[s] the experience of women”).

sexual harassment must be shown to be discrimination because of sex in order to be within the reach of Title VII's prohibition.¹⁸

The legal definition of sexual harassment by other legal systems has taken a step even further away from discrimination and toward the conceptualization of sexual harassment as a violation of interests in dignity. In 2012, new prohibitions against sexual harassment were enacted into France's labor and penal codes, after a prior prohibition of sexual harassment in the penal code had been invalidated by the French Constitutional Council.¹⁹ The Labor Code's new prohibition of sexual harassment contains a two-part definition of sexual harassment, the first of which provides that "[n]o employee shall be required to submit to facts . . . of sexual harassment, consisting of repeated words or behavior with a sexual connotation, which undermine his or her dignity by reason of their degrading or humiliating nature or create against his or her an intimidating, hostile, or offensive situation."²⁰ Not only does this prohibition of sexual harassment not require any express showing that the harassment was motivated by sex discrimination, but the French legislature, as well as the French courts and many of its legal scholars, insists that sexual harassment is not a form of discrimination, making it extremely unlikely that any notion of discrimination is implied into the prohibition.²¹

Other legal systems also treat sexual harassment in a manner similar to a dignitary tort, even when they retain the notion of sexual harassment as a form of discrimination. The Labour Code of Canada, applicable to federal employees, defines sexual harassment as "any conduct, comment, gesture or contact of a sexual nature . . . that is likely to cause offence or humiliation to

¹⁸The United States Supreme Court made clear in *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998), that in all sexual harassment cases, the plaintiff "must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted 'discrimination . . . because of . . . sex.'" *Id.* at 81 (emphasis in original).

¹⁹See Conseil constitutionnel [CC] [Constitutional Court] decision No. 2012-240 QPC, May, 4, 2012, J.O. 8015 (Fr.).

²⁰CODE DU TRAVAIL [C. TRAV.], art. L 1153-1 (Fr.) (translation provided by author). In the original French, the provision states: « Aucun salarié ne doit subir des faits . . . [s]oit de harcèlement sexuel, constitué par des propos ou comportements à connotation sexuelle répétés qui soit portent atteinte à sa dignité en raison de leur caractère dégradant ou humiliant, soit créent à son encontre une situation intimidante, hostile ou offensante ». The second part of the Labor Code's prohibition of sexual harassment prohibits the use of serious pressure to obtain acts of a sexual nature.

²¹For a detailed analysis of the French sexual harassment provisions, as well as the French legal system's separation of the concepts of harassment from discrimination, see L. Camille Hébert, *Divorcing Sexual Harassment from Sex: Lessons from the French*, 21 DUKE J. GENDER L. & POL'Y 1, 11–23 (2013). The legislative history of the new prohibitions on sexual harassment in the French labor code and penal code indicates that, while sexual harassment is not generally viewed in France as a form of discrimination, a number of participants in the enactment of that legislation expressed the view that the existence of sexual harassment in the workplace "does implicate issues of equality between men and women." *Id.* at 18–19.

any employee” or “that might, on reasonable grounds, be perceived by that employee as placing a condition of a sexual nature on employment or any opportunity for training or promotion.”²² Accordingly, sexual harassment can violate Canadian law without an express finding of discriminatory motivation, even though elsewhere Canadian law declares that sexual harassment is a form of prohibited discrimination.²³ And the Canadian Supreme Court, interpreting a provincial prohibition of sexual harassment, made clear that sexual harassment is a form of sex discrimination, as limiting the employment opportunities of women.²⁴ In the same decision, however, the court also emphasized the ways in which sexual harassment harms the dignitary interests of those subjected to harassment:

Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being.²⁵

Accordingly, while Canadian law clearly views sexual harassment as a form of discrimination on the basis of sex, it also recognizes the way in which sexual harassment constitutes a harm to dignity and appears to prohibit harassment at least in part because of that dignitary harm.

As explained above, some legal systems have made the choice to make sexual harassment unlawful not because, or not only because, it results in unequal treatment of men and women in the workplace, but because the existence of sexually harassing behavior creates an environment injurious to the dignity of workers. This indicates that at least some legal systems conceptualize sexual harassment as a dignitary wrong, apart from its possible status as a wrong of inequality. This raises the question of whether sexual harassment might also be conceptualized as a dignitary wrong within our legal system, that is, whether sexual harassment might be conceptualized as a dignitary tort, rather than, or rather than just, a form of discrimination.

²² Canada Labour Code, R.S.C. 1985, c. L-2, § 247.1.

²³ Canadian Human Rights Act, R.S.C. 1985, c. H-6, § 14(2) (providing that sexual harassment shall “be deemed to be harassment on a prohibited ground of discrimination”).

²⁴ *Janzen v. Platy Enters.*, [1989] 1 S.C.R. 1252, 1290–91 (Can.) (concluding that “sexual harassment is a form of sex discrimination because it denies women equality of opportunity in employment because of their sex”). The Canadian Supreme Court noted that this had been the conclusion of almost all of the courts and human rights commissions to consider the issue under a wide variety of statutory prohibitions against sexual harassment, including the Canadian Labour Code and federal and provincial human rights statutes. *See id.* at 1276–79.

²⁵ *Id.* at 1284.

III. IF SEXUAL HARASSMENT IS A DIGNITARY TORT, WHAT TORT IS IT?

To the extent that claims of sexual harassment might be conceptualized as a type of tort, the question then arises as to what type of existing tort claim a claim of sexual harassment most resembles. In a decision by the Supreme Court relatively early in its dealing with discrimination claims, the Court suggested not only that a discrimination claim—there, racial discrimination in housing—“sounds basically in tort,”²⁶ but also suggested that discrimination claims might “be likened to” an action for intentional infliction of mental distress.²⁷ And some courts have allowed employees bringing claims of harassment in the context of employment to state claims for intentional infliction of emotional distress. For example, the Superior Court of Connecticut in the case of *Leone v. New England Communications*²⁸ refused to dismiss an employee’s claim of intentional infliction of emotional distress based on his allegations that he had been subject to ethnic slurs, as well as comments on his penis, sexually offensive pictures on his computer, and comments about his sexuality. The court held that the conduct alleged by the plaintiff was sufficiently extreme and outrageous as required by the tort of intentional infliction of emotional distress; the court emphasized the strong public policy expressed by prohibitions against discrimination and noted that this caused the conduct to be “utterly intolerable in a civilized community.”²⁹

A claim of intentional infliction of emotional distress, as set forth in § 46 of the *Restatement (Third) of Torts*, provides that “[a]n actor who by extreme and outrageous conduct intentionally or recklessly causes severe emotional harm to another is subject to liability for that emotional harm and, if the emotional harm causes bodily harm, also for the bodily harm.”³⁰ “Emotional harm” is defined to mean “impairment or injury to a person’s emotional tranquility,”³¹ although the comment to that definitional section indicates that the term includes “a variety of mental states, including fright, fear, sadness, sorrow, despondency, anxiety, humiliation, depression (and other mental illnesses) and a host of other detrimental—from mildly unpleasant to

²⁶ *Curtis v. Loether*, 415 U.S. 189, 195 (1974).

²⁷ *Id.* at 195 n.10. The Court suggested that a claim of racial discrimination might also be likened to a claim of defamation. *Id.*

²⁸ *Leone v. New Eng. Commc’ns*, No. CV010509525, 2002 Conn. Super. Ct. LEXIS 1361 (Conn. Super. Ct. Apr. 10, 2002).

²⁹ *Id.* at *8–9 (internal quotation marks omitted). Although the court quoted the entire definition of extreme and outrageous conduct—“so outrageous in character, and so extreme in degree as to go beyond all bounds of decency and to be regarded as atrocious and ‘utterly intolerable in a civilized community’”—the court emphasized the final clause of that definition. *Id.* at *9 (emphasis in original) (citations omitted).

³⁰ RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 46 (2012).

³¹ *Id.* § 45.

disabling—mental conditions.”³² A number of states have adopted either this or an earlier version of the *Restatement*'s definition of the tort.³³

The *Restatement* itself recognizes the potential overlap that exists between claims of employment discrimination and tort claims for intentional infliction of emotional distress, but also notes the differences between the claims, including the persons or entities that may be liable under the different claims. The *Restatement* indicates that it is not intended to restrict plaintiffs from asserting occupational claims of intentional infliction of emotional distress.³⁴

It seems clear that the documented harm caused by sexual harassment of women and men in the workplace, in addition to harm of an economic and sometimes of a physical nature, would meet the requirements of “emotional harm” for a claim of intentional infliction of emotional distress. The targets of sexual harassment often report feeling humiliation, anxiety, and fear as a result of the harassing conduct to which they have been subjected.³⁵ These emotions, particularly humiliation, appear to be quite consistent with the experience of violation of or harm to one's dignity. Interestingly, even workers who are not themselves the direct target of sexually harassing behavior, but who instead are subject to ambient sexual harassment or who experience sexual harassment indirectly, also report negative psychological outcomes.³⁶ And while not every target or affected observer of harassment may be able to meet the requirement that the emotional harm be “severe,” many will undoubtedly be able to do so.³⁷

³² *Id.* § 45 cmt. a.

³³ *Id.* § 46 cmt. a (noting that forty-nine jurisdictions expressly follow this section of the *Restatement* and that two other jurisdictions follow a modified version of the rule set forth in the section).

³⁴ *Id.* § 46 cmt. n.

³⁵ See Barbara A. Gutek & Mary P. Koss, *Changed Women and Changed Organizations: Consequences of and Coping with Sexual Harassment*, 42 J. VOCATIONAL BEHAV. 28, 32–35 (1993) (reporting the results of studies indicating the psychological effects of sexual harassment, including emotional reactions such as anger, fear, depression, anxiety, irritability, loss of self-esteem, feelings of humiliation and alienation, and a sense of helplessness and vulnerability, and noting the similarity between the symptoms reported in the aftermath of sexual harassment and the symptoms characteristic of post-traumatic stress disorder); see also Kimberly T. Schneider et al., *Job-Related and Psychological Effects of Sexual Harassment in the Workplace: Empirical Evidence from Two Organizations*, 82 J. APPLIED PSYCHOL. 401, 406–07, 412–13 (1997) (reporting results of a study in which women subjected to sexually harassing behaviors reported negative job-related and psychological results, including stress, depression, and symptoms of post-traumatic stress).

³⁶ Theresa M. Glomb et al., *Ambient Sexual Harassment: An Integrated Model of Antecedents and Consequences*, 71 ORG. BEHAV. & HUM. DECISION PROCESSES 309, 321–24 (1997) (reporting that women who experienced ambient sexual harassment reported negative psychological outcomes, even when they were not themselves directly subject to sexual harassment).

³⁷ It appears that courts have used this requirement to limit the liability of employers and harassers for intentional infliction of emotional distress, even when the conduct at

The requirement that the harasser act intentionally or recklessly in causing that emotional harm or distress would also appear to be met by sexual harassing behavior directed by harassers against their targets. As the Supreme Court has recently indicated, under traditional tort law, “intent” means “that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it.”³⁸ No matter what some harassers may contend, sexual harassment that is sufficiently severe or pervasive to create a hostile and abusive working environment and therefore affect a term and condition of employment is not the product of innocent, clueless, or inadvertent behavior on the part of the harasser.³⁹ It is difficult to imagine that courts would conclude, at least in the present legal climate, that harassers who coerce others into sexual conduct, who use degrading and derogatory sexual comments to refer to others, and who denigrate and mock the presumed sexual conduct of others, sometimes by simulating sexual acts with them, do not intend to inflict harm or at least are not aware that harm is substantially certain to occur.⁴⁰

issue appears to meet the standard for extreme and outrageous behavior. In *Smith v. Amedisys Inc.*, 298 F.3d 434 (5th Cir. 2002), the plaintiff had alleged pervasive harassment by her immediate supervisor and the chief financial officer of the employer, including being touched on the leg, having sexual advances made, being grabbed and pulled onto a bed while in a hotel room on a business trip, being told to wear tighter clothes to improve sales, and being told to prostitute herself to obtain business for the company. *Id.* at 437–38. Although the court of appeals acknowledged that under Louisiana law a claim of intentional infliction of emotional distress could be based on “a pattern of deliberate, repeated harassment over a period of time,” the court held that the plaintiff had not suffered severe emotional distress because the depression, headaches, and loss of appetite that she suffered was not “unendurable.” *Id.* at 449–50. Similarly, in *Island v. Buena Vista Resort*, 103 S.W.3d 671 (Ark. 2003), the plaintiff alleged sexual harassment by the owner of her employer, including numerous instances over a period of time in which he offered to buy the plaintiff a car if she had sex with him once a week, asked to touch her breasts, talked about his sexual experiences in “graphic detail,” made comments about her body, and asked her to meet him at hotels to engage in sexual activities. *Id.* at 673–77. She was discharged shortly after she yelled at him and told him “to never speak dirty to [me] again.” *Id.* at 682 (alteration in original). The court held that while the owner’s conduct was “egregious,” the plaintiff did not prove that she suffered severe emotional distress that was such that no reasonable person could endure it, because “it appears that she did endure the alleged harassment for several years before she firmly rejected his alleged advances.” *Id.* at 681–82.

³⁸ *Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1194 n.3 (2011).

³⁹ *See, e.g.*, L. Camille Hébert, *The Economic Implications of Sexual Harassment for Women*, 3 KAN. J.L. & PUB. POL’Y 41, 47–50 (1994) (discussing the economic causes of sexual harassment, including the fact that sexual harassment is often directed at women who are economically vulnerable and may be motivated by the frustration and hostility of men based on their decreasing advantages over women in the workplace).

⁴⁰ *See, e.g.*, *State Farm Fire & Cas. Co. v. Compupay, Inc.*, 654 So. 2d 944, 947 (Fla. Dist. Ct. App. 1995) (holding, in context of claim against insurance company for failure to provide a defense to sexual harassment claim by employee against insured employer, that there was no insurance coverage because of the intentional nature of the conduct and

The more difficult question is whether sexual harassing behavior will be considered to constitute the type of “extreme and outrageous conduct” necessary to state a claim of intentional infliction of emotional distress. The comments to the *Restatement* indicate that in order for conduct to meet this standard, both terms must be given effect: “this double limitation, ‘extreme and outrageous,’ requires both that the character of the conduct be outrageous and that the conduct be sufficiently unusual to be extreme.”⁴¹ Accordingly, if sexual harassment is viewed as fairly common behavior, it is possible that the courts might find it not to be extreme, regardless of how outrageous they find it to be.⁴²

The Restatements and the courts have tended to define the terms “extreme and outrageous” in colorful, but not very useful, language. In a comment to the *Restatement (Second) of Torts*, the following guidance was offered on how to identify “extreme and outrageous” conduct:

Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, “Outrageous!”⁴³

The definition seems to have been softened in the current *Restatement*, if only by the deletion of certain adjectives and adverbs. That guidance now provides that liability for the tort exists “only if the conduct goes beyond the bounds of human decency such that it would be regarded as intolerable in a civilized community.”⁴⁴ It seems possible that some uncivil conduct might be regarded as intolerable in a civilized community but not “utterly” intolerable in such a community. Similarly, some indecent conduct might be viewed as

stating that “[i]t can be reasoned that an act of discrimination or harassment, like an act of sexual abuse, has but one end: to harm the victim” and that “several courts have concluded that sexual harassment is deemed an intentional act as a matter of law”); *Commercial Union Ins. Cos. v. Sky, Inc.*, 810 F. Supp. 249, 253 (W.D. Ark. 1992) (rejecting a claim that an insurance company had to duty to defend a claim of sexual harassment in the context of employment and noting that “it strains the imagination to speculate how a pattern of sexual overtures and touching [could] be ‘accidental’”).

⁴¹ RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 46 cmt. d (2012).

⁴² For example, a concurring justice in *Hoffman-La Roche, Inc. v. Zeltwanger*, 144 S.W.3d 438 (Tex. 2004) (Hecht, J., concurring), suggested that the sexually harassing behavior of the plaintiff’s supervisor, while “certainly objectionable, reprehensible, [and] at times even disgusting,” was “regrettably not that unusual.” *Id.* at 450–51. In fact, Justice Hecht suggested that the existence of a statutory prohibition of sexual harassment in the workplace suggested the lack of unusualness of that activity. *Id.* at 450.

⁴³ RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965).

⁴⁴ RESTATEMENT (THIRD) OF TORTS § 46 cmt. d (2012).

beyond the bounds of human decency, even if not “beyond all possible bounds of decency.”

Some courts have added to the definition of extreme and outrageous conduct by invoking other concepts, such as dignity. The court in *Weathersby v. Kentucky Fried Chicken*⁴⁵ indicated that behavior should be considered extreme and outrageous “only if the average member of the community must regard the defendant’s conduct as being a complete denial of the plaintiff’s dignity as a person.”⁴⁶

Some courts also appear to be defining extreme and outrageous conduct in a negative manner, by indicating the type of conduct that is not sufficient to be characterized as extreme and outrageous. For example, the court in *GTE Southwest, Inc. v. Bruce*⁴⁷ noted that “insensitive or even rude behavior” and “mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities do not rise to the level of extreme and outrageous conduct.”⁴⁸

Applying these definitions, it appears that at least some forms of sexual harassment, including some forms of verbal harassment, such as referring to women as “cunts,” as well as harassment consisting of unwelcome touching or fondling and sexual conduct that is particularly degrading and humiliating, would meet the definition of extreme and outrageous behavior. It would not be strange to say that such conduct, particularly in the context of the workplace, would be intolerable in a civilized society and beyond the bounds of human decency, as well as a denial of personal dignity. And it would be strange to call that conduct merely rude or insensitive behavior or to characterize it as petty or trivial.

Courts have reached different conclusions on the issue of whether some forms of sexually harassing behavior might meet the standard of extreme and outrageous conduct. A California court of appeal in *Fisher v. San Pedro Peninsula Hospital*⁴⁹ faced that issue in the context of a claim of sexual harassment by a nurse against her supervising physician, involving verbal sexual insults and offensive touching, including one incident in which he hugged her so tightly that he separated the cartilage in her ribs; she also complained of being subjected to an abusive environment, in which harassment of other women occurred in her presence, including the harasser pulling nurses onto his lap, grabbing women’s breasts and moving his hands toward their vaginal area, and moving his pelvic area while walking up closely

⁴⁵ *Weathersby v. Ky. Fried Chicken Nat’l Mgmt. Co.*, 587 A.2d 569 (Md. Spec. App. 1991), *rev’d on other grounds*, 607 A.2d 8 (Md. Ct. App. 1992).

⁴⁶ *Id.* at 578; *see also* *Godfrey v. Perkin-Elmer Corp.*, 794 F. Supp. 1179, 1189 (D.N.H. 1992) (citing with approval definition of “extreme and outrageous conduct” from the *Weathersby* case).

⁴⁷ *GTE Sw., Inc. v. Bruce*, 998 S.W.2d 605 (Tex. 1999).

⁴⁸ *Id.* at 612.

⁴⁹ *Fisher v. San Pedro Peninsula Hosp.*, 262 Cal. Rptr. 842 (Cal. Ct. App. 1989).

behind a woman.⁵⁰ Although the court of appeals concluded that the plaintiff had not stated a claim for actionable sexual harassment because she had not pled that the harassment was pervasive, the court suggested that a claim of actionable sexual harassment would also succeed in stating an actionable claim of intentional infliction of emotional distress. Noting that sexual harassment was “often inherently oppressive and malicious” and that an employee had a fundamental right to a workplace free of discrimination, the court concluded that “by its very nature, sexual harassment in the work place is outrageous conduct as it exceeds all bounds of decency usually tolerated by a decent society.”⁵¹

Other courts have also recognized the possibility that discrimination and harassment can constitute extreme and outrageous conduct in the context of the employment relationship, with some of those courts suggesting that the very fact of the employment relationship might make certain conduct of an employer toward an employee more likely to be found to be outrageous. In concluding that the allegations of imposition of discriminatory terms and conditions of employment with respect to male and female attorneys and the refusal to remove the female plaintiff from the supervision of the discriminating supervisor did not state a claim for intentional infliction of emotional distress, the court in *Clemente v. State*⁵² did note that courts are more likely to find conduct to be outrageous if inflicted within the context of the “special relationship” of employer and employee.⁵³ The court indicated, however, that the plaintiff in that case had not shown the sort of “extraordinary transgression of the bounds of socially tolerable conduct”:

In the present case, no such extraordinary outrageous aggravating factors occurred. Plaintiff was not verbally, sexually, or physically abused or harassed. Nobody engaged in name-calling. She was not exposed to violence, nor was she repeatedly and viciously ridiculed. At most, she was subjected to an insensitive, mean-spirited supervisor who might have engaged in gender-based, discriminatory treatment, but in this case, that treatment by itself did

⁵⁰ *Id.* at 846. The lower court had rejected the nurse’s claims against the physician, noting that the “world is full of offensive jackasses but there is no tort for being offensive.” *Id.* at 848 (internal quotation marks omitted).

⁵¹ *Id.* at 857–58. Some scholars also have taken this approach. For example, in Prosser and Keeton on the Law of Torts, the authors state that “[s]exual harassment on the job is undoubtedly an intentional infliction of emotional distress.” W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 12 (5th ed. 1984 & Supp. 1988). The Ohio Court of Appeals in *Johnson v. Cox*, No. 96CA622, 1997 Ohio App. LEXIS 1346, at *1 (Ohio Ct. App. 1997), noted its agreement with Prosser and Keeton “that sexual harassment on the job is an intentional infliction of emotional distress.” Other courts, however, have disagreed. The United States District Court for the District of Oregon in *Meagher v. Lamb-Weston, Inc.*, 839 F. Supp. 1403, 1413 (D. Or. 1993), expressly rejected the plaintiffs’ contention that sexual harassment “is *per se* outrageous behavior.”

⁵² *Clemente v. State*, 206 P.3d 249 (Or. App. 2009).

⁵³ *Id.* at 255.

not amount to “aggravated acts of persecution that a jury could find beyond all tolerable bounds of civilized behavior.”⁵⁴

Similarly, the court in *Kanzler v. Renner*⁵⁵ sought to identify the factors relied on by courts to determine when sexually harassing conduct in the workplace was considered sufficiently outrageous to make out a claim of intentional infliction of emotional distress. The court indicated that one or more of the following factors seemed to cause the harassing conduct to cross the line into outrageousness: abuse of authority; repeating or recurring acts of harassment; unwelcome touching or physical contact, particularly of intimate areas of the body; or retaliation for refusing to submit to sexual conduct or for reporting that conduct.⁵⁶

Other courts have agreed that workplace harassment, including sexually and racially harassing conduct, can constitute sufficiently outrageous conduct to state a claim for intentional infliction of emotional distress.⁵⁷ The court in *Coleman v. Housing Authority of Americus*⁵⁸ refused to dismiss an employee’s claim of intentional infliction of emotional distress against her former supervisor based on his sexual harassment of her, which took the form of calling her into his office to talk about sex, showing her cartoons of a sexual nature, asking her about her sexual activities with her husband, telling her racist and sexual jokes, trying to engage her in conversations about the sexual practices of black women, and making sexual remarks about her dress and her

⁵⁴ *Id.* 254–55 (emphasis omitted). The court indicated that the unlawfulness of the conduct was relevant, but not dispositive, in determining whether the conduct was actionable as intentional infliction of emotional distress. *Id.* at 255 n.3.

⁵⁵ *Kanzler v. Renner*, 937 P.2d 1337 (Wyo. 1997).

⁵⁶ *Id.* at 1341–43. The court held that the plaintiff’s allegations that a police officer with whom she had previously had a friendly relationship followed her home in his squad car and parked near her home, came into the dispatch room and sat close to her for long periods of time while she was working, put his arm around her and pulled her close to his body, and followed her into a utility closet and attacked her could be construed as outrageous, making summary judgment for the police officer inappropriate. *Id.* at 1344; see also *Salvatore v. KLM Royal Dutch Airlines*, No. 98 Civ. 2450 (LAP), 1999 U.S. Dist. LEXIS 15551, at *7 (S.D.N.Y. Sep. 30, 1999) (distinguishing between claims of sexual harassment for which claims of intentional infliction of emotional distress are allowed to proceed and those that are not and noting that successful claims generally involve an “unrelenting campaign of day in, day out harassment or that the harassment was accompanied by physical threats”) (citation omitted).

⁵⁷ See, e.g., *Alcorn v. Anbro Eng’g, Inc.*, 468 P.2d 216, 217 (Cal. 1970) (holding that complaint stated a claim of intentional infliction of emotional distress when racial slurs were used against the African-American employee in connection with his discharge); *Sawicka v. Catena*, 912 N.Y.S.2d 666, 667 (N.Y. App. Div. 2010) (holding that the plaintiffs’ allegations that they were secretly recorded while using the restroom by a video camera installed by the owner of the employer stated a claim of creation of a hostile work environment on the basis of sex and intentional infliction of emotional distress, given that the action was “unquestionably outrageous and extreme”).

⁵⁸ *Coleman v. Hous. Auth. of Americus*, 381 S.E.2d 303 (Ga. Ct. App. 1989).

mannerisms. The court noted that even if some of the acts would not by themselves constitute the sort of conduct that “would naturally humiliate, embarrass, frighten, or outrage” the plaintiff, the repetition of those actions over her protests were sufficient.⁵⁹ The court noted that conduct of this type was particularly likely to cross the line into outrageousness in the workplace context, in which the employee is under the control of the employer:

The workplace is not a free zone in which the duty not to engage in wilfully and wantonly causing emotional distress through the use of abusive or obscene language does not exist. Actually, by its very nature, it provides an environment more prone to such occurrences because it provides a captive victim who may fear reprisal for complaining, so that the injury is exacerbated by repetition, and it presents a hierarchy of structured relationships which cannot easily be avoided.⁶⁰

Courts have also held that an employer’s action in refusing to respond to or take remedial action with respect to an employee’s complaints of sexual harassment by a supervisory employee can constitute sufficiently outrageous behavior to state a claim of intentional infliction of emotional distress against the employer. The plaintiff in *Ford v. Revlon, Inc.*⁶¹ brought numerous complaints of verbal and physical sexual harassment by her direct supervisor to the attention of her employer; the harassment consisted of repeated assertions that he was going to “fuck her” and a physical altercation in which he grabbed her and put her in a chokehold while he ran his hand over her breasts, stomach, and between her legs. For over a year, her pleas for help were ignored, in spite of the fact that she reported her fear of him and the distress it was causing her. The supervisor finally received a letter of censure and was terminated shortly after the plaintiff attempted suicide.⁶² The court

⁵⁹ *Id.* at 305–06.

⁶⁰ *Id.* at 306. It is true that not all courts have reached the same conclusion about the likelihood of being able to establish the existence of intentional infliction of emotional distress in the context of the workplace. The court in *Cox v. Keystone Carbon Co.*, 861 F.2d 390, 395 (3d Cir. 1988), indicated that “it must be recognized that it is extremely rare to find conduct in the employment context that will rise to the level of outrageousness necessary to provide a basis for recovery for the tort of intentional infliction of emotional distress.” Similarly, the state court in *Wilkinson v. Hobbs Assocs., LLC*, No. CV-075007485, 2011 Conn. Super. LEXIS 1849, at *10 (Conn. Super. Ct. July 20, 2011), indicated that such a claim would be difficult to establish because “individuals in the workplace reasonably should expect to experience some level of emotional distress, even significant emotional distress, as a result of conduct in the workplace.” The cases that suggest that the existence of an imbalance of power in the workplace creates a “special relationship” that makes the claim easier, rather than harder, to establish seem better reasoned than those whose approach is essentially “that’s life.” See Regina Austin, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*, 41 STAN. L. REV. 1, 2 (1988).

⁶¹ *Ford v. Revlon, Inc.*, 734 P.2d 580 (Ariz. 1987).

⁶² *Id.* at 581–83.

agreed that the employer could be held liable for intentional infliction of emotional distress, in spite of the fact that the jury had not found the actual harasser liable for that tort. The court found the employer's action—or inaction—to be independently tortious and “extreme or outrageous”:

Ford made numerous Revlon managers aware of Braun's activities at company functions. Ford did everything that could be done, both within the announced policies of Revlon and without, to bring this matter to Revlon's attention. Revlon ignored her and the situation she faced, dragging the matter out for months and leaving Ford without redress. Here is sufficient evidence that Revlon acted outrageously.⁶³

The court also agreed that the employer either intended to cause the plaintiff emotional distress or that its reckless disregard of the supervisor's conduct made it “nearly certain” that emotional distress would in fact occur.⁶⁴

Some courts seemed to have defined the line between conduct that will be considered extreme and outrageous and conduct that will not be found to meet that standard in terms of what type of conduct employees in the workplace should be required to accept.⁶⁵ And for these courts, this standard seems to be an evolving one. For example, in *Retherford v. AT&T Communications*,⁶⁶ the court rejected the contention of the plaintiff's co-workers that their retaliatory actions toward her after she complained of sexual harassment by a female co-worker could not constitute extreme and outrageous conduct sufficient to state a claim of intentional infliction of emotional distress; that conduct had included what the court termed “months of persecution,” including shadowing her movements, intimidation by threatening looks and remarks, and manipulations that made her work much more stressful.⁶⁷ The court held that accepting the defendants' assertions to the contrary would be a “travesty” because “sexual harassment is simply unacceptable in today's society”.⁶⁸

It is worth stating forcefully that any other conclusion would amount to an intolerable refusal to recognize that our society has ceased seeing sexual harassment in the work place as a playful inevitability that should be taken in good spirits and has awakened to the fact that sexual harassment has a corrosive effect on those who engage in it as well as those who are subjected

⁶³ *Id.* at 585.

⁶⁴ *Id.* at 585–86.

⁶⁵ *See, e.g.,* *Godfrey v. Perkin-Elmer Corp.*, 794 F. Supp. 1179, 1189 (D.N.H. 1992) (concluding that the plaintiff's allegations that her two supervisors made sexual comments to her, attempted to engage her in sexual conversations, and sat close to her in a sexually suggestive manner were not “acceptable sexual banter,” but “ongoing, unadorned discrimination of an inherently offensive nature, of a kind one should not be expected to encounter as part of daily life”).

⁶⁶ *Retherford v. AT&T Commc'ns*, 844 P.2d 949 (Utah 1992).

⁶⁷ *Id.* at 978.

⁶⁸ *Id.*

to it and that such harassment has far more to do with the abusive exercise of one person's power over another than it does with sex.⁶⁹

Other judges, on the other hand, have suggested that sexually harassing conduct does not generally meet the requirement of extreme and outrageous conduct necessary to establish intentional infliction of emotional distress, and that only the most serious of such conduct, such as repeated intimidating and physically threatening harassment, should be held to meet that standard. That was the position of the concurring justice in *Hoffman-La Roche, Inc. v. Zeltwanger*,⁷⁰ in which an employee had recovered for sexual harassment by her supervisor, consisting of sexual comments about her, commentary about his sexual experiences, and apparent retaliation for complaining about that conduct. That justice sought to distinguish the conduct in that case from what she viewed as more serious and more physically threatening conduct in another case in which intentional infliction of emotional distress had been found:⁷¹

Undoubtedly, most conduct that would support a sexual-harassment claim is outrageous and intolerable, presumably the very reason the Legislature made such conduct statutorily actionable. But only when such behavior repeatedly becomes so forceful and intimidating that a reasonable person would feel immediately threatened or afraid can a court conclude with sufficient certainty that the actor intended to cause severe emotional distress or that severe emotional distress was the primary risk of the actor's conduct.⁷²

One cannot help but wonder how the justice distinguishes between the "outrageous and intolerable" conduct that she views as sufficient to be outlawed, but not tortious, and the "extreme and outrageous" conduct that is sufficiently tortious. One might also wonder why only fear or threat counts as severe emotional distress, but not humiliation or despondency.

⁶⁹ *Id.* (citation omitted).

⁷⁰ See *Hoffman-La Roche, Inc. v. Zeltwanger*, 144 S.W.3d 438, 454 (Tex. 2004) (O'Neill, J., concurring).

⁷¹ That other case was *GTE Southwest, Inc. v. Bruce*, 998 S.W.2d 605 (Tex. 1999). The plaintiffs in that case, three female employees, obtained a jury verdict for damages for intentional infliction of emotional distress, based on evidence that their male supervisor had "yelled, screamed, cursed, and even 'charged' at them"—bending his head down, putting his arms by his sides, balling his hands into fists, and walking quickly toward or lunging at the employees, stopping close to their faces. *Id.* at 609, 613. He also used profanity toward them, using the words "fuck" and "motherfucker." *Id.* at 613. One employee testified that the supervisor would call her into his office and stare at her for as long as thirty minutes at a time and she was not allowed to leave until she was dismissed. *Id.* at 614. In upholding the jury verdict, the court noted that the supervisor's action was intentionally intimidating and humiliating. *Id.* at 617.

⁷² *Hoffman-La Roche, Inc.*, 144 S.W.3d at 454 (O'Neill, J., concurring).

IV. THE BENEFITS AND RISKS OF CONCEPTUALIZING SEXUAL HARASSMENT AS A DIGNITARY TORT

At least some claims of sexual harassment would appear to fit quite comfortably within the elements of a claim of intentional infliction of emotional distress, and, as demonstrated above, some courts have shown a willingness to find that sexually harassing conduct violates tort law under that theory. But the conclusion that sexual harassment can be conceptualized as a dignitary tort does not answer the question of whether it should be. Determining the desirability of framing sexual harassment in this way requires the assessment of the advantages and disadvantages to this approach, both practical and theoretical.

There are some potential advantages of a conclusion that sexual harassment constitutes a dignitary tort, such as intentional infliction of emotional distress. One such potential advantage is that if, under tort theory, sexual harassment does not have to be shown to be discriminatory in order to be actionable, some forms of sexual harassment that courts now find not to be unlawful may be found to be actionable. For example, courts routinely find sexually harassing behavior directed at gay men and lesbians to be outside the scope of Title VII on the grounds that that conduct is motivated not by the target's sex or gender but because of his or her sexual orientation.⁷³ Similarly, some courts have concluded that sexually explicit and degrading behavior directed at women is not unlawful because it was motivated not by the woman's sex or gender but because of some personal characteristic that the harasser found objectionable.⁷⁴ To the extent that conceptualization of sexual harassment as a dignitary tort eliminates the requirement that the harassment be shown to have been discriminatorily motivated, the range of sexual harassment found to be actionable might be thereby broadened.

Another potential advantage of conceptualizing sexual harassment as a dignitary tort is to impose liability on all parties responsible for the sexually harassing behavior, not just the employer. Because Title VII has been interpreted to impose liability for violation of its provisions only on employers

⁷³ See, e.g., *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 761–66 (6th Cir. 2006) (affirming the district court's dismissal of male plaintiff's claim of sex discrimination, which alleged pervasive harassment, including simulated anal intercourse, on grounds that the plaintiff's claim was one of sexual orientation, not sex, discrimination); see also *Chrouser v. DePaul Univ.*, No. 95 C 7363, 1998 U.S. Dist. LEXIS 8179, at *8 (N.D. Ill. May 20, 1998) (rejecting female plaintiff's contention that being called a "breeder" by her lesbian supervisor was based on sex rather than her heterosexual sexual orientation).

⁷⁴ See, e.g., *Wieland v. Dep't of Transp.*, 98 F. Supp. 2d 1010, 1019 (N.D. Ind. 2000) (summarily concluding that gender-based hostility was not a factor when female employee was called a "bitch" and a "slut" by another woman); *Reyes v. McDonald Pontiac-GMC Truck, Inc.*, 997 F. Supp. 614, 616–18 (D.N.J. 1998) (concluding on summary judgment that woman who was called a "bitch" and "Miss Fucking Queen Bee" had not demonstrated that conduct was directed at her because of gender rather than frustration and anger).

and not on individuals employed by the employer, in many cases the individual primarily responsible for the harassing conduct will face no direct economic consequences for his or her actions. Not only does this lack of direct economic consequences affect the incentives for those individuals to avoid engaging in harassing conduct, but some courts have shown a reluctance to impose liability for sexually harassing behavior on “innocent” employers,⁷⁵ when the persons seen as directly responsible for the harassment do not face liability. This means, of course, that the most “innocent” individuals—the employee or employees targeted by or subjected to sexually harassing behavior—are the ones made to bear the burden of that conduct, by having to endure the harassment itself and by being deprived of a remedy for the economic, emotional, and other consequences of that harassment. It is possible that courts reluctant to hold employers liable for sexually harassing conduct might be more willing to impose liability on the direct perpetrators of that conduct.

Another advantage of conceptualizing sexual harassment as a dignitary tort, such as intentional infliction of emotional distress, is that the limitation on compensatory and punitive damages statutorily imposed by Title VII⁷⁶ would not apply in a tort action. Accordingly, employees who are subjected to sexual harassment would be more likely to obtain full recovery for the harm that they suffer based on the sexually harassing conduct, by seeking the full measure of their economic damages, including backpay and frontpay, from culpable employers in a Title VII action, while seeking full recovery for psychological and emotional harm in a claim of intentional infliction of emotional distress.

There are, however, a number of potential disadvantages of conceptualizing sexual harassment as a dignitary tort, in particular as an intentional infliction of emotional distress. Under existing sexual harassment law under Title VII, not all conduct that might be viewed as sexual harassment is unlawful, because existing case law requires that an employee establish that sexually harassing behavior not only be motivated by sex or gender, but also that the harassment be sufficiently “severe or pervasive . . . to create an

⁷⁵ See, e.g., *McCurdy v. Ark. State Police*, 375 F.3d 762, 772–74 (8th Cir. 2004) (refusing to hold employer vicariously liable for sexual harassment by supervisory employee when employer promptly responded to the plaintiff’s complaint of harassment). The court of appeals in *McCurdy* indicated that “[i]t is a fair question to ask who should bear the responsibility for a single incident of supervisor sexual harassment, an innocent employee like *McCurdy* or an employer like the [Arkansas State Police,] which effectively stops the harassment after it learns about it,” but concluded that the law did not allow the employer to be held liable, in spite of controlling Supreme Court precedent to the contrary. *Id.* at 772.

⁷⁶ 42 U.S.C. § 1981a(b)(3) (2012) places a cap on the recovery of compensatory and punitive damages for actions under Title VII, based on the size of the employer, with damages limited for each complaining party to \$50,000 for employers with between fifteen and 100 employees, to \$100,000 for employers with between 101 and 200 employees, to \$200,000 for employers with between 201 and 500 employees, and to \$300,000 for employers with more than 500 employees.

objectively hostile or abusive work environment.”⁷⁷ This has proved not to be an easy standard to meet; there are numerous cases in which courts have summarily rejected the sexual harassment claims of employees because the objectionable and abusive conduct to which they were subjected was not bad enough.⁷⁸ And this problem is likely to be substantially worsened by the requirement that the harassment be “extreme and outrageous,” as required by the tort of intentional infliction of emotional distress. There have been a number of cases in which courts have concluded that conduct that is sufficient to meet the requirements for a sexual harassment claim fall short of the type of extreme and outrageous conduct necessary to state a claim for intentional infliction of emotional distress.⁷⁹ As one court explained: “statutory discrimination occurs at a much lower threshold of inappropriate conduct than the threshold required for the tort of intentional infliction of emotional distress,” and “the fact that there is a Title VII hostile environment does not necessarily support a claim of intentional infliction of emotional distress.”⁸⁰

In addition to these practical effects on the ability of employees who have been subjected to sexual harassment to establish the unlawfulness of that conduct and to recover damages for the harm inflicted on them, there are also substantial theoretical issues raised by the way in which sexually harassing behavior is conceptualized. These theoretical issues may suggest the need for caution with respect to the conceptualization of sexual harassment as a

⁷⁷ *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–22 (1993).

⁷⁸ *See, e.g., Jones v. Clinton*, 990 F. Supp. 657, 664, 674–76 (E.D. Ark. 1998) (holding that single incident in which high-ranking public official allegedly exposed his erect penis and asked low-level employee to “kiss it” was not sufficiently severe or pervasive to constitute actionable hostile work environment); *Dockter v. Rudolf Wolff Futures, Inc.*, 684 F. Supp. 532, 535 (N.D. Ill. 1988), *aff’d on other grounds*, 913 F.2d 456 (7th Cir. 1990) (holding that sexual advances made to the plaintiff by her direct supervisor and an incident in which her supervisor had fondled her breast fell “far short” of establishing the existence of a hostile work environment).

⁷⁹ *See, e.g., Pascal v. Storage Tech Corp.*, 152 F. Supp. 2d 191, 213–15 (D. Conn. 2001) (refusing to grant summary judgment on the plaintiff’s claim of sexual harassment but rejecting on summary judgment her claim of intentional infliction of emotional distress and noting that just because the conduct directed at the plaintiff was unlawful did not mean that it was sufficiently “egregious or oppressive conduct within the contemplation of this tort”); *Piech v. Arthur Andersen & Co.*, 841 F. Supp. 825, 831–32 (N.D. Ill. 1994) (refusing to dismiss claim of sexual harassment but dismissing claim of intentional infliction of emotional distress and noting that “[c]laims for intentional infliction of emotional distress in the employment setting have generally involved circumstances beyond what can be considered a typical employment dispute better addressed in a Title VII or equivalent suit”).

⁸⁰ *Stingley v. Arizona*, 796 F. Supp. 424, 431 (D. Ariz. 1992). The court, however, did agree that one incident of sexual harassment involving the plaintiff—a co-worker’s action of poking the plaintiff twice in the buttock with a plastic fork and indicating that he was checking whether “‘the meat’ was done”—was sufficiently egregious to preclude summary judgment on her claim of intentional infliction of emotional distress. *Id.*

dignitary tort, regardless of the immediate practical effects that such a conceptualization may have on the claims of individual employees.

As a general matter, discrimination is viewed as a group harm, even when it is individuals who are subjected to discriminatory behavior.⁸¹ That is, in order to establish that employees have been subjected to discriminatory conduct, it is necessary to show that the treatment to which they were subjected was motivated by, or had an adverse effect on them because of,⁸² their membership in a protected group. Accordingly, when a woman or a man seeks to establish the existence of sexual harassment as discrimination, she or he must generally establish that she or he was targeted for harassment not based on personal characteristics unique to her or him, but because of characteristics associated with her or his sex or gender. That is, a woman who is targeted for harassment because she is personally disliked cannot establish the existence of discriminatory harassment, while a woman who is targeted for the precise same conduct because she is viewed as too aggressive for a woman, not sufficiently feminine, otherwise non-compliant with gender stereotypes, or just because she is a woman should be able to establish the existence of discriminatory harassment.⁸³ Similarly, a man who is targeted for harassment because he is viewed as insufficiently masculine or otherwise does not act as a “real man” should act should be able to establish the existence of discriminatory harassment.⁸⁴

⁸¹The United States Supreme Court’s most clear articulation of the theories of cognizable discrimination under Title VII is in its decision in *Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). There, the Court made clear that both the disparate treatment theory and the disparate impact theory are based on claims of individuals either being treated or affected in certain ways because of the protected groups to which they belong. *Id.*

⁸²Sexual harassment is generally viewed as a form of intentional discrimination under Title VII, as a violation of the statute under what is known as the disparate treatment theory, in which the harassment is shown to have motivated by sex or gender. I have argued elsewhere that sexual harassment might also be established under the other principal theory of discrimination, the disparate impact theory, under which even a facially neutral rule or practice can be unlawful if it has a disproportionate negative effect on members of a protected group. *See generally* L. Camille Hébert, *The Disparate Impact of Sexual Harassment: Does Motive Matter?*, 53 U. KAN. L. REV. 341, 383–95 (2005).

⁸³*See Price Waterhouse v. Hopkins*, 490 U.S. 228, 235, 251 (1989). The Court recognized claim of sex discrimination by a woman who was denied partnership in accounting firm, in part because she was viewed as “macho” and not sufficiently feminine and because she “overcompensated for being a woman.” *Id.* at 235. A plurality of the Court noted that “[a]s for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they match the stereotype associated with their group.” *Id.* at 251.

⁸⁴*See EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 449–54 (5th Cir. 2013) (recognizing a claim for sexual harassment based on sexual stereotyping brought by heterosexual man, who was called “pussy,” “princess,” and “faggot” and was subject to simulated anal intercourse, in part because he brought Wet Ones to work to use instead of toilet paper, and noting that supervisor who conducted harassment admitted that the

The focus of the anti-discrimination laws on wrongs against protected groups leads to a recognition that sexual harassment is not just a wrong against an individual woman, but against women generally. This “group” focus suggests that harassers choose their targets not because of the personal characteristics of the particular target, but rather because of their sex or gender,⁸⁵ for example, because of gender hostility, a desire for sexual or workplace dominance, or sexual stereotyping. And to the extent that recognizing sexual harassment as group harm focuses on the systematic nature of sexually harassing behavior, sometimes directed toward men but normally directed toward women, it is easier for the courts to see sexual harassment in the workplace as conduct that not merely offends the sensibilities of women, but that adversely affects their workplace opportunities.⁸⁶

Conversely, the type of harm that underlies dignitary torts in general, and a claim of intentional infliction of emotional distress in particular, appears to be individualized harm.⁸⁷ Tort law has been described as “defin[ing] duties to refrain from injuring (or to protect from injury) that are owed by certain persons to others: duties that, when breached, constitute *wrongs to those others*, as opposed to wrongs to the world”⁸⁸ and it has been said that:

Tortious wrongdoing always involves an interference with one of a set of individual interests that are significant enough aspects of a person’s well-

plaintiff’s use of Wet Ones was “feminine” and “kind of gay,” even though he testified that he did not believe that the plaintiff was gay).

⁸⁵ It appears to have been a desire for the effects of this “group” focus that at least partially motivated one of the earliest and foundational scholarly arguments for treating sexual harassment as a form of sex discrimination. Professor Catharine MacKinnon, in her book *Sexual Harassment of Working Women*, explains:

[I]f one shows that sexual harassment in employment systemically occurs between the persons and under the conditions that an analysis of it as discrimination suggests—that is, as a function of sex as gender—one undercuts the view that it occurs because of some unique chemistry between particular (or aberrant) individuals. That sexual harassment does occur to a large and diverse population of women supports an analysis that it occurs *because* of their group characteristic, that is, sex.

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

⁸⁶ There is considerable evidence that the existence of sexual harassment in the workplace does adversely affect the work experiences and employment opportunities of women, often resulting in decreased productivity, increased absenteeism, and job loss. *See, e.g., U.S. MERIT SYS. PROT. BD., SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: TRENDS, PROGRESS, CONTINUING CHALLENGES* 23–27 (1995) (discussing the costs of sexual harassment to both the federal government and employees in terms of lost productivity, job turnover, and use of sick leave or other forms of leave).

⁸⁷ Catharine MacKinnon argued for the inadequacy of tort law to address issues of sexual harassment in the workplace precisely because of the focus of tort law on individual harm. MACKINNON, *supra* note 85, at 171–72.

⁸⁸ John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 *TEX. L. REV.* 917, 918 (2010) (emphasis in original).

being to warrant the imposition of a duty on others not to interfere with the interest in certain ways, notwithstanding the liberty restriction inherent in such a duty imposition.⁸⁹

Accordingly, tort law is generally deemed to address issues concerning private wrongs or harms to individuals.⁹⁰

Within the area of tort law, dignitary torts seem particularly focused on issues of individual harm. The dignitary torts of defamation, invasion of privacy, and intentional infliction of emotional distress are said to address behavior that “invades an individual’s sense of worth and dignity” and to protect “interests in individual personality.”⁹¹ It is true that the term “dignity” is used in a number of legal contexts to describe different types of harms, some collective and some individual. For example, the term “dignity” is used to describe interests in equality, as well as interests in autonomy and freedom from humiliation;⁹² violations of equality would seem to count as collective harms, while violations of autonomy and humiliating treatment seem more like individual harms. However, the manner in which the term “dignity” is used in the legal systems that prohibit sexual harassment based on harms to dignity appears to refer to the notion of freedom from humiliation,⁹³ a harm that seems to be focused on harm to individuals.

As described above, when courts ask whether an employer, an employer’s representative, or even a co-worker intended to inflict emotional distress on an employee, the inquiry is generally individualized, with respect to the existence of intent to harm, the nature of the conduct aimed at the employee, and the degree of emotional distress caused by that conduct.⁹⁴ The courts considering such claims do not generally ask why an employee was targeted for particular conduct, nor is the motivation for that conduct necessarily considered an aggravating factor in judging the objectionableness of that conduct. And courts

⁸⁹ *Id.* at 937. Interestingly, these authors, while seeming to emphasize the individual focus of tort law, also assert that workplace sexual harassment counts as a tort, simply noting that the claim involves “an assertion that the defendant has committed a legal wrong against the plaintiff,” without describing the nature of that wrong. *See id.* at 939.

⁹⁰ W. PAGE KEETON ET AL., *supra* note 51, § 1 (“There remains a body of law [which] is directed toward the compensation of individuals, rather than the public, for losses which they have suffered within the scope of their legally recognized interests generally, rather than one interest only, where the law considers that compensation is required. This is the law of torts.”).

⁹¹ Cristina Carmody Tilley, *Rescuing Dignitary Torts from the Constitution*, 78 BROOK. L. REV. 65, 69–70 (2012).

⁹² See discussion of various meanings given to the term “dignity” in different legal contexts in Hébert, *supra* note 21, at 33–36.

⁹³ *Id.* at 35–36; see also MICHAEL ROSEN, DIGNITY: ITS HISTORY AND MEANING 127 (2012) (“[T]he idea that humiliation or degradation counts as a violation of human dignity has a very good claim to be universal even though the practices by which that may be expressed vary.”).

⁹⁴ *See supra* Part III.

require that the particular employee show the requisite degree of emotional harm, rather than focusing on the way in which the conduct is harmful to the interests of women generally.

Similarly, the very nature of the tort of intentional infliction of emotional distress frames the injury of such conduct as causing offense to the dignity of women and in causing them emotional harm, rather than harm to their employment opportunities. Viewed in this way, sexual harassment can be seen as a harm to women's dignity or psychological health that just happens to occur in the workplace, rather than as harm to women's workplace status or opportunities in the workplace, which may also cause them emotional and psychological distress.

But one wonders whether the dichotomy between conceptualizing sexual harassment as a form of discrimination and conceptualizing sexual harassment as a dignitary tort is inevitable. Perhaps it is possible to conceptualize sexual harassment as a dignitary tort without losing the notion that sexual harassment also constitutes discrimination. Perhaps it is possible to recognize that sexual harassment is both a group harm—harming the interests of workplace equality for women—and an individual harm—subjecting the women (and men) who are targeted for degrading and humiliating treatment to a violation of their dignity.

Courts might simply conclude that both types of harms occur at the same time, without necessarily being influenced by the other. That is, when employees are targeted for sexually harassing conduct because of gender hostility, a gender-linked desire for dominance, sexual stereotyping, or otherwise because of sex,⁹⁵ courts might conclude that those employees have been discriminated against by having workplace opportunities and benefits conditioned on or affected by that sexually harassing conduct, such that a violation of Title VII has occurred. Liability for such discrimination would, under prevailing law, be visited upon the employer, either on grounds of vicarious liability or negligence.⁹⁶ But these courts might also conclude that the harassment to which the employees have been subjected was outrageous conduct intended to cause, and that did cause, severe emotional distress to those employees. Liability for this tortious action would be visited upon the

⁹⁵ Although I have grave doubts about the conclusion of courts that sexual harassment is frequently motivated by sexual desire on the part of harassers, courts, including the Supreme Court, have concluded that sexual harassment motivated by sexual desire meets the “because of . . . sex” requirement of Title VII. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80–81 (1998).

⁹⁶ *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (imposing vicarious liability on employers for sexually harassing conduct by supervisors, subject to an affirmative defense in cases in which no tangible employment action is taken); *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2441–43 (2013) (adopting a narrow definition of who constitutes a supervisor and making clear that employer liability for sexually harassing conduct by non-supervisory employees is based on negligence).

individual engaged in the harassment and perhaps on the employer who employs that harasser.⁹⁷

But courts might conclude that the discriminatory nature and the tortious nature of unlawful sexually harassing conduct are not wholly unconnected to each other, in that discrimination itself might be viewed as causing harm to the dignity of those subjected to it.⁹⁸ That is, sexual harassment might be found to meet the requirements of a claim of intentional infliction of emotional distress because sexual harassment constitutes a deprivation of workplace equality. Courts might determine that sexual harassment constitutes outrageous conduct precisely because of its discriminatory nature—that the sex- and gender-related harms that it inflicts on women (and some men) subjected to it are particularly outrageous. And courts might conclude that when woman and men are subjected to sexually harassing conduct, with that conduct chosen as a particularly harmful way to humiliate and degrade them, they are more likely to suffer extreme emotional distress, a fact that is unlikely to escape their harassers.

It would not seem strange for courts to conclude that sexually harassing conduct is outrageous precisely because of its discriminatory nature—when employees are targeted for humiliating and degrading conduct not because of the random whim⁹⁹ of their supervisors and co-workers, but because of their gender or sex, including their sexual orientation or gender identity.¹⁰⁰ If

⁹⁷For a detailed analysis of the rules of employer liability for the torts of its employees, see Martha Chamallas, *Vicarious Liability in Torts: The Sex Exception*, 48 VAL. U. L. REV. 133, 141–55 (2013). Professor Chamallas recognizes that many courts have shown reluctance to hold employers liable for the sexually-related torts of their employees, even when vicarious liability would likely be imposed for non-sexually related torts. *See id.* at 141–49. In any event, courts have been generally willing to hold employers liable in connection with employees' intentional torts when the employer can be shown to have been negligent in allowing the conduct to occur or facilitating such conduct. *See id.* at 177.

⁹⁸In her book, *Dignity Rights: Courts, Constitutions, and the Worth of the Human Person*, Erin Daly argues that “[e]quality jurisprudence implicates dignity because rank discrimination violates dignity” because conferring benefits and burdens based on the category “to which a person belongs both limits his or her ability to define him- or herself and constricts his or her individuation by treating him or her solely as a member of a class.” ERIN DALY, *DIGNITY RIGHTS: COURTS, CONSTITUTIONS, AND THE WORTH OF THE HUMAN PERSON* 35 (2013).

⁹⁹The continued persistence of the doctrine of employment at will in the employment law of the United States suggests that employer actions motivated by random or even whimsical reasons are not considered outrageous behavior.

¹⁰⁰While sexual orientation and gender identity are not currently provided the same protections in many jurisdictions as are other characteristics, such as sex and race, there does seem to be a growing national consensus that discrimination on grounds of sexual orientation and gender identity, including in employment, is unacceptable in a civilized society. National opinion polls suggest that a growing number of Americans believe that individuals should not be subject to discrimination on grounds of sexual orientation or gender identity. *Gay and Lesbian Rights*, GALLUP, <http://www.gallup.com/poll/1651/Gay-Lesbian-Rights.aspx> (last

outrageous conduct is defined as that which employees should not be required to accept in the context of the workplace, then it would appear that discrimination on the basis of sex, like racial discrimination, would be a candidate for characterization of outrageous conduct.¹⁰¹ After all, Title VII itself declares that discrimination on the basis of sex is unacceptable in the workplace, and the evolving legal standards under that statute now make clear that sexual harassment constitutes a form of sex discrimination.¹⁰² And Title VII's prohibition on sex discrimination appears to be evolving so that gender identity and sexual orientation may well fall within that prohibition; the Equal Employment Opportunity Commission, charged with the enforcement of the statute, currently takes the position that discrimination on the basis of gender identity and sexual orientation falls within the statutory prohibition.¹⁰³

Nor would it be strange for courts to recognize that sexually harassing conduct in the workplace that discriminatorily affects women's employment

visited June 17, 2014), *archived at* <http://perma.cc/8FUZ-N73V> (in response to the question of whether "homosexuals should or should not have equal rights in terms of job opportunities," 89% of respondents indicated that such equal rights should exist in May 2008, compared with 56% in June 1977); *see also New HRC Study Shows That American Public Strongly Supports Federal Non-Discrimination Protections*, HUMAN RTS. CAMPAIGN (June 16, 2014), <http://www.hrc.org/blog/entry/new-hrc-study-shows-that-american-public-strongly-supports-federal-non-disc>, *archived at* <http://perma.cc/DD26-NHYW> (reporting results of a poll of registered voters conducted in June 2014, indicating that 63% of those surveyed favor a federal law protecting gay and transgender persons from employment discrimination). The growing protection at the state and federal level against discrimination against sexual minorities suggests a growing disapproval of discrimination on these grounds. *See* Christi Parsons & Michael A. Memoli, *Obama to Sign Executive Order Curbing Discrimination Against Gays*, L.A. TIMES (June 16, 2014, 11:07 PM), <http://latimes.com/nation/la-na-obama-discrimination-20140617-story.html#page=1>, *archived at* <http://perma.cc/Y2XK-UBF5> (announcing President Obama's plan to sign executive order forbidding federal contractors from discriminating on the basis of sexual orientation or gender identity and discussing state laws prohibiting discrimination on the basis of sexual orientation).

¹⁰¹ *See supra* text accompanying note 29.

¹⁰² Professor Martha Chamallas has argued for the reformation of tort law, including the tort of intentional infliction of emotional distress, by applying concepts from Title VII to tort law, including the notions that a pattern of harassment can create employment-related harms equal to those imposed by other work-related disadvantages and that sexual harassment is not motivated principally by sexual attraction but is used for other purposes, including maintaining gender hierarchy in the workplace. *See* Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 WM. & MARY L. REV. 2115, 2171–75 (2007).

¹⁰³ *See* EEOC Decision No. 0120120821, 2012 WL 1435995, at *1 (Apr. 20, 2012) (*Macy v. Holder*) (articulating the EEOC's position that discrimination against a person because he or she is transgendered, also known as gender identity discrimination, constitutes discrimination on the basis of sex); EEOC Decision No. 0720130012, 2013 WL 2146756, at *3–4 (May 7, 2013) (*Culp v. Napolitano*) (finding that allegation of sexual orientation discrimination was a claim of sex discrimination because supervisor was motivated by his attitudes about sex stereotypes that women should only have relationships with men).

opportunities inflicts a particularly harmful type of emotional or psychological harm.¹⁰⁴ Although women are achieving gains in the employment sector, their positions relative to men still remain precarious in a number of workplaces. Accordingly, for women seeking to gain acceptance in the workplace, it is particularly important for them to be accepted as competent workers; being treated in a sexual manner in such a context inflicts serious harm upon their professional interests.¹⁰⁵ Accordingly, being subjected to sexual harassment in a setting in which it is particularly important to be perceived in a professional manner may inflict more serious emotional harm.¹⁰⁶ Employees subjected to sexual harassment might be viewed as more likely to suffer extreme emotional distress when not only their dignity is attacked, but also when those actions deprive them of workplace opportunities.

Finally, just as courts have been able to recognize that sexual harassment can be intentional action aimed at disadvantaging women in the workplace and harming their employment opportunities, it seems likely that courts will recognize that when harassers choose to humiliate and degrade women through sexual conduct, the harassers are not unaware of the consequences of their actions. It is true that not all harassers so clearly articulate their motives as did the harasser in *LeLouis v. Western Directory Co.*,¹⁰⁷ who reportedly told his target that if she didn't like the harassment, she could leave and "don't let the door hit you in the ass on the way out."¹⁰⁸ But it is likely that harassers

¹⁰⁴ Research suggests that psychological harm from instances of workplace uncivility may be more substantial when that treatment has a gendered or sexual nature to it, perhaps suggesting that discrimination itself can be shown to be psychologically harmful. See Sandy Lim & Lilia M. Cortina, *Interpersonal Mistreatment in the Workplace: The Interface and Impact of General Incivility and Sexual Harassment*, 90 J. APPLIED PSYCHOL. 483, 493 (2005).

¹⁰⁵ See Hébert, *supra* note 82, at 388–91 (discussing the disparate negative effect of sexual harassment on women, particularly the ways in which women are more harmed by sexualization of the workplace than are men and the tendency of women to be marginalized as workers when they are treated like sexual objects).

¹⁰⁶ In the case of *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991), Dr. Susan Fiske offered expert testimony concerning the differential effects of sexually harassing conduct on men and women, including emotional effects. *Id.* at 1502. The district court summarized her testimony as follows:

Nonprofessional ambience imposes much harsher effects on women than on men. The general principle, as stated by Dr. Fiske, is "when sex comes into the workplace, women are profoundly affected . . . in their job performance and in their ability to do their jobs without being bothered by it." The effects encompass emotional upset, reduced job satisfaction, the deterrence of women from seeking jobs or promotions, and an increase of women quitting jobs, getting transferred, or being fired because of the sexualization of the workplace. By contrast, the effect of the sexualization of the workplace is "vanishingly small for men."

Id. at 1505 (citations omitted).

¹⁰⁷ *LeLouis v. Western Directory Co.*, 230 F. Supp. 2d 1214 (D. Or. 2001).

¹⁰⁸ *Id.* at 1217.

understand that if they direct sexually offensive conduct at their co-workers and subordinates, that conduct is likely to affect both the workplace environment and the emotional welfare of those targets, if only because those harassers likely have witnessed the effect of such behavior before.¹⁰⁹

An example of the awareness of the consequences on their actions on the part of harassers is graphically illustrated by the case of *Robinson v. Jacksonville Shipyards, Inc.*,¹¹⁰ in which the female plaintiff complained about the presence of pictures and drawings depicting nude and partially nude women in suggestive or submissive positions or engaged in sexual activity in the workplace, indicating that she found them degrading and humiliating. The response to her complaints was an increase in the number of pictures in the workplace and their placement in places where she would be sure to see them, such as her toolbox, as well as the painting of the words “Men Only” on the doors of the shipfitter’s trailer.¹¹¹ It is hard to imagine that these harassers were unaware that their discriminatory conduct was not only exclusionary, but also degrading and humiliating, particularly when they had been told by their target that it was.¹¹²

¹⁰⁹ Although there are undoubtedly some harassers who engage in harassing conduct only a single time, most harassers appear to be recidivists, not only engaging in a pattern of harassment against single targets, but also harassing multiple targets. *See, e.g.*, *Harris v. Forklift Sys.*, 510 U.S. 17, 19 (1993) (recognizing that president of company targeted the plaintiff and several other women at the company by asking them to retrieve coins from his front pants pocket, throwing objects on the ground and asking them to pick them up, and making sexual comments about their clothing); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 60–61 (1986) (recounting that the plaintiff had testified that Taylor, who repeatedly fondled her and forcibly raped her, also touched and fondled other women at the bank). In addition, in most of the cases described in this Article, the harassment consisted of repeated behavior focused on the plaintiff as well as on other employees in the workplace, who were usually women.

¹¹⁰ *Robinson*, 760 F. Supp. at 1490, 1498–1501.

¹¹¹ *See id.* at 1490, 1498, 1500–01.

¹¹² Another example of the fact that harassers are generally aware of the consequences of their actions can be found in the decision in *Harris v. Forklift Systems*. In that case, Hardy, the president of the company, had subjected the plaintiff to a series of humiliating conduct, including calling her a “dumb ass woman” and asking her to retrieve coins from his front pants pocket. *Harris*, 510 U.S. at 19. After the conduct had gone on for some time, Harris complained about the conduct to Hardy, who indicated that he was surprised that she was offended and promised to stop. Only a few weeks later, however, he asked her, in front of other employees, whether she had promised a client sex to secure a deal. *Id.* On remand from the Supreme Court, the federal district court upheld the magistrate’s determination that until Harris complained, Hardy “had no knowledge of the fact that [the] plaintiff was [offended] by any of his conduct.” *Harris v. Forklift Sys.*, No. 3:89-0557, 1994 U.S. Dist. LEXIS 19928, at *2–3 (M.D. Tenn. Nov. 9, 1994). Quite apart from the questionable conclusion that a man seemingly intelligent enough to be president of a company would not understand the offensiveness of calling a female manager a “dumb ass woman” and asking women to retrieve coins from his front pants pocket without first being told, even the district court apparently could comprehend that Hardy understood that his conduct was offensive *after* he had been told that it was.

V. CONCLUSION

Conceptualizing sexual harassment as a dignitary tort, such as the tort of intentional infliction of emotional distress, is not without its risks, including the fact that such a conceptualization may suggest that sexual harassment constitutes more of a harm to the dignity interests of women than to their employment opportunities. Such a result would constitute a substantial step backward for recognition of the harms of sexual harassment, harking back to the days in which courts rejected such claims under Title VII because the courts viewed the harms being complained about as being “personal” rather than related to employment.

However, it should be possible to establish that sexual harassment is both a harm to the dignitary interests of those subjected to it and a harm to society’s interests in workplace equality. Indeed, these interests should in fact be seen as complementary rather than contradictory, such that the dignity of women and men subjected to sexual harassment is particularly implicated by the inequality inherent in sexually harassing behavior. That is, courts should recognize that the very nature of the workplace inequality that causes sexually harassing conduct, as well as results from such conduct, is precisely what causes that conduct to be particularly damaging to the dignity interests of employees and for that reason meet the standards of extreme and outrageous behavior that is intolerable in a civilized society.

