"Equal Opportunity Harasser" Doctrine: Flawed, Pernicious, Abrogated

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Introduction

Title VII of Civil Rights Act of 1964 (the Act) prohibits, among other things, gender-based discrimination in employment.[1] While the Act does not prohibit sexual harassment expressly, gender-based harassment amounts to gender discrimination.[2] Both the victim and the perpetrator of harassment can be of either gender, and the victim and the harasser need not be of opposite genders.[3] Sometimes, however, a perpetrator may harass employees of both genders. When that happens, courts have concluded that either (1) such "equal opportunity" or bisexual[4] harassment precludes a Title VII gender discrimination claim, because both sexes are treated similarly poorly, or (2) the plaintiff must show that members of his or her sex were affected differently from members of the other sex. After a string of Supreme Court employment discrimination cases including *Oncale v. Sundowner Offshore Services*,[5] *Faragher v. City of Boca Raton*,[6] and *Burlington Industries, Inc. v. Ellerth*, [7] the "equal opportunity harasser" defense gained more steam.[8] Although this defense is not as ubiquitous as others in sexual

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1. 42 U.S.C. §§ 2000e to e-17.

2. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 73 (1986) (noting that sexual harassment is a form of sex discrimination under Title VII: "we hold that a claim of 'hostile environment' sex discrimination is actionable under Title VII").

3. Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 82 (1998).

4. The terms *equal opportunity* and *bisexual* harasser or harassment is used interchangeably in this article. The case law refers to "equal opportunity" harassment, but scholarship often refers to "bisexual" harassment.

5. *Oncale*, 523 U.S. 75.

6. Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

7. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).

8. David J. Walsh, *Small Change: An Empirical Analysis of the Effects of Supreme Court Precedents on Federal Appeals Court Decisions in Sexual Harassment Cases, 1993–2005*, 30 Berkley J. Emp. & Lab. L. 461, 493 (2009) (courts considered the "equal opportunity harasser" defense in five cases in 1993–1998 and in twenty-nine cases in 1993–2005).

harassment cases,[9] the "equal opportunity harassment" defense has proliferated to other areas of employment discrimination law, including as an argument that sexual orientation discrimination does not violate Title VII if men and women equally face that discrimination.[10]

This article argues that the "equal opportunity harasser" doctrine in its current form (1) contravenes Title VII,[11] (2) all the more clearly violates the Civil Rights Act of 1991 (the 1991 Act)[12] as interpreted by *Desert Palace, Inc. v. Costa*,[13] and (3) is now abrogated by *Bostock v. Clayton County*.[14] Under those statutes and caselaw, the "equal opportunity harassment" doctrine is at best misapplied when courts use it to dismiss sex harassment cases with both male and female harassment victims. Most recently, *Bostock* implicitly undercut the defense when it held that discrimination based on sexual orientation or transgender status is illegal gender-based discrimination.[15] The Court rejected the defendants' argument that treating both genders harshly automatically precludes a gender discrimination charge.[16] Instead, the Court focused on Title VII's mandate to examine whether each *individual* plaintiff suffered gender discrimination in the totality of circumstances, rather than analyze the effect of the harassment on both genders.[17]

This article applies *Desert Palace* and *Bostock* to the "equal opportunity harasser" doctrine, concluding that, although neither case analyzed the doctrine explicitly, their logic undercuts this deeply misguided jurisprudence. Instead, this article proposes a different framework for analyzing sexual harassment claims where both genders may have suffered harassment: rather than ask if harassment is directed collectively at employees of only one gender (or if one gender suffers more harassment than the other), courts should instead analyze each harassment claim individually and allow plaintiffs to present to a fact

9. Zev J. Eigen, David S. Sherwyn & Nicholas F. Menillo, *When Rules Are Made to Be Broken*, 109 NW. U. L. REV. 109, 168 ("Only seventy-three federal court opinions since *Oncale* use the phrase 'equal opportunity harasser' (or some derivative thereof), demonstrating the small number of cases in which this defense comes up.").

10. In *Bostock v. Clayton County*, the defendants pressed a similar defense, arguing that "equal opportunity discrimination" permits termination based solely on an employee's LGBTQ status. 140S. Ct. 1731, 1744 (2020) ("For present purposes, [defendants] do not dispute that they fired the plaintiffs for being homosexual or transgender.") Additionally, at least one district court granted summary judgment in a race-based hostile work environment claim because the alleged harasser was "equal opportunity." Craddock v. FedEx Corp. Servs., No. 2:17-cv-02780-TLP-cgc, 2020 U.S. Dist. LEXIS 87909, at *30 (W.D. Tenn. May 19, 2020) ("As with sex discrimination, an 'equal opportunity harasser' who harasses across all racial divides cannot be said to be discriminating on the basis of race.").

11. 42 U.S.C. §§ 2000e to e-17.

12. *Id.* § 2000e(m).

13. Desert Palace, Inc. v. Costa, 539 U.S. 90, 99–102 (2003).

14. *Bostock*, 140 S. Ct. at 1741.

15. *Id.* at 1741–42.

16. *Id.* at 1748.

17. *Id.* at 1740–41.

finder any evidence of gender discrimination. This framework would allow employers to invoke the *McDonnell Douglas* framework to argue equal opportunity harassment as an affirmative defense, where they would bear the burden of proof, and where evidence of other-gender harassment would be only one fact negating discrimination. The court then would (1) weigh this *on summary judgment* against competing evidence (including rebuttal evidence of pretext), rather than (2) accept evidence of other-gender harassment as a complete bar to a harassment claim *on a motion to dismiss*. As a result, the "equal opportunity harassment" defense would not result in a dismissal on a motion to dismiss, where the court tests the sufficiency of the complaint. Instead, the earliest stage at which the employer can obtain a pre-trial dismissal would be summary judgment, where employer would have to prove, with unrebutted, case-specific, individualized, and admissible evidence, that other-gender harassment is a non-discriminatory reason for the adverse action. Given that the plaintiff would then get an opportunity to rebut such evidence with its own evidence of pretext, a denial of summary judgment, forcing a trial, is highly probable.

Thus, the application of the *McDonnell Douglas* framework to the equal opportunity harassment defense would harmonize harassment claims with other types of employment discrimination claims and comply with prior Supreme Court precedent and now *Bostock*.

I. The History of "Equal Opportunity Harasser"

The concept later dubbed an "equal opportunity harasser" was first raised in dictum in 1977 by the D.C. Circuit in *Barnes v. Costle*.[18] The *Barnes* plaintiff alleged that her employer eliminated her job after she refused to have a sexual affair with him.[19] In footnote 55, the court stated that gender-based harassment is distinguishable from "a bisexual superior who conditions the employment opportunities of a subordinate of either gender upon participation in a sexual affair. In the case of the bisexual superior, the insistence upon sexual favors would not constitute gender discrimination because it would apply to male and female employees alike."[20]

18. Barnes v. Costle, 561 F.2d 983, 990 n.55 (D.C. Cir. 1977).

19. *Id.* at 984–85.

20. *Id.* at 990 n.55. The Eleventh Circuit echoed the concept of bisexual harasser, also in dictum, immunity in *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982). While the central issue in *Henson* did not concern "equal opportunity" harassment, the court noted, as a point of comparison, that sexual harassment directed at both genders would not violate Title VII's prohibition on discrimination because of sex. *Id.* The Second Circuit has done the same in *Brennan v. Metropolitan Opera Ass'n*, 192 F.3d 310, 318 (2d Cir. 1999) ("[A]n environment which is quality harsh for both men and women . . . [d]oes not constitute a hostile working environment under the civil rights statutes"). The Second Circuit continued validating the "equal opportunity harasser" defense in *Menaker v. Hofstra University*, 935 F.3d 20, 38 n.88 (2d Cir. 2019) ("If the [harassment] allegations

The D.C. Circuit reiterated the legality of bisexual harassment in another dictum in *Bundy v. Jackson*.[21] In reversing the lower court's grant of summary judgment to the defendant, the Circuit Court noted, pre-*Oncale*, that a woman harassing a man, or same-sex harassment, could constitute illegal gender-based harassment, because "in each instance the question is one of but-for causation: would the complaining employee have suffered the harassment had he or she been of a different gender?"[22] In hypothesizing about other, then-novel, forms of sexual harassment, the court applied individual inquiry to the harassment to determine whether it was gender-based. Yet then, absurdly, the court continued: "Only by a reductio ad absurdum could we imagine a case of harassment that is not sex discrimination where a bisexual supervisor harasses men and women alike."[23] Apparently, the *Bundy* court's willingness to adopt an individualized approach to sexual harassment cases stopped at the bisexual harasser, where the court assumed the harassment could not be gender-based.

The "equal opportunity harasser" caselaw that developed in the decades following those earlier cases is inconsistent. When presented with evidence of other gender harassment, some courts accept such evidence as conclusive proof of no discrimination, while others require the plaintiff to convince the court that one gender on the whole experienced the harassment differently from the other gender. No circuit court has analyzed a case individually to determine whether a particular plaintiff was harassed because of their gender if the defendant presented evidence of other gender harassment. As explained below, while some factual analysis is better than a blanket ruling that harassment affecting both genders is not actionable, it is still a far cry from a truly individual inquiry now required by *Bostock*.

A. Courts Applying "Equal Opportunity Harassment" as a Complete Defense

The Seventh Circuit eventually coined the phrase "equal opportunity harasser" in the 2000 case *Holman v. Indiana*.[24] In *Holman*, husband and wife employees both claimed sexual harassment and

would have been leveled regardless of the plaintiff's sex, no sex discrimination has occurred.").

21. Bundy v. Jackson, 641 F.2d 934, 942 n.7 (D.C. Cir. 1981).

22. *Id.*

23. *Id.*

24. Holman v. Indiana, 211 F.3d 399, 402 (7th Cir. 2000) (affirming grant of summary judgment where the supervisor sexually harassed both a male and female employee). *But see* Kampmier v. Emeritus Corp., 472 F.3d 930, 940–41 (7th Cir. 2007) (reversing a grant of summary judgment in an "equal-opportunity harasser" case where the female employee allegedly endured harassment that was "far more severe and prevalent than the alleged conduct endured by the male employees"). Thus, even the Seventh Circuit is capable of nuance on the subject when it allows the employee to present some facts.

retaliation by the same supervisor.[25] The Court, relying on *Oncale v. Sundowner Offshore Services, Inc.*,[26] acknowledged that "the touchstone of Title VII is, of course, discrimination or disparate treatment."[27] However, the court noted that Title VII analysis focuses on "'whether members of one sex are exposed to disadvantageous terms or conditions of employment *to which members of the other sex are not exposed*.'"[28] The court reasoned that "because Title VII is premised on eliminating *discrimination*, inappropriate conduct that is inflicted on both sexes, or is inflicted regardless of sex, is outside the statute's ambit."[29] Continuing with the same logic, *Holman* stated that "requiring disparate treatment is consistent with the statute's purpose of preventing such treatment."[30] Thus, the circuit court affirmed the lower court's dismissal of the Holmans' complaint for failure to state a claim upon which relief could be granted.[31] The court did not analyze whether the harasser's conduct affected the genders differently; the allegation that a supervisor harassed employees of both genders was fatal to plaintiffs' claims.[32]

In 2001, the Fourth Circuit followed suit in *Lack v. Wal-Mart Stores, Inc.*[33] Applying *Oncale* and Title VII standards to a state-law discrimination claim, the court similarly held that a supervisor's verbal abuse consisting of lewd comments directed at the male plaintiff and other female employees was not actionable because the harasser did not discriminate based on sex.[34] Other circuits similarly have applied a strong form of the "equal opportunity" harassment defense in dismissing claims where such courts concluded that the harassment impacted both genders equally.[35]

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25. *Holman*, 211 F.3d at 401.

26. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79–80 (1998).

27. *Holman*, 211 F.3d at 402. Ironically, the Court in *Oncale* ruled for the plaintiff-petitioner, holding that Title VII covers any sex-based discrimination where both the victim and the perpetrator are of the same sex. 523 U.S. at 82.

28. *Holman*, 211 F.3d at 403 (quoting *Oncale*, 523 U.S. at 80).

29. *Id.*

30. *Id.* at 404.

31. *Id.* at 407.

32. *Id.* at 406.

33. Lack v. Wal Mart Stores, Inc., 240 F.3d 255, 262 (4th Cir. 2001).

34. *Id.* (reversing the lower court's denial of defendant's post-trial motion for judgment as a matter of law, noting that "the evidence compels the conclusion that [the supervisor] was just an indiscriminately vulgar and offensive supervisor, obnoxious to men and women alike").

35. Reine v. Honeywell Int'l Inc., 362 F. App'x 395, 397 (5th Cir. 2010) (affirming grant of summary judgment to defendant where "[t]estimony from numerous employees—male and female—demonstrates that [the harasser] was an 'equal opportunity' harasser"); Penry v. Fed. Home Loan Bank, 155 F.3d 1257, 1263 (10th Cir. 1998) (affirming grant of summary judgment to defendant where "gender-based incidents were too few" to constitute actionable gender-based harassment and the alleged harasser's behavior was "motivated by poor taste and lack of professionalism rather than by plaintiff's gender").

B. Courts Requiring Some Fact Inquiry into Whether One Gender Is Affected Disproportionately or Differently

Other courts have examined the different overall impact that the harassment had upon both genders. Plaintiffs who convinced the courts that harassment was gender-disparate in quality or magnitude were allowed to reach the jury.[36] In *Kopp v. Samaritan Health System*, the Eighth Circuit ruled that, although the supervisor allegedly harassed employees of both genders, the harassment directed at women was more severe and more pervasive; therefore, plaintiff's hostile work environment claim survived summary judgment.[37] The Ninth Circuit found similarly in *Steiner v. Showboat Operating Co.*: "[W]hile [the harasser's] abuse of men in no way related to their gender, his abuse of female employees, especially [the plaintiff], centered on the fact that they were females. It is one thing to call a woman 'worthless,' and another to call her a 'worthless broad.'"[38]

Over twenty years later, the Ninth Circuit reversed a grant of summary judgment for the defendant where the lower court noted that the harasser was "rude, overbearing, obnoxious, loud, vulgar, and generally unpleasant" but dismissed the case because the harasser was not motivated by "lust" or "a desire to drive women out of the organization."[39] The Ninth Circuit once again analyzed the qualitative and quantitative effect of the harassment on both genders overall and reversed the grant of summary judgment to defendant because (1) "there [was] no evidence in the record that any male employee manifested anywhere near the same severity of reactions . . . to [the harasser's] conduct as many of the female employees ha[d] reported," and (2) "an unbalanced distribution of men and women in relevant employment positions, and the fact that some men were also harassed, does not automatically defeat a showing of differential treatment."[40] As with *Steiner*, although the court ultimately ruled for the plaintiff, it was only because one gender suffered worse harassment overall than the other gender. Other courts similarly allowed harassment claims to reach the jury where plaintiffs showed more pervasive harassment directed at their gender.[41]

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36. However, even then, plaintiffs ran the risk of having their verdicts overturned on appeal. *See Lack*, 240 F.3d at 259.

37. Kopp v. Samaritan Health Sys., 13 F.3d 264, 269 (8th Cir. 1993) (reversing lower court's grant of summary judgment for the defendant: "Of the [harassment] incidents cited in this opinion alone, approximately ten involved female employees; only four involved male employees. Further, the incidents involving female employees are of a more serious nature than those involving male employees.").

38. Steiner v. Showboat Operating Co., 25 F.3d 1459, 1464 (9th Cir. 1994).

39. Equal Emp. Opportunity Comm'n v. Nat'l Educ. Ass'n, 422 F.3d 840, 845 (9th Cir. 2005).

40. *Id.* at 846.

41. Reeves v. C.H. Robinson Worldwide, Inc. 594 F.3d 798, 809–10 (11th Cir. 2010) ("[While] sexual language and discussions that truly are indiscriminate do not themselves establish sexual harassment under Title VII, . . . a member of a protected group

These decisions, while more nuanced than *Holman* and its progeny, still apply the same premise: they disallow a harassment claim unless one gender was treated *collectively* worse than the other gender.[42] However, as explained below, the correct inquiry in hostile work environment and sexual harassment cases, as with any Title VII claims, is whether each *individual* plaintiff faces worse terms or conditions of employment based on sex. Moreover, in none of the cases did the courts

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cannot be forced to endure pervasive, derogatory conduct and references that are gender-specific in the workplace, just because the workplace may be otherwise rife with generally indiscriminate vulgar conduct. Title VII does not offer boorish employers a free pass to discriminate against their employees specifically on account of gender just because they have tolerated pervasive but indiscriminate profanity as well."); Gallagher v. C.H. Robinson Worldwide, Inc., 567 F.3d 263, 271–72 (6th Cir. 2009); Petrosino v. Bell Atl., 385 F.3d 210, 223 (2d Cir. 2004) (although all employees "were routinely exposed to sexually offensive language and graphics, we conclude that a reasonable jury could find this conduct more demeaning of women than men and, therefore, the evidence should not have been excluded from an assessment of the totality of circumstances in considering [defendant's] motion for summary judgment").

42. Interestingly, the Ninth Circuit declined to extend the same logic to race discrimination claims. In *Swinton v. Potomac Corp.*, the Ninth Circuit upheld a verdict in plaintiff's favor in a racial harassment claim, despite defendant employer's evidence that the offending supervisor made racial jokes about multiple ethnic groups. 270 F.3d 794, 807 (9th Cir. 2001). The Court specifically and definitively rejected the "equal opportunity harasser" defense:

> Nor was Swinton required to prove that white employees were not subject to similar harassment. To suggest, as Potomac does, that it might escape liability because it equally harassed whites and blacks would give new meaning to equal opportunity. Potomac's status as a purported "equal opportunity harasser" provides no escape hatch for liability. The fact that Fosdick may have told jokes about racial or ethnic groups other than African-Americans does not excuse the fact that he racially harassed Swinton.

Id. at 807. Ironically, the court based its holding on *Steiner v. Showboat Operating Co.*, a gender-based harassment case, even though the Ninth Circuit in *Steiner* had upheld the plaintiff's verdict simply because the harassment that the men suffered was not gender-based. 25 F.3d at 1466–67. Perhaps the reason for the dichotomy between gender harassment and racial harassment claims is that, in the cases presented to the courts to date, there were only two genders, but many races. Therefore, it may be easier for a court to imagine that harassment directed at more than one race can still be race-based, but harassment directed at both genders must not be discriminatory. The same multi-race logic could extend to sex harassment, however, given that gender fluidity has gained wider recognition, and courts may (almost certainly will) start seeing gender harassment cases based on a plaintiff's "third gender," non-binary, agender, or gender fluid status. *See* Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 897, 900 (2019) ("Nonbinary gender identities have quickly gone from obscurity to prominence in American public life, with growing acceptance of gender-neutral pronouns, such as 'they, them, and theirs,' and recognition of a third-gender category by U.S. states including California, Colorado, Minnesota, New Jersey, Oregon, and Washington. . . . People with nonbinary gender identities do not exclusively identify as men or women. . . . Nonbinary gender identity is not a niche concern. To the contrary, the legal response to nonbinary gender has important implications for a variety of other identity-based legal movements."). Given the quickly growing recognition of nonbinary gender identities, courts will need to apply a consistent, predictable, and stable framework to adjudicate cases brought by nonbinary gender plaintiffs. The framework laid out in this article, which complies with statutory requirements and Supreme Court precedent, would accommodate such claims.

treat the "equal opportunity harasser" as an affirmative defense, where the defendant bears the burden of proof. Rather, plaintiffs had to disprove equal opportunity harassment in their cases-in-chief.

C. Individual Inquiry in a Bisexual Harasser Case

At least one District Court has correctly inquired into the *individual* circumstances of sexual harassment of four plaintiffs—two men and two women—in *Chiapuzio v. BLT Operating Corp.*[43] Because the supervisor made abusive remarks of a sexual nature to all plaintiffs, the defendant raised the "bisexual" harasser defense.[44] In denying summary judgment to the defendant, the court ruled that "the equal harassment of both genders does not escape the purview of Title VII in the instant case. Where a harasser targets both men and women, 'it is not unthinkable to argue that each individual who is harassed is being treated badly because of sex.'"[45] With the "each individual" language stressing the individual inquiry, the court came closer to an individual inquiry in a bisexual harasser case than any circuit court. However, in the end, the court based its denial of summary judgment on the qualitative difference between the harassment of men and women. Recognizing an "'equal-opportunity' harasser whose remarks are gender-driven," the court differentiated between the harassment experienced by the women as "concern[ing] sexual prowess and includ[ing] graphic descriptions of sexual acts [the harasser] desired to perform with various female employees" from the harassment experienced by the men as "intend[ing] to demean and, therefore, harm [the men] because each was male."[46] Thus, the court decided that the harassment experienced by women was of a sexual nature, while the harassment experienced by the men was of a domineering nature. This distinction persuaded the court to allow the claims to proceed to trial. So while *Chiapuzio* may be the case that has come closest to undertaking an appropriately individualized inquiry, it still detoured into a comparative analysis of each gender collectively, and it has not been followed by any court considering the "equal opportunity harasser" defense.

D. The Limited Relevance of the Split among Courts

The different outcomes between the circuits, or even within the same circuit, could be explained simply by different facts of each case. Consider the following scenarios.

Scenario 1, *Holman v. Indiana*. Karen Holman alleged that her boss "sexually harass[ed] [her] by touching her body, standing too

43. Chiapuzio v. BLT Operating Corp., 826 F. Supp. 1334, 1337–38 (D. Wyo. 1993).
44. *Id.* at 1336.
45. *Id.* at 1337 (quoting John J. Donahue, *Review Essay: Advocacy Versus Analysis in Assessing Employment Discrimination Law*, 44 STAN. L. REV. 1583, 1610–11 (1992)).
46. *Id.* at 1337–38.

closely to [her], asking her to go to bed with him and making sexist comments and otherwise making [her] work in a sexually hostile work environment."[47] Steven Holman alleged that the same supervisor "sexually harassed [him] by grabbing his head while asking for sexual favors which requests were refused."[48]

Scenario 2, *Equal Employment Opportunity Commission v. National Education Ass'n*. With respect to the male employees;

- the supervisor "raised his voice . . . only on a 'couple of occasions' and . . . they were 'able to talk it out'";[49]
- "the period of raising the voice was very short";[50]
- the supervisor's aggression "had the quality of 'bantering back and forth with somebody, and being with the boys";[51] and
- only with one male employee, the supervisor was "very loud, spitting in my face, accusing me of being insubordinate."[52]

The female employees, in contrast, were "crying, feeling panicked and physically threatened, avoiding contact with [the supervisor,] avoiding submitting overtime hours for fear of angering [him,] calling the police, and ultimately resigning."[53]

The difference in these cases' outcomes could be explained by the facts rather than judicial philosophy. In *Holman*, the harassment directed at husband and wife was more "equitable." In *National Education*, the harasser's conduct toward the men simply did not meet the standard for actionable harassment; the court analyzed "equal opportunity" harassment in response to defendants' argument, which plaintiff defeated. Other factors that might influence the courts and result in divergent outcomes are (1) the quality of attorneys' arguments (especially those of plaintiffs' attorneys)[54] and (2) the composition of the different panels within each circuit.[55] However, regardless of the

47. Holman v. Indiana, 211 F.3d 399, 401 (7th Cir. 2000) (affirming a Rule 12 dismissal of a complaint alleging that a supervisor harassed both husband and wife).

48. *Id.*

49. Equal Emp. Opportunity Comm'n v. Nat'l Educ. Ass'n, 422 F.3d 840, 846 (9th Cir. 2005) (reversing a summary judgment grant where the supervisor's verbal harassment of women was qualitatively and quantitatively different from that of men).

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *See generally* Scott A. Moss, *Bad Briefs, Bad Law, Bad Markets: Documenting the Poor Quality of Plaintiffs' Briefs, Its Impact on the Law, and the Market Failure It Reflects*, 63 EMORY L.J. 59 (2013) (finding that a substantial number of plaintiffs' lawyers omit viable summary judgment arguments or argue ineffectively).

55. *Compare* Lack v. Wal-Mart Stores, Inc., 240 F.3d 255, 262 (4th Cir. 2001) (reversing the lower court's denial of defendant's post-trial motion for judgment as a matter of law; "[T]he evidence compels the conclusion that [the supervisor] was just an indiscriminately vulgar and offensive supervisor, obnoxious to men and women alike"), *with*

type of analysis, no court has analyzed the "equal opportunity harassment" argument through the *McDonnell Douglas* framework, which is ubiquitous in almost any discrimination jurisprudence and requires a case-specific analysis; thus, its application would individualize the inquiry of whether harassment is gender-based. Further, the *McDonnell Douglas* framework would (1) place the burden on the defendant to show that the employer's adverse action was not improperly motivated by the employee's gender, and (2) allow the plaintiff to rebut such a showing.

Given that no circuit completely rejects the "equal opportunity harasser" defense and no circuit applies it to dismiss cases regardless of the facts, the differences in the case law are not as significant as the core problem: that the doctrine is flawed no matter how courts apply it. Moreover, as detailed below, *Bostock* further abrogates the defense even where the harassment unleashed upon both genders is of similar type and magnitude. *Bostock*—and, as *Bostock* explains, Title VII itself—requires truly individualized inquiry: a plaintiff's claim should survive even when harassment is "equitable" overall, as long as the harasser is harassing because of the plaintiff's gender.

E. Academic Critique of the Doctrine

Like the courts, legal scholars have struggled with a cohesive take on the bisexual or equal opportunity harasser. In *The Epistemic Contract of Bisexual Erasure*, Kenji Yoshino noted that bisexual harassment causes sexual harassment jurisprudence embarrassment because it creates the "double for nothing" problem: "by doubling the proscribed conduct, the harasser lowers his liability to nothing."[56] Yoshino argued that, although bisexuals have initially garnered an "advantage" in sexual harassment jurisprudence—Title VII "cannot encompass bisexuals who are truly sex-blind within its prohibitions"—"the bisexual harassment exemption has been closed."[57] Yoshino based this conclusion on cases such as *Chiapuzio*, where the court distinguished between the types of harassment doled out to men and women and denied summary judgment to defendant who harassed both men and women, albeit differently.[58] Unfortunately, *Holman*, decided five months after the publication of Yoshino's article, breathed new life into the defense.

Equal Emp. Opportunity Comm'n v. R&R Ventures, 244 F.3d 334 (4th Cir. 2001) (reversing lower court's grant of summary judgment to defendant; "[w]hile [the harasser] may sometimes have been abusive toward male employees, the allegations indicate that [he] directed his sexually pointed comments exclusively to the young women who worked for him").

56. Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 441 (2000).

57. *Id.* at 440.

58. *See supra* Part I.C.

In contrast, in *Equal Opportunity to Harass, Unequal Burdens of Proof: Affirming the Equal Opportunity Harasser Defense*,[59] Todd Clark viewed *Harris v. Forklift Systems, Inc.*,[60] and *Oncale*[61] as "tacit approval of the equal opportunity harasser defense as a means to avoid liability under Title VII."[62] Such interpretation is logical, because *Oncale* quoted Justice Ginsburg's concurrence in *Harris*, stating that "[t]he critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."[63] While courts and scholars may reasonably interpret that statement to mean that sexual harassment must affect one gender collectively more than the other, such an interpretation would violate Title VII, prohibiting discrimination of an *individual* "because of such individual's . . . sex,"[64] and the requirement that the analysis focus on individuals rather than groups is now reaffirmed by *Bostock*.[65] Clark advocated for precisely this analysis in 2012, eight years before *Bostock*: "[a]nother way to mitigate the equal opportunity harasser defense is to conduct an individualized analysis to determine whether the alleged harassment was 'because of sex.'"[66]

Finally, David Cleveland suggests that the only way to eliminate the equal opportunity harasser is to legislate him or her out of existence.[67] He deemed judicial reinterpretation as "unlikely because changes that resolve the problem also fundamentally contradict existing doctrine."[68] He concluded that "[t]he Court is unlikely to abandon the causation requirement it so recently and strongly reaffirmed."[69] Yet if *Bostock* is interpreted as this article suggests it should be, it may

59. Todd J. Clark, *Equal Opportunity to Harass, Unequal Burdens of Proof: Affirming the Equal Opportunity Harasser Defense*, 1 Tenn. J. Race, Gender & Soc. Just. 59 (2012).

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

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

62. Clark, *supra* note 59, at 73 (2012) (quoting Mark J. McCullough, Note, *One Is a Claim, Two Is a Defense: Bringing an End to the Equal Opportunity Harasser Defense*, 67 U. Pitt. L. Rev. 469, 476 (2005)).

63. *Oncale*, 523 U.S. at 80 (quoting *Harris*, 510 U.S. at 26 (Ginsburg, J., concurring)).

64. 42 U.S.C. § 2000e-2(a).

65. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1741 (2020) ("[T]he law makes each instance of discriminating against an individual employee because of that individual's sex an independent violation of Title VII.").

66. Clark, *supra* note 59, at 80. Clark interprets *Chiapuzio* and *Steiner* as individual inquiry decisions. However, *Steiner*, while applying a more individualized approach than *Holman* and its following, still differentiated between the types or magnitudes of harassment both genders experienced. *Chiapuzio* came closer, but still fell short of a truly individualized analysis. See analysis in Parts I.B and I.C, *supra*. Even *Chiapuzio* and *Steiner* may not pass the *Bostock* muster, where both women and men experienced exactly the same adverse action: termination due to gender. *Bostock*, 140 S. Ct. at 1737.

67. David R. Cleveland, *Discrimination Law's Dirty Secret: The Equal Opportunity Sexual Harasser Loophole*, 58 How. L.J. 5, 42–46 (2014).

68. *Id.* at 43.

69. *Id.* at 44.

resurrect hopes of judicially eliminating the equal opportunity harassment doctrine.

II. Statutory and Supreme Court Framework Require an Individualized Approach to Harassment Analysis.

Title VII does not distinguish gender-based harassment and hostile work environment from any other gender-based adverse employment actions; it demands equal treatment at work based on sex and provides a remedy to employees whose employers fail to meet that standard.[70] Yet, while Title VII does not require a heightened standard of proof of a discriminatory motive,[71] the "equal opportunity harasser" defense places a higher burden on the plaintiff to prove the mistreatment was "because of . . . sex" than any other gender-based Title VII claim. This heightened standard had been unwarranted under Title VII, the 1991 Act, and *Desert Palace*, and is now abrogated by *Bostock*. The following discussion describes the proper legal framework in which all other gender-based claims are analyzed and applies it to sexual harassment claims.

A. *Gender Must Be Only "A Motivating Factor": Title VII, The 1991 Act, and* Desert Palace

To establish hostile environment sexual harassment liability under Title VII, a plaintiff must prove that "1) she was subjected to unwelcome harassment, 2) the harassment was based on her sex, 3) the harassment was sufficiently severe or pervasive so as to alter the condition of her employment and create a hostile or abusive atmosphere, and 4) there is a basis for employer liability."[72] However, even if the harasser is motivated only in part by the victim's gender, the harassment victim can still get relief under the 1991 Act's prohibition on gender-based discrimination even where gender was only one among multiple motivating factors.[73]

Under section 107 of the 1991 Act, "an unlawful employment practice is established when the complaining party demonstrates that . . . sex . . . was *a* motivating factor for *any* employment practice, even though

70. A full history of sexual harassment law is beyond the scope of this article. For a history of sexual harassment law, see Kristin H. Berger Parker, *Ambient Harassment Under Title VII: Reconsidering the Workplace Environment*, 102 NW. U. L. REV. 945 (2008).

71. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 73 (1986) (noting that sexual harassment is a form of sex discrimination under Title VII; "we hold that a claim of 'hostile environment' sex discrimination is actionable under Title VII").

72. Kampmier v. Emeritus Corp., 472 F.3d 930, 940–41 (7th Cir. 2007).

73. Even before the 1991 expansion, *Barnes v. Costle* held that "the statutory embargo on sex discrimination in employment is not confined to differentials founded wholly upon an employee's gender. On the contrary, it is enough that gender is a factor contributing to the discrimination in a substantial way." 561 F.2d 983, 990 (D.C. Cir. 1977).

other factors also motivated the practice."[74] The Supreme Court interpreted that statute in *Desert Palace, Inc. v. Costa*, a sex discrimination case, holding that the 1991 Act does not require a heightened standard or direct evidence to prove discriminatory motive.[75] Neither the 1991 Act nor *Desert Palace* required the plaintiff to show evidence that an employee of another gender had not suffered a similar adverse action at the employer's hands. Rather, *Desert Palace* requires a plaintiff to prove only that gender was a motivating factor in an adverse action.[76]

The *Desert Palace* Court also analyzed a "limited"[77] affirmative defense under the 1991 Act, where an employer may "demonstrate that [it] would have taken the same action in the absence of the impermissible motivating factor."[78] Thus, in a sexual harassment case, to show that gender was not "a motivating factor," the employer might present evidence that the harasser had harassed employees of the other gender. However, this evidence would be:

- neither decisive nor dispositive, but rather only one piece in the puzzle;
- relevant just to damages rather than to liability;[79]
- an affirmative defense that the defendant must prove with evidence; and
- for the above reasons, presented to the jury, rather than a way to enable the court to dismiss the case on a motion to dismiss or for summary judgment.

Even if the defendant proves that the harassment was not gender-based, it would not escape liability under the 1991 Act; a successful defense would simply limit the types of damages available to the plaintiff: "declaratory relief, certain types of injunctive relief, and attorney's fees and costs."[80] Thus, once the plaintiff proves that gender was "a motivating factor" in treatment sufficiently adverse to qualify as

74. 42 U.S.C. § 2000e(m) (emphases added).

75. Desert Palace, Inc. v. Costa, 539 U.S. 90, 98–101 (2003) (noting that plaintiff's sexual harassment case was dismissed by the District Court and was not part of the Supreme Court analysis).

76. *Id.*

77. *Id.* at 94 (quoting 42 U.S.C. § 2000e(m)).

78. *Id*. at 95.

79. *E.g.*, Thomas v. Home Depot U.S.A., Inc., 792 F. App'x 722, 726 (11th Cir. 2019) (noting that where a certain defense to plaintiff's Title VII claim was an "affirmative defense," it is defendant's "burden of proving that defense"). But in *Hubbell v. World Kitchen, LLC*, the court ruled that "equal opportunity harasser" is not an affirmative defense, but rather an argument that plaintiff must overcome in its case-in-chief. 688 F. Supp. 2d 401, 422 (W.D. Pa. 2010). *Hubbell* directly conflicts with the 1991 Act and *Desert Palace*.

80. *Desert Palace*, 539 U.S. at 94 (quoting 42 U.S.C. § 2000e-5(g)(2)(B)).

harassment, the defendant's liability is established, and the only issue to be resolved is the kind of relief the plaintiff would get.[81]

In contrast, the "equal opportunity harassment" cases consider the evidence of other-gender harassment when evaluating a plaintiff's case-in-chief, thus making it plaintiff's burden to rebut rather than defendant's burden to prove. The consequences of this burden shift are significant: if the plaintiff cannot rebut such evidence, the claim would be dismissed, and the plaintiff would get no relief.

B. No Heightened Standard to Prove Discriminatory Motive in Other Discrimination Cases: Reeves *and* Ash

The Supreme Court had a busy decade in the 2000s reversing circuits that required a heightened standard or certain types of evidence for employment claims. *Desert Palace* was only one in a series of Supreme Court precedent explaining that no heightened standard of proof applies to employment discrimination claims, and no particular type of proof is required.

In *Reeves v. Sanderson Plumbing Products, Inc.*, the Supreme Court reversed a Fifth Circuit decision that a plaintiff "had not introduced sufficient evidence to sustain the jury's finding of unlawful [age] discrimination."[82] The Fifth Circuit had ruled that evidence of pretext—that the employer's assertion of a non-discriminatory motivation was a falsehood—was insufficient proof of discriminatory motive and "ignored the evidence supporting [plaintiff's] prima facie case and challenging [defendant's] explanation for its decision."[83] The Supreme Court reversed, holding that "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated."[84]

Similarly, in *Ash v. Tyson*, two African-American plaintiffs alleged race discrimination in promotion, and the Supreme Court reversed the Eleventh Circuit's affirmance of a grant of judgment as a matter of law to the defendant.[85] At trial, to prove that the defendant's proffered reason for a promotion denial was pretextual, plaintiffs introduced evidence that they had higher qualifications than the white men who ultimately got the jobs for which the plaintiffs applied.[86] The Eleventh Circuit had ruled that showing simple superiority of qualifications was not enough; "the disparity in qualifications [must be] so apparent as virtually to jump off the page and slap you in the face."[87] Not so, held

81. *Id.*
82. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 140 (2000).
83. *Id.* at 146.
84. *Id.* at 148.
85. Ash v. Tyson, 546 U.S. 454, 455–56 (2006).
86. *Id.* at 456.
87. *Id.* at 456–57.

the Supreme Court: "[Q]ualifications evidence may suffice, at least in some circumstances, to show pretext," and "[S]ome formulation other than the test the Court of Appeals articulated in this case would better ensure that trial courts reach consistent results."[88]

The relevance to the "equal opportunity harasser" doctrine is that *Desert Palace*, *Reeves*, and *Ash* are all Supreme Court reversals of the lower courts' attempts to graft higher standards of proof onto discrimination claims. The *Desert Palace* Court stressed that if Congress wanted to require a "heightened showing [in employment discrimination cases], it could have made that intent clear by including language to that effect in § 2000e(m). Its failure to do so is significant, for Congress has been unequivocal when imposing heightened proof requirements in other circumstances, including in other provisions of Title 42."[89] Nevertheless, lower courts continued attempting to graft a higher showing than the statute requires, including in sexual harassment cases with both male and female victims.

C. Sex Harassment Caselaw Contravenes the Statutory and Supreme Court Framework

The Supreme Court has not addressed directly the quantum of proof required in gender-based harassment claims. As a result, even though the lower courts have not expressly held gender-based harassment plaintiffs to a higher standard of proof, in practice those claims are harder to prove than other types of discrimination claims. Compare two scenarios.

- Scenario 1: A bisexual harasser targets nine different men, demanding sexual favors as a condition of employment. One day, the harasser desires sex with a woman and demands that she have sex with him if she wants to keep her job.
- Scenario 2: In a workforce reduction, a decision-maker needs to terminate ten employees. He creates gender-neutral criteria and then evaluates the employees based upon the criteria. The first nine terminations that fit the criteria coincidentally happen to be men. However, two employees, a male and a female, tie for the tenth termination spot. The supervisor terminates the female employee because the nine terminated for gender-neutral reasons all happened to be men.

The two scenarios are almost identical in important respects. In both scenarios, men were disproportionately affected by the adverse actions described: nine male and one female employee experienced adverse treatment—sexual harassment and termination. In both

88. *Id.* at 457–58.
89. Desert Palace, Inc. v. Costa, 539 U.S. 90, 99 (2003).

scenarios, the female employee suffered adverse treatment because of her sex: the sexual harassment occurred because the harasser wanted sex with a woman, and the termination occurred because the decision maker did not want to fire yet another man. The differences between these scenarios are (1) the type of adverse treatment suffered by the female employee—harassment versus termination—and (2) in the first scenario, the men suffered harassment due to their gender (the boss wanted sex with a man), but, in the second scenario, all the men were terminated because they happened to meet the termination criteria.

Yet, the two female employees would fare very differently in their respective Title VII claims under the current framework. The female employee in the first scenario would lose her claim before trial, because *Holman*[90] requires dismissal of cases where both genders suffer harassment. Even under the more forgiving standard of *Kopp*[91] and *Steiner*,[92] which allows claims with male and female victims if evidence shows disproportionate effects on one gender overall, men overall suffered more harassment than women, which precludes a sexual harassment claim by the female employee. In the first scenario, the court would not even reach the analysis of why a particular individual female employee suffered sexual harassment; the case would be dismissed upon defendant's presentment of evidence of other-gender harassment. In contrast, the wrongful termination claim by the female employee from the second scenario would almost certainly reach trial, because the employer would have to *prove* a non-discriminatory motive, creating an issue of material fact and necessitating a trial. Yet the only difference between the two claims is the type of adverse treatment suffered by two female employees.

When, as in the second scenario, adverse employment treatment other than harassment affects both genders, courts evaluate claims by what happened to the individual plaintiff, not just what happened to a broader group of those in the plaintiff's gender. For instance, in a case involving a sex-based wrongful termination claim, courts might look at evidence such as a decision-maker's statements to or about the plaintiff,[93] plaintiff's behavior conforming (or not conforming) to

90. Holman v. Indiana, 211 F.3d 399, 403 (7th Cir. 2000).
91. Kopp v. Samaritan Health Sys., 13 F.3d 264, 270 (8th Cir. 1993).
92. Steiner v. Showboat Operating Co., 25 F.3d 1459, 1464 (9th Cir. 1994).
93. In *Price Waterhouse* [*v. Hopkins*], Ann Hopkins alleged that she was denied a partnership position because the accounting firm where she worked had given credence and effect to stereotyped images of women. Hopkins had been called, among other things, "'macho'" and "'masculine,'" was told she needed "'a course at charm school,'" and was instructed to "'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry'" if she wanted to make partner. Six members of the Court agreed that such comments bespoke gender discrimination.

gender stereotypes,[94] plaintiff's performance reviews,[95] or the gender of the employee replacing the plaintiff.[96] Overall statistics about how the employer treated the broader group (not just the individual) are but one piece of evidence that courts might consider in such cases.[97] In analyzing sexual harassment, however, the entire framework is different: courts assume that if men and women are harassed with similar frequency and severity, then the harassment cannot be gender-related and the claim fails.

D. Sex Can Be a Motivating Factor When an Employer Discriminates Against Both Men and Women: Bostock v. Clayton County

Holman and the rest of the "equal opportunity harasser" jurisprudence contravene the 1991 Act by treating evidence of gender-neutral harassment either as grounds for dismissal or as evidence that plaintiff must overcome in its case-in-chief. *Desert Palace* implicitly abrogated *Holman* when it reiterated the statutory framework under which all employment discrimination cases, including those for sexual harassment, must be analyzed. All "equal opportunity harasser" cases that followed *Desert Palace* violate both the statute and the Supreme Court precedent detailed above by requiring plaintiffs to disprove in their cases-in-chief the employers' gender-neutral reason for harassment.

In the backdrop of the "equal opportunity harasser" caselaw, enter Gerald Bostock, who, along with a plaintiff in another case, alleged gender discrimination in a termination based on his sexual orientation.[98] Clayton County, Georgia, fired Bostock for conduct "unbecoming"

Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 119 (2d Cir. 2004) (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 235–36, 251 (1989) (plurality) and citing *id.* at 258 (White, J., concurring) and *id.* at 272–73 (O'Connor, J., concurring)).

94. *Id.*

95. Acrey v. Am. Sheep Indus. Ass'n, 981 F.2d 1569, 1573 (10th Cir. 1992) ("[F]rom th[e] evidence the jury could conclude plaintiff was performing satisfactorily . . . . [T]he jury could conclude that proper training to enable her to operate . . . was deliberately withheld from her. . . .").

96. Zimmermann v. Assocs. First Cap. Corp., 251 F.3d 376, 379 (2d Cir. 2001) ("[Plaintiff] was replaced by Stephen Mitchell, a slightly younger male . . . . [T]hat a plaintiff was replaced by someone outside the protected class will suffice for the required inference of discrimination at the prima facie stage of the Title VII analysis.").

97. Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 995 n.3 (1988) ("We have emphasized the useful role that statistical methods can have in Title VII cases, but we have not suggested that any particular number of 'standard deviations' can determine whether a plaintiff has made out a prima facie case in the complex area of employment discrimination. . . . [A] case-by-case approach properly reflects our recognition that statistics 'come in infinite variety and . . . their usefulness depends on all of the surrounding facts and circumstances.'") (quoting Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 311 n.17 (1977), and Teamsters v. United States, 431 U.S. 324, 340 (1977)).

98. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737–38 (2020). *Bostock* was a compilation of three cases in which the Court granted certiorari. *Id. Bostock* and *Altitude Express v. Zarda* involved plaintiffs terminated because they were gay. The third, *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Emp. Opportunity Comm'n*, involved a plaintiff who was terminated because of her gender identity.

a county employee after he joined a gay recreational softball league.[99] The employer conceded that Bostock was terminated for his sexual orientation, but argued that Bostock was not terminated "because of sex" because the employer would have terminated a gay individual of either gender.[100] The Court disagreed, holding that Bostock's termination for his sexual orientation was gender-based.[101] As an example, the Court hypothesized that, if an otherwise model employee brought a female spouse to the employer's Christmas party, a male employee would remain employed, but a female employee would not.[102] Therefore, if a man married to a woman keeps his job, while a woman married to a woman gets fired, the termination is necessarily "because of . . . sex."[103]

The *Bostock* defendants argued that they would have fired both male and female gay employees, effectively applying the "equal opportunity harasser" defense to other, non-harassment, areas of employment law, such as wrongful termination. The Court rejected the argument in two ways relevant to the "equal opportunity harassment" defense: by holding that (1) adverse employment action analysis must focus on the individual plaintiff, not the entire group, and therefore (2) gender-based discrimination against individuals of both genders doubles the employer's liability rather than eliminates it.[104]

First, the Court dispensed with the defense that, as long as both genders are treated equally overall (*i.e.*, the defense that anti-gay and anti-transgender bias applies to both genders), there is no prohibited violation "because of sex." Justice Gorsuch stressed that Title VII "focuses on discrimination against individuals, not groups."[105]

> An employer musters no better a defense by responding that it is equally happy to fire male *and* female employees who are homosexual or transgender. Title VII liability is not limited to employers who, through the sum of all of their employment actions, treat the class of men differently than the class of women. Instead, the law makes each instance of discriminating against an individual employee because of that individual's sex an independent violation of Title VII. So just as an employer who fires both Hannah and Bob for failing to fulfill traditional sex stereotypes doubles rather than eliminates Title VII liability, an employer who fires both Hannah and Bob for being gay or transgender does the same.[106]

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99. *Id*. at 1737–38. The Court did not elaborate on what exactly a "gay recreational softball league" is.

100. *Id.* at 1748.

101. *Id.* at 1743 ("[A]n employer who fires both Hannah and Bob for being gay or transgender does the same.").

102. *Id.*

103. *Id.*

104. *Id.* at 1740–41.

105. *Id.* at 1745.

106. *Id.* at 1742.

Consistently with its past precedent, the *Bostock* Court clarified that an employer who terminates men and women because of their gender would not evade Title VII liability, because Title VII requires examining the reasons for the adverse action against each individual plaintiff. If a court analyzes correctly individual plaintiffs' circumstances, the employer who harasses or otherwise discriminates against men and women due to their gender will find itself liable to employees of both genders. The Court left little to interpretation:

> And *it doesn't matter if the employer treated women as a group the same when compared to men as a group*. If the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee—put differently, if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred.[107]

Bostock thereby implicitly abrogated the "equal opportunity harasser" doctrine by rejecting the premise that a sex-based adverse action against an individual is non-discriminatory if members of another sex suffered similar mistreatment also because of sex. Thus, under *Bostock*, in the scenario where one supervisor sexually harasses nine men and one woman because of their sex, the "equal opportunity harasser" defense would (1) be scrutinized closely at trial as part of the employer's affirmative defense of a non-discriminatory motive in a *McDonnell Douglas* framework, where the *employer* would bear the burden of proof, and, (2) under the facts presented in the hypothetical, fail in sex harassment claims by all ten employees.[108]

Conclusion

The "equal opportunity harasser" doctrine always undercut the 1991 Act and contravened extensive Supreme Court precedent. But *Bostock* all the more clearly reiterated the critical principles of discrimination law that the equal opportunity harasser doctrine had defied. Every court that has dismissed claims based on that doctrine has wrongfully evaluated the effect of harassment on one gender as a whole, rather than inquiring whether each particular plaintiff was harassed due to his or her gender. Courts treat sexual harassment cases where both genders have suffered harassment differently from cases where the plaintiff suffers any other gender-based adverse action, effectively applying a heightened standard to sexual harassment cases as compared to all other discrimination claims. Instead, *Bostock* requires courts to treat sexual harassment claims consistently with other discrimination claims and permit plaintiffs to prove that gender was a

107. *Id.* at 1741.

108. The employees would still have to meet all the other elements of a sex harassment claim.

"motivating factor" in harassment. Then, consistently with the *McDonnell Douglas* framework, if plaintiff makes out his or her prima facie case, the defendant could be allowed to mount an affirmative defense showing that gender played no role in the harassment of plaintiff. The defendant would have the burden of proving that harassment was not gender-based. Evidence of harassment of both genders can be but one piece of evidence that a defendant can introduce to show gender neutrality.