Two Wrongs Do Not Make a Defense: Eliminating the Equal-Opportunity-Harasser Defense

Shylah Miles
TWO WRONGS DO NOT MAKE A DEFENSE:
ELIMINATING THE EQUAL-OPPORTUNITY-HARASSER
DEFENSE

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Abstract: Sexual harassment is a prevalent problem in the American workplace that accounts for nearly sixty-four percent of all gender discrimination claims under Title VII. The equal-opportunity-harasser defense allows harassers who target both males and females to escape liability. Courts have allowed the defense because they have interpreted the "because of sex" element of a sexual harassment claim to require disparate treatment or a showing that the plaintiffs would not have been harassed if they were members of the opposite sex. An equal-opportunity harasser harasses both sexes and, therefore, plaintiffs cannot prove disparate treatment. This Comment argues that the disparate-treatment requirement does not fit the sexual harassment model because it is a class-based analysis and sexual harassment is an individual-based discrimination. By limiting analysis of equal-opportunity-harasser claims to disparate treatment, courts allow sexual inequality in the workplace to continue, undermining the purpose behind sexual harassment laws. To rectify this situation, the courts should adopt an individual analysis of the "because of sex" element, which a recent U.S. Supreme Court decision allows. Adoption of an individual analysis will follow current trends in federal and Washington state courts to limit applicability of the defense and will enable courts to deny the equal-opportunity-harasser defense.

"We must be aware that whatever rules we develop will require constant reexamination, modification, and fine-tuning. The sexual, gender, and preference revolutions are not over. Society is in a constant state of evolution."

Steven and Karen worked in the maintenance department at the Indiana Department of Transportation. Their male supervisor, Gale, aimed his sexually charged actions and explicit language toward both Steven and Karen on separate occasions. Specifically, Gale touched Karen’s body, stood too close to her, asked her to sleep with him, and made sexist comments. Gale also sexually propositioned Steven while

2. Holman v. Indiana, 211 F.3d 399, 401 (7th Cir. 2000). The descriptions in the text are the actual facts of Holman. That court decided that the equal-opportunity-harasser defense protected the employer from liability in a sexual harassment claim. Id.
3. Id.
4. Id.
grabbing his head. Disturbed by their supervisor’s conduct, both sought legal relief through a sexual harassment claim against their employer.

After litigation, the two victims learned that Title VII harassment law offered them no protection from this harasser. Even though the law protects employees against same-sex and opposite-sex sexual harassment, federal courts have held that the harassment they were exposed to was not of either of these types. Instead, they were being harassed by an equal-opportunity harasser, whose status protects the employer from liability. Courts reason that when a supervisor harasses both a man and a woman, there is no disparate treatment and therefore plaintiffs cannot satisfy the element of a sexual harassment claim that requires proof that the harassment was “because of sex.” This legal gap in the protection of victims against sexual harassment exists in Washington law as well as in most federal circuits.

As new fact scenarios develop in sexual harassment law, law aimed to protect victims from sexual harassment must evolve in order to continue to protect all individuals from sexual harassment in the workplace. This Comment advocates that courts dismantle the equal-opportunity-harasser defense by adopting an individual analysis of the “because of sex”

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5. Id.
6. Id.
7. Id. at 403.
9. Infra note 94.
10. This Comment applies equally to both the bisexual and equal-opportunity-harasser defenses. Bisexual harassment occurs when a supervisor extorts or attempts to extort sexual favors or tolerance of sexual harassment from a male and a female employee in exchange for a job, a job benefit, or protection from adverse employment actions. Barnes v. Costle, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977). Another form of bisexual harassment occurs where the harasser is bisexual but does not harass members of both sexes. See Rycek v. Guest Servs., Inc., 877 F. Supp. 754, 761 n.6 (D.D.C. 1995). Where a supervisor creates a work environment that unreasonably interferes with a male and a female’s work performance or creates an intimidating, hostile, or offensive work environment for employees of both sexes, the supervisor is referred to as an equal-opportunity harasser. See Chiapuzio v. BLT Operating Corp., 826 F. Supp. 1334, 1336-37 (D. Wyo. 1993). An equal-opportunity harasser might not actually be bisexual. See id.
11. Holman, 211 F.3d at 403.
12. Id.
14. Although this Comment refers to evidence of harassment of both sexes as the equal-opportunity-harasser defense, it is not an affirmative defense. Rather, it is an evidentiary showing that prohibits satisfaction of the “because of sex” element of a sexual harassment claim. Reference to
element and by disregarding the harasser's treatment of others. Part I discusses sexual harassment, the incidence of claims, and the effects of sexual harassment in the workplace. Part II explains the status of sexual harassment law generally in the federal courts and in Washington. Part III examines how federal and Washington courts use the equal-opportunity-harasser defense. Finally, Part IV argues that evidence of disparate treatment should be replaced by an individual analysis of the "because of sex" element so that the defense may be denied.

I. THE PROBLEMS AND PERVASIVENESS OF SEXUAL HARASSMENT IN THE WORKPLACE

Sexual harassment is a pervasive problem that erects and maintains barriers to sexual equality in the workplace. Sexual harassment occurs when "submission to...[unwelcome sexual] conduct is made either explicitly or implicitly a term or condition of an individual's employment." In 1999, sexual harassment claims accounted for 64% of all gender discrimination claims under Title VII and the proportion filed by male employees increased from 9% in 1992 to 12% in 1997-1999. Approximately 50% to 85% of American females will experience some form of sexual harassment during their academic or working lives.

Sexual harassment hinders equality of the sexes because it supports a sexual hierarchy, punishing those who do not conform to sexual stereotypes. A harasser may view individuals as stereotypically male or female. Where individuals do not conform to the harasser's preconceptions, the harasser singles out the victim based on the victim's
divergence from scripted gender norms. The harasser's "sexual misconduct" may serve to block professional advancement for men and women because such misconduct may interfere with the individual's work performance, may create a hostile work environment, and can be directly linked to denial of job benefits. Sexual harassment qualifies as sex discrimination because individuals are treated differently because of their sex. Both Washington and federal courts have sought to prohibit sexual harassment so that these barriers to sexual equality can be eradicated.

One recent development in sexual harassment law is the emergence of equal-opportunity harassers. An equal-opportunity harasser harasses both men and women. Under the traditional analysis of the "because of sex" element of a sexual harassment claim, plaintiffs must show that if they were of the opposite sex, they would not have been harassed. Consequently, when the perpetrator harasses both men and women, this element is impossible to satisfy, leaving plaintiffs without protection under sexual harassment law. Accordingly, the status of an equal-opportunity harasser has become a defense to liability. Courts have been frustrated by this problem as they try to allow claims against equal-opportunity harassers yet still comply with the disparate-treatment requirement.

II. FEDERAL AND WASHINGTON STATE LAW REGARDING SEXUAL HARASSMENT CLAIMS

Federal and Washington laws prohibit sexual harassment in the workplace. In so doing, both systems have identified the elements of a

25. See infra notes 59-64 and accompanying text.
26. Glasgow, 103 Wash. 2d at 406, 693 P.2d at 712.
27. Holman v. Indiana, 211 F.3d 399, 403 (7th Cir. 2000).
28. Id.
sexual harassment claim and the evidence to satisfy them in like fashion. The only substantial difference is that, by statute, Washington explicitly states that courts are to construe the sexual harassment statute liberally in order to fulfill its purpose, while federal law does not.

A. Federal Law Against Sexual Harassment

Title VII of the 1964 Civil Rights Act\(^29\) prohibits sex discrimination, which courts have interpreted to include sexual harassment. By making sexual harassment actionable as sex discrimination, courts have required that sexual harassment claims satisfy the elements of a sex discrimination claim.\(^30\) Most important to the analysis of the equal-opportunity harasser defense is the "because of sex" element. Although courts routinely require evidence of disparate treatment to satisfy the "because of sex" element, a recent U.S. Supreme Court decision has provided plaintiffs with more flexibility in meeting this element.

1. Title VII Has Been Interpreted To Prohibit Sexual Harassment

In 1964, Congress declared that sex discrimination in employment was prohibited, but it failed either to define "sex" or list included offenses. Under Title VII of the 1964 Civil Rights Act, Congress made it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."\(^31\) The prohibition against discrimination based on sex was a last-minute amendment in the House of Representatives in an effort to rouse opposition to the bill.\(^32\) Despite this effort, the bill passed as amended, with little debate on the substantive merits of prohibiting sex discrimination in the workplace.\(^33\) The Senate held no debate on the


\(^{30}\) See infra notes 59–64 and accompanying text.


\(^{32}\) See 110 CONG. REC. 2577–84 (1964).

\(^{33}\) Id.
issue, either.\textsuperscript{34} The lack of debate left very little legislative history to guide courts in interpreting what Congress intended sex discrimination to include.\textsuperscript{35}

Although the language of Title VII failed to specifically address sexual harassment, case law has established that Title VII proscribes such conduct. In \textit{Meritor Savings Bank v. Vinson},\textsuperscript{36} the U.S. Supreme Court held that sexual harassment violates Title VII.\textsuperscript{37} The Court reasoned that when a supervisor harasses an employee because of the employee's sex, that supervisor discriminates on the basis of sex, and this discrimination is "every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality."\textsuperscript{38}

Following the \textit{Meritor} decision, federal courts have interpreted the term "sex" to refer to gender\textsuperscript{39} and have recognized two different forms of sexual harassment: hostile work environment\textsuperscript{40} and quid pro quo.\textsuperscript{41} Hostile work environment harassment occurs when offensive and unwelcome conduct is sufficiently severe to create an abusive or hostile work environment.\textsuperscript{42} Quid pro quo harassment is the extortion or attempted extortion of sexual favors in exchange for a job, a job benefit, or protection from adverse employment actions.\textsuperscript{43}

To establish a prima facie case of hostile work environment sexual harassment, the plaintiff must establish five elements. Federal courts require the plaintiff to prove that: (1) the employee is a member of a

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\item \textsuperscript{34} Kristi J. Johnson, Comment, Chiapuzio v. BLT Operating Corporation: \textit{What Does it Mean to Be Harassed "Because of" Your Sex?: Sexual Stereotyping and the "Bisexual" Harasser Revisited}, 79 IOWA L. REV. 731, 736 (1994).
\item \textsuperscript{36} 477 U.S. 57 (1986).
\item \textsuperscript{37} \textit{id.} at 73.
\item \textsuperscript{38} \textit{id.} at 61 (quoting Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982)); see Katz v. Dole, 709 F.2d 251, 254-55 (4th Cir. 1983).
\item \textsuperscript{39} DeCintio v. Westchester County Med. Ctr., 807 F.2d 304, 307 (2d Cir. 1986); Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1085 (7th Cir. 1984); DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 329 (9th Cir. 1979). It thus follows that sex refers to male or female and not sexual preference.
\item \textsuperscript{40} See, e.g., Ellison v. Brady, 924 F.2d 872, 875 (9th Cir. 1991).
\item \textsuperscript{41} See, e.g., Henson v. City of Dundee, 682 F.2d 897, 910 (11th Cir. 1982). This Comment is concerned with both types of sexual harassment because a bisexual harasser exists in both quid pro quo and hostile work environment contexts.
\item \textsuperscript{42} 29 C.F.R. § 1604.11(a)(3) (2000).
\item \textsuperscript{43} \textit{Henson}, 682 F.2d at 910.
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protected group; (2) the employee was subjected to unwelcome harassment; (3) the harassment was based upon sex; (4) the harassment affected a term, condition, or privilege of employment and was sufficiently severe and pervasive so as to alter the conditions of employment and create an intimidating, hostile, or offensive working environment;\(^4\) and (5) the existence of respondeat superior liability.\(^5\)

With some variation, federal courts widely follow this formulation of the hostile work environment harassment case.\(^6\)

The elements of quid pro quo harassment are nearly identical to hostile work environment harassment. Instead of a "severe and pervasive" element, quid pro quo has an element that requires receipt of an employment benefit or protection from a job detriment in exchange for the harassment by the supervisor.\(^7\) Both types of claims require that harassment be "because of sex."

2. The "Because of Sex" Element

a. How the "Because of Sex" Element Is Traditionally Satisfied

Courts traditionally require plaintiffs to prove the "because of sex" element with evidence of disparate treatment.\(^8\) Thus, plaintiffs must show that they would not have been harassed if the plaintiff had been of the opposite sex.\(^9\) The disparate treatment need not be sexual in nature to constitute sexual harassment,\(^10\) but the harassment must be motivated by a gender-based animus.\(^11\) Conversely, the "because of sex" element is not automatically fulfilled just because the harasser's words have "sexual content or connotations."\(^12\) Courts may have created this limitation

\(^4\) This is referred to as the "severe and pervasive" element. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 63–73 (1986). This element ensures that the actions by the alleged harasser substantially affected the conditions of employment and that the actions were not ordinary socializing. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998).

\(^5\) Meritor, 477 U.S. at 63–73; 29 C.F.R. § 1604.11.


\(^7\) Henson, 682 F.2d at 909–10.

\(^8\) Id. at 904.

\(^9\) Id.

\(^10\) Id.


\(^12\) Id.
because sexually explicit conduct does not necessarily intimate a motivation to harass because of sex and, instead, could be linked to general dislike for the individual or juvenile provocation. Therefore, courts allow room to reject a sexual harassment claim where harassment is motivated by these types of considerations.

b. Why Courts Use Disparate Treatment To Satisfy the "Because of Sex" Element

Courts have traditionally used disparate treatment, a class-based analysis, to satisfy the "because of sex" element instead of an individual-based analysis. Class-based discrimination occurs when a perpetrator chooses a victim based on his or her membership in a targeted class. For example, a class-based discriminator can be presumed to discriminate against all members of a class (e.g., females). In contrast, individual discrimination occurs when a perpetrator selects a victim based on factors in addition to membership in a targeted class. An individual discriminator may not discriminate against an entire targeted class and instead may choose only one individual based on both the victim's membership in that class and individual factors such as personality and physical characteristics.

When the U.S. Supreme Court expanded Title VII to include sexual harassment, it borrowed the elements from traditional sex discrimination claims and thereby established a class-based analysis of sexual harassment. Traditional sex discrimination occurs when a person is treated differently than other similarly situated individuals solely because of his or her sex. This is a class-based discrimination because a

56. Id.
57. Id.
58. See id.
60. Butler v. N.Y. State Dep't of Law, 211 F.3d 739, 746 (2d Cir. 2000). Sex discrimination is a broader cause of action than sexual harassment because any treatment of the victim because of the
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perpetrator will generally select victims based solely on their sex and can be assumed to discriminate against all members of the victims’ sex.\textsuperscript{61} With this in mind, courts fashioned a class-based analysis of the “because of sex” element, which required evidence of disparate treatment of the sexes.\textsuperscript{62} Disparate treatment requires plaintiffs to prove that, but for their sex, they would not have been discriminated against.\textsuperscript{63} When courts crafted elements of a sexual harassment claim, they read this element into the text of Title VII, which bans discrimination “because of sex.”\textsuperscript{64} Until confronted with a same-sex harassment scenario, courts relied solely on evidence of the class-based disparate-treatment requirement to satisfy the “because of sex” element.

c. Oncale v. Sundowner Offshore Services, Inc.: The U.S. Supreme Court Presents Alternatives for Satisfying the “Because of Sex” Element

The U.S. Supreme Court modified evidentiary options for satisfying the “because of sex” element when it was confronted with a fact scenario that could not fit in the traditional class-based discrimination analysis. In Oncale v. Sundowner Offshore Services, Inc.,\textsuperscript{65} the Court was faced with a same-sex harassment action.\textsuperscript{66} The plaintiff worked in an all-male environment, which made disparate treatment impossible to show.\textsuperscript{67} The plaintiff charged that his two supervisors had “assaulted him in a sexual manner” and threatened to rape him.\textsuperscript{68} In determining that same-sex harassment was actionable under Title VII, the Court identified three types of evidence that might satisfy the “because of sex” element: (1) comparative evidence, (2) gender-specific conduct or actions, or (3) explicit or implicit proposals of sexual activity.\textsuperscript{69}

\textsuperscript{61} Locke, supra note 59, at 393–95; Paul, supra note 55, at 352.
\textsuperscript{62} Locke, supra note 59, at 393–95; Paul, supra note 55, at 352.
\textsuperscript{63} Locke, supra note 59, at 393–95.
\textsuperscript{64} Id. at 393.
\textsuperscript{65} 523 U.S. 75 (1998).
\textsuperscript{66} Id. at 76.
\textsuperscript{67} Id. at 77.
\textsuperscript{68} Id.
\textsuperscript{69} Id. at 79–81.
Prior to *Oncale*, plaintiffs could only satisfy this element through proof of disparate treatment.\textsuperscript{70} *Oncale* now provides plaintiffs with three evidentiary routes in which a fact-finder may draw reasonable inferences that the harassment was because of the plaintiff's sex.\textsuperscript{71} Commentators have recognized that *Oncale* allows greater flexibility in establishing sexual harassment claims.\textsuperscript{72}

\textbf{B. Washington State Law Against Sexual Harassment}

The Washington Law Against Discrimination (WLAD)\textsuperscript{73} is similar to Title VII. Accordingly, Washington courts follow the reasoning of the federal courts when addressing sexual harassment claims. This reasoning includes requiring evidence of disparate treatment to satisfy the "because of sex" element.

In 1949, Washington State enacted the WLAD,\textsuperscript{74} which recognized as a civil right "the opportunity to obtain employment without discrimination because of race, creed, color or national origin."\textsuperscript{75} The WLAD made it an unfair labor practice for employers to "discriminate against any person in compensation or in other terms or conditions of employment because of such person's race, creed, color or national origin."\textsuperscript{76} In 1971, the Legislature expanded the WLAD to protect all inhabitants of the state from sex discrimination and to eliminate and prevent such discrimination in employment.\textsuperscript{77}

Washington courts have found that sexual harassment in the workplace violates the WLAD.\textsuperscript{78} Because the WLAD is similar in purpose and subject matter to Title VII discrimination claims,

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\item \textsuperscript{70} Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982).
\item \textsuperscript{71} *Oncale*, 523 U.S. at 79–81.
\item \textsuperscript{72} BARBARA T. LINDEMANN & DAVID D. KADUE, SEXUAL HARASSMENT IN EMPLOYMENT LAW 52 (Supp. 1999); Mary Coombs, *Title VII & Homosexual Harassment After Oncale: Was it a Victory?*, 6 DUKE J. GENDER L. & POL’Y 113, 129–30 (1999); Lussier, *supra* note 22, at 957–58.
\item \textsuperscript{73} WASH. REV. CODE ch. 49.60 (2000).
\item \textsuperscript{74} Ch. 183, 1949 Wash. Laws 506 (codified as amended at WASH. REV. CODE §§ 49.60.010–.401 (2000)).
\item \textsuperscript{75} Ch. 183, § 2, 1949 Wash. Laws at 506.
\item \textsuperscript{76} Id. § 7(1)(c), 1949 Wash. Laws at 512 (codified at WASH. REV. CODE § 49.60.010).
\item \textsuperscript{77} Ch. 81, § 3, 1971 Wash. Laws 1st Ex. Sess. 549, 551 (codified at WASH. REV. CODE § 49.60.180).
\end{itemize}
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Washington courts view cases interpreting the federal law as persuasive when construing the Washington statute. Like the federal courts, Washington courts divide sexual harassment into hostile work environment sexual harassment and quid pro quo sexual harassment. The elements of a prima facie case of hostile work environment sexual harassment are substantially similar to the elements under federal law.

Following the path of the federal courts, Washington courts adopted the traditional "but for sex" analysis from the sex discrimination model without regard to the individualized nature of sexual harassment claims. As a result, Washington adopted a class-based analysis for individual-based conduct. Accordingly, under Washington law a plaintiff must show that he or she would not have been harassed had he or she been of the opposite sex.

The WLAD does differ in one significant aspect from Title VII in that the WLAD requires that the statute be given liberal construction in order to accomplish its purpose. Washington courts have acknowledged this mandate. In Payne v. Children's Home Society of Washington, Inc., the court of appeals decided that conduct that was not sexual could still support a sexual harassment claim. Although the WLAD did not address this issue, the court reasoned that such conduct would still produce barriers to sexual equality in the workplace. Therefore, although federal

80. Glasgow, 103 Wash. 2d at 406-07, 693 P.2d at 711-12.
82. Supra note 45 and accompanying text.
83. The federal prima facie case of hostile work environment sexual harassment claim contains one element, which Washington State's provision does not have, that the plaintiff be a member of a protected class. Washington courts have acknowledged this requirement but have not formally included it within the enumerated provisions because the requirement is automatically met by the employee being a man or a woman. Schonauer, 79 Wash. App. at 821 n.21, 905 P.2d at 399 n.21.
84. Locke, supra note 59, at 393; Paul, supra note 55, at 352.
86. WASH. REV. CODE § 49.60.020 (2000); Glasgow, 103 Wash. 2d at 404, 693 P.2d at 711.
88. Id. at 510-12, 892 P.2d at 1104.
89. Id. at 510-11, 892 P.2d at 1104.
and Washington laws prohibit sexual harassment similarly, Washington has the added requirement that courts construe the sexual harassment statute liberally.

III. FEDERAL AND WASHINGTON STATE LAW REGARDING THE EQUAL-OPPORTUNITY-HARASSER DEFENSE

Employers facing sexual harassment claims have sometimes asserted that the harasser's conduct was not sexual harassment because the employee harassed both men and women alike. The equal-opportunity-harasser defense defeats plaintiffs' ability to satisfy the "because of sex" element. Plaintiffs normally satisfy this element by showing that they were singled out for adverse treatment based on the plaintiff's sex. Where men and women are being harassed alike, the plaintiff cannot offer evidence of disparate treatment and therefore cannot prove discrimination because of sex.

Many Washington and federal courts, when faced with this new dilemma, have been forced to accept the equal-opportunity-harasser defense in practice because of the disparate-treatment requirement. Some federal courts and the Washington Court of Appeals have managed to avoid the defense and still find disparate treatment by analyzing the degree of severity of the harassment. Other federal courts have rejected the defense outright by replacing disparate treatment with an individual analysis of the "because of sex" element.


Washington courts and at least six federal circuits have accepted in principle the equal-opportunity-harasser defense. These courts reason

91. Holman v. Indiana, 211 F.3d 399, 403 (7th Cir. 2000).
93. Holman, 211 F.3d at 403.
that men and women exposed to the same offensive working environment suffer no discrimination based on sex. 95 Nondiscriminatory harassment occurs when a supervisor directs abusive language, crude gestures, or sexual demands on an equal-opportunity basis. 96 Plaintiffs cannot satisfy the "because of sex" element because these courts require a showing of disparate treatment. 97

One of the first federal cases to foresee the possibility of an equal-opportunity harasser and the problems it would create under a disparate-treatment analysis was Barnes v. Costle. 98 In that case, the court noted in dictum that demanding sexual favors from both men and women would not constitute sexual harassment because the conduct was not discriminatory on the basis of sex. 99 Following Barnes, the Eleventh Circuit in Henson v. City of Dundee 100 also indicated that sexual overtures directed toward both sexes or conduct that equally offended both sexes would not be actionable under Title VII. 101 Both courts suggested that if both sexes are being treated equally, disparate treatment would be impossible to prove and plaintiffs would thus be unable to satisfy the "because of sex" element. 102

The possibility of an equal-opportunity harasser became reality in Holman v. Indiana, 103 where the Seventh Circuit was confronted with such a case and refused to accept the sexual harassment claim. 104 The court reasoned that inappropriate conduct directed toward both sexes falls outside Title VII's ambit and does not satisfy the "because of sex" requirement because no disparate treatment occurs. 105 The court rejected a reading of Oncale that allowed for other evidence besides disparate treatment. 106 In addition, the court warned, if plaintiffs were not required to show disparate treatment between the sexes, Title VII would become a

95. See supra note 94.
96. Holman, 211 F.3d at 403.
97. Id.
98. 561 F.2d 983 (D.C. Cir. 1977).
99. Id. at 990 n.55.
100. 682 F.2d 897 (11th Cir. 1982).
101. Id. at 903.
102. Id.
103. 211 F.3d 399 (7th Cir. 2000).
104. Id. at 403–05.
105. Id.
106. Id.
"code of workplace civility," which the U.S. Supreme Court in Oncale stated it did not want to happen.107

The Holman court rejected the argument that allowing such a defense will encourage harassment of both sexes in an effort to insulate harassers and employers from liability.108 The court found it difficult to imagine that harassers would understand the intricacies of sexual harassment law.109 Further, the court reasoned that employers would not manufacture the defense because employers would be creating new claims of sexual harassment and thus exposing themselves to additional liability.110

When Washington faced an equal-opportunity-harasser scenario, the court of appeals in Herried v. Pierce County Public Transportation Benefit Authority Corp.111 denied a claim for sexual harassment based on a facial analysis of the "because of sex" element.112 Herried alleged that a co-worker created a hostile work environment by bumping Herried with his body and refusing to make room in a hallway for Herried to pass, forcing Herried to press against lockers in order to get by.113 These incidents were compounded by the co-worker's threatening manner and other conflicts between the co-worker and Herried.114 The employer argued that the co-worker was hostile and intimidating to other employees as well, both male and female.115 After the court found that the perpetrator harassed members of both sexes, the court ended its examination.116 Based on this facial analysis, the court concluded that the plaintiff had failed to present sufficient evidence of harassment because of her sex because the alleged harasser had harassed both sexes.117 Without evidence of disparate treatment, Herried failed to satisfy the "because of sex" element of her sexual harassment claim.118

107. Id. at 404 (citing Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80–81 (1998)).
108. Id.
109. Id.
110. Id.
112. Id. at 473, 957 P.2d at 770. This was not the only reason for denial of the claim. The claim was also denied because the defendant had taken sufficient corrective action after being notified of the harassment. Id. at 473–75, 957 P.2d at 770–71.
113. Id. at 470–72, 957 P.2d at 768–69.
114. Id. at 470–473, 957 P.2d at 768–70.
115. Id. at 473, 957 P.2d at 770.
116. Id. at 473–74, 957 P.2d at 770.
117. Id. at 474, 957 P.2d at 770.
118. Id.
B. Avoiding the Equal-Opportunity-Harasser Defense Without Rejecting It Outright

Some courts have sought to allow claims against equal-opportunity harassers while still satisfying the disparate-treatment requirement. These courts require trial courts to conduct a more in-depth analysis of the "because of sex" element by focusing on the differences in the severity of harassment. In an Eighth Circuit case, *Kopp v. Samaritan Health System,*119 the plaintiff presented evidence that her supervisor verbally assaulted approximately ten female employees.120 In response, the employer presented evidence that the supervisor had also verbally assaulted four men and argued that the supervisor assaulted everyone and did not discriminate against women.121 The court found that although the supervisor directed harsh language toward both sexes, the supervisor’s language toward women was of a more serious nature, occurred more often, and was sometimes accompanied by physical contact.122 By concluding that the supervisor treated women more harshly than men, the court reasoned that a fact-finder could conclude that the defendant’s treatment of women was worse than his treatment of men and hence there was disparate treatment of the sexes.123

A Washington court was also able to allow a claim against an equal-opportunity harasser while still meeting the disparate-treatment requirement of the "because of sex" element by conducting an in-depth analysis of the facts. In *Kahn v. Salerno,*124 the defendant argued that he did not single the plaintiff out because of her sex because he had harassed other employees, both males and females.125 Reversing a summary judgment, the court of appeals ordered the trial court to determine whether the defendant’s harassing conduct was more abusive toward women than men, and to inquire whether the severity of the impact resulted in disparate treatment.126 By requiring the trial courts to analyze closely the facts and circumstances surrounding the allegations rather

119. 13 F.3d 264 (8th Cir. 1993).
120. Id. at 269.
121. See id. at 268–69.
122. Id. at 269.
123. Id. at 269–70.
125. Id. at 123, 951 P.2d at 328.
126. Id. at 124, 951 P.2d at 329.
than ending the inquiry on the facial determination that both a male and a female were harassed, the court opened the door to rejecting the equal-opportunity-harasser defense outright.

C. Courts that Reject the Equal-Opportunity-Harasser Defense

The Ninth Circuit and a district court in the Tenth Circuit have rejected the defense. In *Steiner v. Showboat Operating Co.*, the Ninth Circuit stated in dicta that evidence of an equal-opportunity harasser would not bar sexual harassment claims against that harasser by both men and women. Barbara Steiner alleged that her boss, Jack Trenkle, spoke to her in a threatening and derogatory fashion using sexually explicit and offensive terms. Trenkle's employer argued that Trenkle harassed everyone and therefore was not harassing Steiner based on her sex. The court accepted the fact that Trenkle was abusive to both men and women; however, the court distinguished Trenkle's treatment of Steiner from his treatment of male employees. Trenkle had referred to male employees as "assholes" but had referred to women as "dumb fucking broads" and "fucking cunts." The *Steiner* court reasoned that Trenkle's abuse of men did not relate to their gender and that Trenkle's abuse of Steiner clearly did.

Although *Steiner*'s analysis was similar to the severity gradations found in *Kopp* and *Kahn*, *Steiner* went one step further in dicta and concluded that even if Trenkle had used remarks equally degrading and intense toward male employees, such conduct would not "cure" his actions toward women. The court added that it did not "rule out the possibility that both men and women...[would] have viable claims against Trenkle for sexual harassment." Therefore, the court did not exclude victims of equal-opportunity harassers just because disparate treatment could not be shown. Commentators have concluded that the

127. 25 F.3d 1459 (9th Cir. 1994).
128. *Id.* at 1464.
129. *Id.* at 1461.
130. *Id.* at 1463.
131. *Id.* at 1463-64.
132. *Id.* at 1464.
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
court’s reasoning denied the equal-opportunity-harasser defense and allowed both men and women to lodge successful claims of sexual harassment against the same harasser.\(^{137}\)

A district court in *Chiapuzio v. BLT Operating Corp.*\(^{138}\) explained how plaintiffs could satisfy the "because of sex" element without evidence of disparate treatment.\(^{139}\) In *Chiapuzio*, the plaintiffs, Dale and Carla Chiapuzio, complained that their supervisor, Eddie Bell, continuously subjected them to sexually abusive remarks.\(^{140}\) Specifically, Bell would comment that Dale could not satisfy his wife sexually and that he, Bell, could do a better job.\(^{141}\) When speaking to Carla, Bell made sexually explicit advances.\(^{142}\) The employer argued that Bell harassed both men and women and therefore could not have discriminated against the Chiapuzios because of either’s sex.\(^{143}\) The court however, refused to accept this defense.\(^{144}\)

First, the court broadly interpreted *Meritor*.\(^{145}\) The U.S. Supreme Court in *Meritor* affirmed that Title VII affords employees the right to work in an environment “free from discriminatory intimidation, ridicule and insult.”\(^{146}\) From this affirmation, the *Chiapuzio* court reasoned that the U.S. Supreme Court was moving away from a disparate-treatment analysis and toward a view that “gender harassment occurs when unwelcome physical or verbal conduct creates a hostile work environment.”\(^{147}\)

In other words, the court chose to focus on the “un-welcome” and “severe and pervasive” elements of the sexual harassment test with the

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139. *Id.* at 1337–38.

140. *Id.* at 1335.

141. *Id.*

142. *Id.*

143. *Id.* at 1336.

144. *Id.*

145. *Id.*


belief that these elements would make up for any ambiguity as to the question of "but for one's sex." 148

Second, the court acknowledged that sexual harassment was an uneasy fit under Title VII and adjusted its analysis of the "because of sex" element accordingly. 149 The court relied on Judge Bork's often-cited dissent in Vinson v. Taylor, 150 which recognized that there was a problem with including the traditional gender discrimination model in sexual harassment. 151 Instead of analyzing the plaintiffs as a class, the court separated each claim and analyzed each individually. 152 By analyzing each claim on its own merits, the court determined that both plaintiffs were harassed because of their sex. 153 The court reasoned that Bell intended to demean and harass Dale because he was male due to remarks regarding Dale's sexual prowess. 154 Such remarks would not have created the same effect if they were directed toward a woman. 155 Similarly, looking at only the circumstances and conduct directed toward Carla, the court concluded she was harassed because she was female. 156 The key to analysis of the evidence was not whether the perpetrator harassed only members of one gender, but whether gender was a significant or motivating factor in each allegation of harassment. 157 The court did not eliminate the "because of sex" element; 158 rather, the court allowed the element to be satisfied by considering the sufficiency of evidence for each claim individually. 159 Therefore, analysis of the "because of sex" element on an individual basis allowed the district court to deny the equal-opportunity-harasser defense. 160

148. Id.
149. Id. at 1337.
150. 760 F.2d 1330 (D.C. Cir. 1985).
151. Id. at 1333 n.7 (Bork, J., dissenting).
153. Johnson, supra note 34, at 742–43.
155. Id. at 1337–38.
156. Id. at 1338.
157. Id. at 1337.
158. Id. at 1337–38.
159. Id.
160. Id. at 1336.
IV. COURTS SHOULD REJECT THE EQUAL-OPPORTUNITY-HARASSEDEFENSE BY ADOPTING AN INDIVIDUAL ANALYSIS OF THE "BECAUSE OF SEX" ELEMENT

Analyzing each claim individually will enable courts to deny the equal-opportunity-harasser defense. Where a perpetrator harasses both men and women, the traditional interpretation of the "because of sex" element prevents plaintiffs from making the required showing of disparate treatment. Evidence of disparate treatment, however, does not exhaust the evidence of discrimination because of sex; individual analysis of the plaintiff's claim may also expose harassment based on an individual's sex. This analysis separates plaintiffs' claims and analyzes conduct directed at each plaintiff individually. If that conduct is motivated by the plaintiff's gender, then the plaintiff has satisfied the "because of sex" element. By utilizing an individual analysis, courts can deny the equal-opportunity-harasser defense, enable sexual harassment law to fulfill its purpose, and avoid absurd results that occur with the traditional disparate-treatment requirement.

A. Acceptance of the Equal-Opportunity-Harasser Defense Is Based on Misplaced Reliance on the Need for Disparate-Treatment Analysis

Evidence of disparate treatment is inappropriate in sexual harassment claims because sexual harassment is an individual discrimination while disparate treatment looks for discrimination on a class level. Courts adopted the disparate-treatment analysis used to satisfy the "because of sex" element in sexual harassment claims from the traditional sex discrimination model. The problem with including this disparate treatment within a sexual harassment framework is that sex discrimination and sexual harassment are theoretically different.161 While a person who discriminates based on sex presumably discriminates against all members of a particular sex, a sexual harasser may not harass all

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161. See Meritor Sav. Bank v. Vinson, 477 U.S. 57, 69 (1986). The U.S. Supreme Court's decision in Meritor acknowledged the fact that sexual harassment is not the same as class-based discrimination by its suggestion that a plaintiff's provocative speech and dress may be admissible in sexual harassment cases. See Michelle Ridgeway Peirce, Note, Sexual Harassment and Title VII—A Better Solution, 30 B.C. L. Rev. 1071, 1094 (1989). If the work environment were hostile for one gender, then characteristics of the plaintiff, one individual, should be immaterial. See id.
members of a certain sex and might harass members of both sexes. The decision to sexually harass a person is not based on gender alone but also on considerations such as the relationship to the victim and the victim’s physical and social characteristics. Therefore, in contrast to traditional class-based sex discrimination, sexual harassment is directed at individuals. This distinction makes sexual harassment claims an uncomfortable fit with traditional sex discrimination analysis because a court must use a class-based analysis to find individually based harassment.

Judge Bork recognized this uneasiness when he argued against making sexual harassment actionable in Vinson v. Taylor. He noted that under the traditional discrimination framework an equal-opportunity harasser would be legally excused because a plaintiff would not be able to prove the harassment was due to the plaintiff’s sex where the harassment was directed at both genders. Importing the disparate-treatment interpretation of the “because of sex” element from sex discrimination cases thus created a hole in sexual harassment laws. By looking for the effects of class-based discrimination, this analysis is blind to situations where gender is just one factor in the harasser’s selection of a victim. Judge Bork opined that if sexual harassment claims were to be included in Title VII, they would require a separate analysis from discrimination. The district court in Chiapuzio heeded Judge Bork’s warning and developed an individualized analysis of the “because of sex” element to hold equal-opportunity harassers accountable.

Most courts, however, have not heeded Judge Bork’s objection. By insisting on evidence of disparate treatment to satisfy the “because of sex” element of a prima facie case of sexual harassment, courts have created a doctrinal hole in sexual harassment law through which an equal-opportunity harasser might slip. The disparate-treatment re-

162. Locke, supra note 59, at 393; Paul, supra note 55, at 352.
163. See Paul, supra note 55, at 352.
164. Id.
165. Id.
166. 760 F.2d 1330, 1333 n.7 (D.C. Cir. 1985) (Bork, J., dissenting).
167. Id.
169. Vinson, 760 F.2d at 1133 n.7 (Bork, J., dissenting).
170. See supra notes 152–60 and accompanying text.
171. See, e.g., Rabidue v. Osceola Ref. Co., 805 F.2d 611, 620 (6th Cir. 1986); see also Locke, supra note 59, at 390.
The Equal-Opportunity-Harasser Defense

requirement has forced courts to accept the equal-opportunity-harasser defense because where employees of both sexes are being harassed alike there can be no evidence of disparate treatment, and the "because of sex" element becomes impossible to satisfy.\(^{172}\) Courts should follow the district court's example in Chiapuzio and recognize an individual analysis of the "because of sex" element to protect all victims from sexual harassment.

B. How an Individualized Analysis Operates To Satisfy the "Because of Sex" Element

An individual analysis is simply a more in-depth review of the evidence presented by each plaintiff. This analysis would more closely examine an equal-opportunity harasser's conduct\(^{173}\) and would not allow a facial showing of a lack of disparate treatment to foreclose this examination.\(^{174}\) Under the traditional "because of sex" analysis, courts have been primarily concerned with whether or not persons of the opposite sex were harassed in a similar manner as the plaintiff.\(^{175}\) If the harasser did harass a male and a female, courts have generally looked no further than this facial analysis.\(^{176}\) Rather than review the harasser's conduct directed toward each victim, courts have automatically assumed that such conduct was not because of either person's gender.\(^{177}\)

An individual analysis would not stop at this facial inquiry but would accept the premise that a harasser can victimize both males and females. The shift in approach would be largely procedural. First, if there were multiple claims, the court would separate the plaintiffs' claims.\(^{178}\) Second, when analyzing a plaintiff's claim, the court should only examine conduct directed at that plaintiff individually regardless of

\(^{172}\) Applebaum, supra note 137, at 613.

\(^{173}\) Johnson, supra note 34, at 741–43.

\(^{174}\) This Comment does not address what should be the applicable test for the "because of sex" element for all types of sexual harassment. Instead, this individual analysis should only be applied to targeted conduct that is related to the victim's gender. Therefore, it does not apply to facially neutral conduct, such as the telling of jokes, cartoons, and the like.

\(^{175}\) Locke, supra note 59, at 393; Paul, supra note 55, at 352.

\(^{176}\) Applebaum, supra note 137, at 613.

\(^{177}\) Id.

whether there were other victims of the harasser. Therefore, evidence of equal-opportunity harassment should not be dispositive, particularly on summary judgment. Finally, in order to establish a case from which a fact-finder could reasonably infer that the harassment was because of the plaintiff’s sex, a plaintiff could present three types of evidence as listed in Oncale. These procedural modifications would keep the evidentiary burden on the plaintiff, who would face a showing essentially the same as in a traditional sexual harassment claim. The only difference would be that the claim would not founder on evidence unrelated to instances of discrimination against the individual.

An individual analysis would look for the same evidence of gender-specific conduct as satisfies a traditional claim. Evidence that traditionally satisfies the “because of sex” element establishes a nexus between the harasser’s conduct and the victim’s gender. If the conduct is related to the victim’s gender, then the fact-finder can conclude that gender animated the harasser’s behavior. Because such a nexus may exist regardless of the plaintiff’s conduct toward other employees, a fact-finder should be permitted to draw a similar conclusion whenever a plaintiff presents evidence of conduct related to his or her gender, notwithstanding conduct related to other employees’ genders.

The presentation of such evidence of gender-specific conduct to prove discrimination because of sex falls squarely within the evidentiary showing deemed sufficient by Oncale. For example, terms such as “cunt” and “broad” are derogatory terms traditionally used to refer to women. Because such abusive terms are centered upon a particular sex, a fact-finder could conclude that the victim was harassed because

179. Id.
180. Id. at 1338.
182. Gender refers to not only whether a person is a male or a female, but also includes cultural manifestations of sex. See Paetzold, supra note 137, at 27 n.13. This includes personality traits and physical characteristics of a person that are considered to be tied to a particular sex and therefore are presumed to be displayed by that particular sex. Ramona L. Paetzold, Same-Sex Sexual Harassment, Revisited: The Aftermath of Oncale v. Sundowner Offshore Services, Inc., 3 EMPLOYEE RTS. & EMP. POL’Y J. 251, 257–58 (1999). For example, sensitivity and emotional behavior (personality traits) as well as certain types of clothes, makeup and hairstyles (physical characteristics) are associated with females. Id.
183. Id. at 45–46.
185. See, e.g., Steiner v. Showboat Operating Co., 25 F.3d 1459, 1464 (9th Cir. 1994).
she was female.\textsuperscript{186} Conduct or language that would almost fail entirely of its crude purpose had the victim been of the opposite sex might show a similar nexus with the victim’s sex.\textsuperscript{187} For example, a harasser who draws cartoons of the victim giving birth to a baby and exaggerates the sexual characteristics of the victim will, generally, have a more profound effect upon a female victim than a male victim.\textsuperscript{188} By focusing on the nexus between specific conduct and the plaintiff’s gender, a court should not be able to conclude that evidence of unrelated conduct defeats, as a matter of law, plaintiff’s evidence of sexual harassment.\textsuperscript{189}

Applying this analysis to the facts of \textit{Holman v. Indiana},\textsuperscript{190} discussed in the introduction of this Comment, will further explain its operation. First, a court would separate Karen and Steven’s claims. Then, the court would look at the harassing conduct directed toward Karen individually. In Karen’s case, her supervisor, Gale, touched her body, sexually propositioned her, and made derogatory remarks about women. A fact-finder could reasonably have concluded that Gale touched Karen and sexually propositioned her because she was a woman and he was attracted to her. Similarly, a fact-finder could have concluded that the sexist remarks would not have had the same derogatory and offending effect if they were directed toward a male. Because Karen’s evidence supported the conclusion that the supervisor chose the conduct he aimed at Karen because she was a female, the court should not have granted summary judgment upon the employer’s evidence of unrelated conduct.

After rejecting summary judgment on Karen’s claim, the court would then turn to Steven’s claim. Gale repeatedly asked Steven for sexual favors.\textsuperscript{191} When these favors were rejected, Gale retaliated against him.\textsuperscript{192} Such evidence reasonably suggests that the supervisor was attracted to Steven because he was a man and that there was a quid (retaliation) based on a quo (rebuffed proposition).\textsuperscript{193} This evidence would have

\begin{itemize}
  \item \textsuperscript{186} \textit{Steiner}, 25 F.3d at 1463–64.
  \item \textsuperscript{187} \textit{Zabkowicz v. W. Bend Co.}, 589 F. Supp. 780, 784 (E.D. Wis. 1984), \textit{rev'd in part on other grounds}, 789 F.2d 540 (7th Cir. 1986).
  \item \textsuperscript{188} \textit{Id.} at 783–84.
  \item \textsuperscript{189} \textit{See Chiapuzio v. BLT Operating Corp.}, 826 F. Supp. 1334, 1338 (D. Wyo. 1993).
  \item \textsuperscript{190} 211 F.3d 399 (7th Cir. 2000).
  \item \textsuperscript{191} \textit{Id.} at 401.
  \item \textsuperscript{192} \textit{Id.}
  \item \textsuperscript{193} In regards to same-sex harassment, this test serves to overcome orientation bias. Traditionally, under opposite-sex harassment there is a presumption or inference that sexual conduct is sex-based, whereas in same-sex harassment there is an opposite presumption that the conduct was
\end{itemize}
carried Steven’s claim past summary judgment had evidence of unrelated conduct not been given dispositive weight. As these examples show, an individual analysis would simply allow courts to reach the merits of discrete claims where plaintiffs present otherwise sufficient evidence of gender-based conduct.

C. An Individual Analysis Is an Appropriate Method for Proving the “Because of Sex” Element

Individually analyzing a plaintiff’s claim on its own merits finds support in sexual harassment case law. Adoption of an individual analysis would follow an emerging trend in federal and Washington law. Furthermore, the U.S. Supreme Court has determined that evidentiary alternatives besides disparate treatment are permissible to support a claim of sexual harassment.

1. Adoption of an Individual Analysis of the “Because of Sex” Element Would Be Consistent with an Emerging Trend in Washington and Federal Law

An individual analysis of the “because of sex” element finds support in Kopp v. Samaritan Health System and Kahn v. Salerno. Where a distinction could be made in the severity of the harassment, these courts held that the equal-opportunity-harasser defense did not apply because the plaintiff could show disparate treatment. Rather than accept the irrelevant excuse that harassment was directed at both a man and a woman, these courts required an in-depth analysis of the conduct itself.
Although the *Kopp* and *Kahn* decisions illustrate successful rejection of the equal-opportunity-harasser defense, requiring evidence of disparate treatment preserves the defense in situations where the court cannot distinguish between severities of harassment.\(^{198}\) For example, by showing that victims of the harasser were exposed to varying degrees of harassment, the *Kopp* and *Kahn* courts were able to stay within the confines of a disparate-treatment requirement while allowing the victims’ claims to go forward.\(^{199}\) In cases where the harassment is equal in severity or where the court cannot make a distinction, this reasoning will force courts to deny claims of equal-opportunity-harasser victims. An alternative, and a lasting solution, would be to adopt an individual analysis not susceptible to the equal-opportunity-harasser defense.

The careful examination by the *Kopp* and *Kahn* courts of the distinction in harassment severity is just one step removed from an individual analysis. Rather than just looking to see if a difference in the severity of the conduct exists, a court could separately analyze each victim and determine whether the conduct was based on the victim’s sex. For courts like *Kopp* and *Kahn* that are already conducting an analysis of the unique context of the harassment, an individual analysis of a plaintiff’s sexual harassment claim would require no additional judicial burden.

The *Chiapuzio* court has already taken this next step and replaced evidence of disparate treatment with an individual analysis, thereby precluding the defense. This court acknowledged that sexual harassment can be directed at individuals of both sexes by the same harasser.\(^{200}\) To allow a claim of sexual harassment, the *Chiapuzio* court reviewed the conduct aimed at each plaintiff individually.\(^{201}\) Because gender was a motivating factor in the harassment, the plaintiff had satisfied the “because of sex” element.\(^{202}\) This analysis no longer requires plaintiffs to show disparate treatment. By adopting an individual analysis, *Chiapuzio* provides a foundation to deny the equal-opportunity-harasser defense. Washington and federal courts should follow this lead and deny the equal-opportunity-harasser defense.

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201. *Id*.
202. *Id*.  

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2. The U.S. Supreme Court No Longer Requires Evidence of Disparate Treatment Under the "Because of Sex" Element

In *Oncale v. Sundowner Offshore Services, Inc.*, the U.S. Supreme Court paved the way for courts to accept an individual analysis of the "because of sex" element. The *Oncale* Court ruled that evidence of disparate treatment was sufficient but no longer necessary to establish discrimination "because of sex." In *Oncale*, the Court was faced with a same-sex sexual harassment claim where evidence of disparate treatment would have been unavailable because the court was unable to compare conduct toward the plaintiff against conduct toward women.

Showing that same-sex harassment was prohibited under Title VII, the Court stated in dicta that a plaintiff could show discrimination "because of sex" with three different types of evidence: (1) comparative evidence, (2) evidence of gender-specific conduct or actions, or (3) evidence of explicit or implicit proposals of sexual activity. Evidence of disparate treatment is thus no longer necessary to establish a prima facie case of sexual harassment. By adding the second and third types of evidentiary showings, the Court opened the door to an individual analysis of the "because of sex" element because such evidence concerns conduct directed toward the individual plaintiff. Hence, the Court has implicitly allowed an individual analysis to satisfy the "because of sex" element.

In *Holman v. Indiana*, the Seventh Circuit incorrectly read *Oncale* to require proof of disparate treatment in all cases of sexual harassment. In *Holman*, the court made clear that *Oncale* "explained that one way to ensure that Title VII does not mutate from a prohibition on sexual discrimination to a general prohibition on harassment is to... [require] a demonstration that there be different treatment of the sexes." From this

204. See id. at 80–81; LINDEMANN & KADUE, supra note 46, at 52; Coombs, supra note 72, at 129–30; Lussier, supra note 22, at 957–58.
205. See *Oncale*, 523 U.S. at 80–81. Although not stated expressly, the facts of the case make it clear that no women were present in the workplace. See id. at 77 (referring to plaintiff's employment on "eight-man crew").
206. Id. at 80–81.
207. See id.
208. 211 F.3d 399 (7th Cir. 2000).
209. Id. at 404 (emphasis in original).
The Equal-Opportunity-Harasser Defense

care concern voiced in Oncale, the Holman court reasoned that disparate treatment is required in all cases of sexual harassment.210 This analysis ignores, however, the fact that Oncale stated disparate treatment was one way to ensure protection against a civility code.211 The Court in Oncale went on to suggest two other means to ensure that the harassment was based on the victim’s sex.212 Furthermore, disparate treatment was impossible to establish in Oncale because there were no female employees against which to examine the victim’s harassment. Although the Court was not entirely clear in its reasoning, commentators agree that Oncale provided plaintiffs with three options to satisfy the “because of sex” element.213

D. Courts Must Deny the Equal-Opportunity-Harasser Defense To Avoid Absurd Results and To Fulfill the Purpose of Sexual Harassment Laws

1. Acceptance of the Defense Leads to Inequitable and Absurd Results

By allowing the equal-opportunity-harasser defense, courts create inequitable and absurd results. First, acceptance of the defense leaves an entire group of sexual harassment victims without protection simply because the perpetrator was an equal-opportunity harasser.214 For example, in Zabkowicz v. West Bend Co.,215 the plaintiff satisfied the “because of sex”216 element when she presented evidence that her supervisor made sexual innuendoes and called her “sexy bitch” and “slut.”217 Conversely, in a similar fact scenario involving an equal-opportunity harasser, the court in Holman rejected the plaintiff’s sexual harassment claim because the harasser also aimed his conduct toward a male employee.218 Thus, similarly situated plaintiffs were treated diff-

210. Id. at 403.
211. Oncale, 523 U.S. at 80–81.
212. Id.
213. LINDEMANN & KADUE, supra note 46, at 52; Coombs, supra note 72, at 129–30; Lussier, supra note 22, at 957–58.
216. Id. at 782.
217. Id. at 785.
218. Holman v. Indiana, 211 F.3d 399, 404 (7th Cir. 2000).
ferently under Title VII. Although one plaintiff's injury was remedied while another plaintiff's injury was not, this is not the most significant difference. The real difference is that the plaintiffs like the one in Zabkowicz are able to pursue discrete claims on their own merits while the Holman plaintiffs had their claims muted by other, unrelated claims. Because alternative causes of action, such as the tort of intentional infliction of emotional distress,\textsuperscript{219} assault,\textsuperscript{220} or outrage,\textsuperscript{221} are not viable options, this difference leaves an entire class of victims without a legal remedy.\textsuperscript{222}

Second, an equal-opportunity harasser is a more offensive person than a traditional harasser because an equal-opportunity harasser treats everyone abusively.\textsuperscript{223} This reprehensible conduct should not serve as a defense to liability for such actions.\textsuperscript{224} Simply put, the courts are accepting that the more people one harasses, the less susceptible one is to prosecution.\textsuperscript{225} This result directly contradicts the purpose of sexual harassment laws because it allows conduct that supports inequitable barriers in the workplace to go unpunished merely because the perpetrator chose to harass both a male and a female rather than only one individual.

\textsuperscript{219} Applebaum, \textit{supra} note 137, at 618–19. The tort of intentional infliction of emotional distress requires that the plaintiff suffer severe or extreme emotional distress from extreme or outrageous conduct from the harasser. \textit{Id.} at 619. Because many victims of harassment do not suffer severe emotional distress as a result of being harassed, this cause of action is not a viable claim for many harassment victims. \textit{Id.}

\textsuperscript{220} \textit{Id.} at 620. Assault requires an apprehension of a harmful or offensive contact. \textit{Id.} Words alone will usually not support a cause of action for assault. \textit{Id.}

\textsuperscript{221} The tort of outrage is supported by a showing that the defendant's conduct was "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." Grimbsy v. Samson, 85 Wash. 2d 52, 59, 530 P.2d 291, 295 (1975). The plaintiff cannot establish the tort of outrage based on mere insults and indignities that cause embarrassment or humiliation. Dicomes v. Washington, 113 Wash. 2d 612, 630, 782 P.2d 1002, 1013 (1989).

\textsuperscript{222} In addition, battery and constructive discharge are unavailing. Battery requires the plaintiff to prove that there was unpermitted physical contact, and this may not occur in a sexual harassment context. Applebaum, \textit{supra} note 137, at 620. For constructive discharge, existence of unlawful sex discrimination alone will not support the claim. Glasgow v. Georgia-Pacific Corp., 103 Wash. 2d 401, 408, 693 P.2d 708, 713 (1985).


\textsuperscript{224} Applebaum, \textit{supra} note 137, at 616.

\textsuperscript{225} \textit{Id.}
Equal-opportunity harassment creates the same hostile work environment and inequalities that traditional harassment does and thus should be prohibited by sexual harassment laws. Courts have recognized that the purpose behind prohibiting sexual harassment was to eradicate arbitrary barriers to sexual equality in the workplace. Like a traditional harasser, a perpetrator who harasses members of both sexes confounds this purpose in two ways. First, the equal-opportunity harasser’s motivation behind the harassment is the same as in traditional sexual harassment because the perpetrator singles out a victim for gendered reasons. Second, the effect of the harassment is the same as in traditional sexual harassment as victims are forced to experience unwelcome sexual advances, physical contact, or verbal abuse. Such conduct supports the continuation of sex stereotyping and the maintenance of a gender hierarchy because it serves to punish those who do not conform to scripted gender norms and to block professional opportunities for both sexes. Therefore, an equal-opportunity harasser’s conduct leads to the same arbitrary barriers to sexual equality in the workplace. In order to bring these harassers within the policy bounds of sexual harassment laws, courts should adopt an individual analysis of the “because of sex” element and eliminate the equal-opportunity harasser defense.


228. Locke, supra note 59, at 407.

229. See Peirce, supra note 161, at 1096 (“[T]he offensiveness of the harassment is not lessened merely because the employer also harasses men. To the woman it is the harassment itself that offends.”).


232. See supra note 231.
Washington has an even greater responsibility to adopt an individual analysis because Washington statutory law mandates that sexual harassment laws be given liberal construction in order to fulfill their purpose of eradicating barriers to sexual equality in the workplace and protecting all employees from sexual harassment. Washington courts have used liberal construction to modify sexual harassment law so that inequities in the workplace are extinguished. For example, the Washington Court of Appeals, in Payne v. Children's Home Society of Washington, Inc., had to decide whether a sexual harassment claim existed where the conduct complained of was not explicitly sexual. Although the WLAD was silent on this issue, the court reasoned that gender-based harassment that is not of a sexual nature also creates barriers to sexual equality. Therefore, to fulfill the statute’s purpose, the court determined that conduct need not be sexual in nature to support a claim for sexual harassment under the WLAD.

Likewise, when presented with the equal-opportunity-harasser defense, Washington courts should liberally construe the WLAD and adopt an individual analysis to deny this defense. By allowing the defense, courts protect conduct that would otherwise be harassment but for a broader group of victims. Instead of fulfilling the statute’s purpose, the defense leaves a supervisor with the power to sexualize the workplace. This result contradicts the statute’s purpose because the harassing conduct serves to punish victims for not following gender norms established by the harasser and creates barriers to advancement in the workplace for both sexes.


Rejecting the equal-opportunity-harasser defense and no longer requiring a showing of disparate treatment will not turn sexual ha-
rassment laws into a code of conduct for the workplace. Proponents of the defense fear that by discarding the disparate-treatment requirement, sexual harassment laws will become regulations of how employees should treat each other; however, this fear is misguided.

First, although evidence of disparate treatment would not be required under the new individualized analysis of the "because of sex" element, the plaintiff must still show that one of the motivating factors behind the harasser's conduct was the plaintiff's gender. This requirement would still guard against Title VII and state harassment laws turning into general harassment statutes in the workplace because the plaintiff would still have to show a nexus between the harassment and the plaintiff's gender.

Second, the U.S. Supreme Court in Oncale stated that the "severe and pervasive" element is the crucial requirement to protect against a workplace civility code. If the harasser's conduct is not severe and pervasive enough to create an objectively hostile work environment, then the conduct does not rise to the level of actionable sexual harassment.

Finally, the decision in Oncale no longer requires a showing of disparate treatment. If the Court was concerned that sexual harassment laws would turn into civility codes without proof of disparate treatment, the Court would not have provided plaintiffs alternatives to showing disparate treatment. Therefore, rejecting the equal-opportunity-harasser defense and not requiring proof of disparate treatment will not render sexual harassment laws civility codes.

V. CONCLUSION

Washington and federal courts should adopt an individual analysis of the "because of sex" element, thus abolishing the equal-opportunity-harasser defense. The defense allows outrageous harassers to go unpunished and leaves unprotected victims who are forced to endure

244. Id. at 82; see supra note 45 and accompanying text.
245. Oncale, 523 U.S. at 82.
246. See id. at 80-81; supra notes 204-07 and accompanying text.
appalling employment situations. Evidence of disparate treatment to satisfy the "because of sex" element is inappropriate in equal-opportunity-harasser cases because it is a class-based analysis attempting to detect an individual discrimination. Although Washington and federal courts have already tried to get around the defense by making a distinction in the severity of the harassment, disparate-treatment analysis will limit the ability of the courts to handle equally severe harassment. The logical progression of these courts' efforts is to adopt an individual analysis that will provide lasting protection for all victims of equal-opportunity harassers. The U.S. Supreme Court has already paved the way for an individual analysis by no longer requiring evidence of disparate treatment to satisfy the "because of sex" element. To protect all victims of sexual harassment and to curb absurd results of the defense, Washington and federal courts should adopt an individual analysis of the "because of sex" element, thereby rejecting the equal-opportunity-harasser defense.