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THE FORGOTTEN PROVISION: HOW THE COURTS HAVE MISAPPLIED TITLE VII IN CASES OF EXPRESS REJECTION OF SEXUAL ADVANCES

*Allison Westfall**

I. INTRODUCTION

Several courts have struggled with the intersection of sexual harassment and retaliation, particularly in the situation where an employee expressly rejects the sexual advances of a supervisor.¹ Currently, legal scholarship has focused on expanding retaliation claims, making the definition broad enough to address that exact situation. The critical flaw in this approach, to be addressed in this Comment, is the courts' failure to realize the full potential of Title VII's sexual harassment provision. The purpose of Title VII of the Civil Rights Act of 1964 is to protect employees from discrimination in the workplace.² However, the current antidiscrimination framework, as interpreted by the Supreme Court, has left employees in certain circumstances unprotected. This Comment seeks to provide an alternative approach, namely utilizing § 2000e-2(a)(2) of Title VII,³ to provide relief for employees left unprotected by the current antidiscrimination framework.

Judicial interpretation of Title VII's sexual harassment provision has overlooked the text and language of the statute, culminating in the burden being set too high for actual relief. Using textualism, legislative history, intentionalism, and purposivism, this Comment demonstrates how courts have under-enforced sexual harassment, and ultimately calls for a broader understanding of the statutory regime.

Part II of this Comment provides a brief background of Title VII and an overview of the Supreme Court's interpretation of the antidiscrimination and antiretaliation provisions. It continues with a brief explanation of the various tests adopted and utilized by the Supreme Court. Part III of this Comment analyzes the current circuit split over whether the express rejection of a supervisor's sexual advances constitutes protected activity as defined under the antiretaliation provision of Title VII.⁴ Part IV then analyzes how the

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1. See *LeMaire v. La. Dep't of Transp. & Dev.*, 480 F.3d 383 (5th Cir. 2007); see also *Ogden v. Wax Works, Inc.*, 214 F.3d 999 (8th Cir. 2000).

2. See Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2011).

3. *Id.* § 2000e-2(a)(2). The text of the statute is laid out *infra* in Part II(A).

4. See *LeMaire*, 480 F.3d 383 (holding that express rejection is not protected activity); see also *Ogden*, 214 F.3d at 1008–09 (holding that express rejection is protected activity).

split can be resolved by reevaluating the current approach utilized by many employees seeking relief under Title VII.⁵ The analysis will draw its conclusions from case law and relevant feminist legal theory. Finally, this Comment argues that in order to obtain the relief envisioned by the drafters of Title VII, employees should bring actions under § 2000e-2(a)(2)⁶ rather than under § 2000e-2(a)(1),⁷ the antidiscrimination provision, or under § 2000e-3(a),⁸ the antiretaliation provision.

II. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964: A BRIEF BACKGROUND

Title VII of the Civil Rights Act of 1964 is the federal antidiscrimination statute that prohibits discrimination and retaliation based on gender and other protected traits. Although the various provisions of Title VII have been categorized into four distinct frameworks, this Comment will focus on the intersection of sexual harassment and retaliation.⁹

A. *The Intersection of Sexual Harassment and Retaliation*

Title VII provides:

(1) It shall be an unlawful employment practice 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 . . .¹⁰

(2) It shall be an unlawful employment practice for an employer . . . to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.¹¹

(3) It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed

5. Employees currently bring discrimination claims under either the antidiscrimination provision, 42 U.S.C. § 2000e-2(a)(1), or the antiretaliation provision, 42 U.S.C. § 2000e-3. See Part II(A) discussing those provisions.

6. 42 U.S.C. § 2000e-2(a)(2) (2011).

7. *Id.* § 2000e-2(a)(1).

8. *Id.* § 2000e-3(a).

9. See *Id.* § 2000e-2(a)(1), § 2000e-2(a)(2), and § 2000e-3. The four frameworks, respectively, are disparate treatment, disparate impact, harassment, and retaliation.

10. *Id.* § 2000e-2(a)(1).

11. *Id.* § 2000e-2(a)(2).

any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.¹²

Although there is not a disagreement over whether the antiretaliation provision is separate and distinct from the antidiscrimination provision, there is disagreement whether the two antidiscrimination provisions are separate.¹³ However, as evidenced in Part IV *infra*, legislative intent and other statutory techniques reveal that there is no reason to separate these provisions. One legal scholar argued, “[A]n abusive environment claim could be identified as a claim of either facial sex discrimination or disparate impact.”¹⁴ This statement recognizes that the two provisions can be read together.

B. Harassment—Hostile Work Environment

Hostile work environment claims stem from the language found in § 2000e-2(a)(1), the provision the Court has interpreted to describe a claim of disparate treatment.¹⁵ Disparate treatment cases have been interpreted to require proof of discriminatory intent or motive, and these cases typically involve “the most easily understood type of discrimination.”¹⁶ The Supreme Court, in stating the intent behind Title VII in a disparate treatment case, said that Congress required the removal of “artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.”¹⁷

In *Meritor Savings Bank v. Vinson*,¹⁸ the Supreme Court interpreted Title VII’s primary operative provision¹⁹ to permit hostile or abusive work environment claims.²⁰ To establish a *prima facie* case, an

12. *Id.* § 2000e-3(a).

13. *See, e.g.*, *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971). This case analyzed a sex discrimination claim as only affecting terms, conditions, or privileges of employee’s work, thus separating § 2000e-2(a)(1) from § 2000e-2(a)(2). Most courts have followed this interpretation.

14. *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1456 (1984).

15. *See supra* text accompanying note 10.

16. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 986 (1988) (citing *Teamsters v. United States*, 431 U.S. 342, 335 n.15 (1977)).

17. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973) (citing *Griggs v. Duke Power Corp.*, 401 U.S. 424, 430–31 (1971)).

18. 477 U.S. 57 (1986).

19. 42 U.S.C. § 2000e-2(a)(1) (2011).

20. *Meritor*, 477 U.S. at 66 (holding that a claim of hostile work environment sexual harassment is a form of sex discrimination, which is actionable under the Title VII employment discrimination statute).

employee must prove (1) he or she²¹ is a member of a protected class, (2) he or she was subject to unwelcome sexual advances, (3) the sexual advances were because of his or her sex, and (4) the harassment affected a term, condition, or privilege of his or her employment.²² The Equal Employment Opportunity Commission (EEOC) guidelines were used to formulate factors that would indicate a hostile work environment, such as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.²³ The Court went on, however, to find that in order for sexual harassment to be actionable under Title VII, “it must be sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment.”²⁴ The current test, despite the broad language of the statute, requires plaintiffs to meet the higher burden of proving “severe”²⁵ or “pervasive” conduct.²⁶

Later, the Court clarified the *Meritor* approach by stating that the test requires both an objectively hostile or abusive environment and the victim’s subjective perception of an abusive environment.²⁷ To establish that the conduct is objectively hostile, courts must consider the totality of the circumstances.²⁸ Some of the relevant factors include the severity and frequency of the conduct, whether the conduct is physically threatening or humiliating, and whether the conduct unreasonably interferes with the victim’s work.²⁹ The Court also stated that in order for a claim to be actionable, the conduct need not cause physical or psychological injury.³⁰

Although the courts have not explicitly rejected § 2000e-2(a)(2) in sexual harassment cases, it appears that most courts rely on the words “terms [and] conditions”³¹ of § 2000e-2(a)(1) to establish a sexual

21. Although most cases of sexual harassment involve women, Title VII and sexual harassment covers both sexes, as well as other protected classes laid out in the statute. *See supra* notes 10–12.

22. *LeGrand v. Area Res. for Cmty. & Human Servs.*, 394 F.3d 1098, 1101 (8th Cir. 2005), *cert. denied*, 546 U.S. 813 (2005).

23. *Henson v. Dundee*, 682 F.2d 897, 903 (11th Cir. 1982).

24. *Id.* at 904.

25. *Id.*

26. *Id.* at 904–05. This case is also relied on by the Supreme Court in their enunciation of a hostile work environment claim under *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), discussed *supra* note 21.

27. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22–23 (1993).

28. *Id.* at 23.

29. *Id.*

30. *Id.* at 22. It should be noted that while not relevant for this Comment, a claim of sexual harassment also involves issues of employer liability, which can be analyzed under the *Ellerth/Faragher* line of cases. *See, e.g., Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

31. 42 U.S.C. § 2000e-2(a)(1) (2011). *See also supra* text accompanying note 10.

harassment claim. Thus, courts have overlooked the potential for § 2000e-2(a)(2) to be utilized in sexual harassment cases and have instead labeled that provision a basis for a disparate impact claim.

C. Retaliation

In a retaliation case, the focus is on the employee's conduct, rather than on the employee's status as a member of a protected class. Retaliation claims are brought under § 2000e-3(a).³² The antiretaliation provision of Title VII is broken up into two sections: participation activity and opposition activity.³³ The distinction is that participation activity protects employees who participate in investigations or discrimination suits, and opposition activity is meant to protect employees who oppose illegal discriminatory conduct. The opposition clause is more frequently used in discrimination claims.³⁴ A prima facie case of retaliation requires proof that (1) the employee engaged in a protected activity, (2) the employee suffered an adverse employment action, and (3) a causal connection exists between the opposition activity and the adverse employment action.³⁵ The circuit split raised in Part III of this Comment discusses the first element, discussing the types of activities considered protected under the statute.

III. THE CIRCUIT SPLIT OVER WHETHER EXPRESS REJECTION OF A SUPERVISOR'S SEXUAL ADVANCE IS A PROTECTED ACTIVITY

Both the Fifth and the Eighth Circuits have recently ruled on whether an employee's express rejection of a supervisor's sexual advance is a protected activity under Title VII.³⁶ While both circuits come to a different conclusion, they both analyze the case under the antiretaliation provision of Title VII. Although the antiretaliation provision provides a helpful remedy when an adverse employment action has occurred, the circuit split at issue demonstrates that this provision is not helpful when an employee's express rejection is deemed unprotected. For example, an employee will be left unprotected under Title VII when the severity of the discrimination does not create a hostile work environment, and when the employee's express rejection does not meet the retaliation

32. 42 U.S.C. § 2000e-3(a).

33. *Id.*

34. For the purposes of this Comment, the opposition clause will be used when in reference to a retaliation cause of action.

35. *Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 978 n.52 (11th Cir. 2008) (quoting *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1454 (11th Cir. 1998)).

36. *See LeMaire v. La. Dep't of Transp. & Dev.*, 480 F.3d 383 (5th Cir. 2007); *Ogden v. Wax Works, Inc.*, 214 F.3d 999 (8th Cir. 2000).

provision because it is deemed unprotected.³⁷ The Fifth Circuit's recent opinion shows this gap in protection.

A. The Fifth Circuit: Express Rejection is Not Protected Activity

In the 2007 case of *LeMaire v. Louisiana Department of Transportation and Development*, the Fifth Circuit held that express rejection of a supervisor's sexual advance is not protected activity.³⁸ LeMaire worked as a bridge operator for the Louisiana Department of Transportation and Development, the job description of which included operating drawbridges and performing maintenance on the bridges.³⁹ While LeMaire and his supervisor were conversing at work, the supervisor made sexually explicit remarks that the supervisor had been molested, that the supervisor had molested LeMaire's friend's ex-husband and the friend enjoyed it, and that the supervisor enjoyed being close with other gay men who had been molested.⁴⁰ LeMaire immediately asked his supervisor to stop talking about the molestation and other sexual interactions and attempted to change the subject.⁴¹

The retaliatory actions that resulted from this encounter included derogatory comments by the supervisor to LeMaire, comments that LeMaire would never be allowed to transfer and would have to quit, and an order from the supervisor to spray herbicide on a large lawn, a task that was not within LeMaire's job description.⁴² LeMaire believed this task was outside the scope of his job duties and therefore left the job site to report to his supervisor's boss.⁴³ LeMaire was told to file an "unjust treatment" complaint instead of a sexual harassment complaint, and was later told nothing conclusive came out of the company's investigation.⁴⁴ However, he was suspended for two days without pay, which was extended to thirty days, and then he was subsequently terminated.⁴⁵

The trial court granted summary judgment in favor of the Department, and LeMaire subsequently appealed the Title VII sexual harassment and

37. See, e.g., *Davis*, 516 F.3d 955, 978 (11th Cir. 2008).

38. *LeMaire*, 480 F.3d 383, 389 (5th Cir. 2007).

39. *Id.* at 385.

40. *Id.*

41. *Id.* There was also testimony that comments were made at a later date when the supervisor talked about his trip to Mardi Gras and his sexual activities with other men while there, which LeMaire was upset about hearing. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 385–86. Conflicting testimony existed as to why the suspension and termination decisions were made. LeMaire's supervisor claimed that LeMaire was found asleep at the bridge once, refused to mow the lawn another time, and was late for work once. *Id.*

retaliation claims.⁴⁶ The Fifth Circuit affirmed summary judgment on the retaliatory order to spray herbicide on the lawn noting that LeMaire failed to produce evidence that he engaged in a protected activity.⁴⁷ Because LeMaire had not yet reported the sexual discrimination at the time of the supervisor's order, the only activity was LeMaire's express rejection.⁴⁸ On the other hand, the court did find that the reporting of sexual harassment is considered protected activity under Title VII.⁴⁹ The court stated, "LeMaire provides no authority for the proposition that rejecting sexual advances constitutes a protected activity for purposes of a retaliation claim under Title VII."⁵⁰ The court relied on an unpublished Fifth Circuit case determining that the plaintiff produced no evidence that express rejection was protected;⁵¹ therefore, the Fifth Circuit held that an express rejection of a sexual advance is not a protected activity.⁵² Thus, LeMaire had no protection for retaliatory actions taken between the time of the sexual harassment and the time he reported the incident.

The court remanded the case to the district court on LeMaire's sexual harassment claim, but made no comment on whether the sexually explicit comments reached the threshold of "severe or pervasive"⁵³ required for a hostile work environment claim.⁵⁴ Therefore, LeMaire was left without any remedy for his sexual discrimination claim at this point in the litigation.

B. The Eighth Circuit: Express Rejection is Protected Activity

In contrast to the Fifth Circuit's approach, in the 2000 case *Ogden v. Wax Works, Inc.*, the Eighth Circuit held that express rejection of a supervisor's sexual advances is "the most basic form of protected

46. *Id.* at 386. LeMaire did not appeal his assault or intentional infliction of emotional distress claims. *Id.*

47. *Id.* at 389.

48. *Id.*

49. *Id.* at 387. See also *Kasper v. Federated Mut. Ins. Co.*, 425 F.3d 496, 502 (8th Cir. 2005).

50. *LeMaire*, 480 F.3d at 389 (citing *Frank v. Harris Cnty.*, 118 F. App'x. 799, 804 (5th Cir. 2004) (unpublished) (affirming judgment for retaliation claim only when protected activity is "express rejection" of sexual advances)).

51. *Frank*, 118 F. App'x. at 804. In *Frank*, the plaintiff alleged six incidents of unwanted and offensive sexual advances and touching, but the court declined to find express rejection was a protected activity, rather plaintiff was only protected after her EEOC filing, which she made after her termination. *Frank*, 118 F. App'x 799.

52. *LeMaire*, 480 F.3d at 389.

53. *Henson v. Dundee*, 682 F.2d 897, 903-04 (1982).

54. *LeMaire*, 480 F.3d at 389-90. The court remanded the case only because defendant's argument was simply to deny that sexual comments were made, and the court found a genuine issue of material fact as to whether the comments were made. However, the dissent commented it would affirm summary judgment because the comments did not rise to the level of severe or pervasive. *Id.* at 389-94.

activity.”⁵⁵ The plaintiff, Ogden, was a sales manager for a video store and was reportedly sexually harassed by her district manager, Hudson.⁵⁶ Ogden claims she was subjected to unwelcome and offensive physical advances on three occasions and numerous inappropriate activities and propositions.⁵⁷ Ogden alleged that Hudson retaliated against her rejection by criticizing her, screaming at her, and refusing to give her an evaluation that affected her ability to get a raise, ultimately forcing her to leave work.⁵⁸

When the court addressed Ogden’s retaliation claim, the court stated, “employers may not retaliate against employees who ‘oppose discriminatory conduct,’ and the jury reasonably concluded Ogden did so when she told Hudson to stop his offensive behavior.”⁵⁹ Therefore, the retaliatory conduct that happened after she rejected his advances and before she filed an internal complaint was protected.⁶⁰

In addition, the court concluded that Ogden’s sexual harassment claim was sufficient to meet the hostile work environment threshold.⁶¹ The court found “the drumbeat of physical advances, propositions, and mistreatment Ogden endured from Hudson for more than a year”⁶² was severe enough to meet the threshold of a hostile or abusive work environment. Therefore, Ogden was protected under both the antidiscrimination and the antiretaliation provisions of Title VII.

C. Other Circuits’ Approach

Several other circuits have discussed the express rejection issue, hypothesized as to how they would resolve it, or refrained from discussing it altogether. The Seventh Circuit chose to remain silent.⁶³ The court did not rule on whether an express rejection of a supervisor’s sexual advances constituted protected activity because no precedent existed on the issue, and the court chose not to decide it because the

55. *Ogden v. Wax Works, Inc.*, 214 F.3d 999, 1007 (8th Cir. 2000).

56. *Id.* at 1002–03.

57. *Id.* Ogden claims Hudson grabbed her waist, put his arm around her, propositioned her for drinks and to stay at his home, and also that he inappropriately took an interest in her personal life. *Id.*

58. *Id.* at 1004–05. Testimony varied regarding how management dealt with the retaliation claim, but nonetheless the company decided not to discipline Hudson and told Ogden she could no longer work for Hudson. *Id.*

59. *Id.* at 1007 (quoting 42 U.S.C. § 2000e-3(a) (2011)).

60. *Id.*

61. *Id.* at 1006–07.

62. *Id.* at 1006. The court noted that the relevant factors for the hostile environment claim consisted of: frequency, severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee’s work performance. *Id.* at 1006 n.9.

63. *See generally* *Murray v. Chi. Transit Auth.*, 252 F.3d 880 (7th Cir. 2001).

employee had not demonstrated an adverse employment action.⁶⁴ Furthermore, the court found that the employee's hostile work environment claim also failed because there were only a few sexual advances, and she waited too long to complain about them.⁶⁵ The court found that the "[plaintiff] acted in precisely the manner a victim of sexual harassment should not act in order to win recovery."⁶⁶ A more recent Seventh Circuit case acknowledged the circuit split, but again chose not to rule on the issue.⁶⁷ The court stated that even if it assumed for purposes of the argument that the express rejection constituted protected activity, "[the plaintiff] did not necessarily believe [the] behavior was illegal at the time."⁶⁸

The Eleventh Circuit affirmed a district court's decision that an employee's claim could not prevail because "even the broadest interpretation of a retaliation claim cannot encompass instances where the alleged 'protected activity' consists of simply 'declining a harasser's sexual advances.'"⁶⁹ Again, the employee's hostile work environment claim failed as well. Although the court found that the employee "spent much of her time discussing 'the parade of horrors,' there was no showing of a substantial adverse result" sufficient to show it was hostile.⁷⁰

The Second Circuit has also remained silent on the issue.⁷¹ The court held that whether the express rejection was protected in and of itself need not be decided because the retaliation and hostile work environment claims were "coextensive" and need not warrant a separate award from one the employee might receive for the harassment claim.⁷² Therefore, it left the question whether express rejection is protected for another day.

64. *Id.* at 890. Although the court stated no precedent existed, the court added a footnote saying some district courts had discussed the issue. *Id.* at 890 n.2.

65. *Id.* at 889.

66. *Id.* (quoting *Shaw v. AutoZone, Inc.*, 180 F.3d 806, 813 (7th Cir. 1999)).

67. *Tate v. Exec. Mgmt. Servs., Inc.*, 546 F.3d 528, 532 (7th Cir. 2008).

68. *Id.* at 533. Believing in good faith that the behavior constitutes sexual harassment has been held to be an element of the cause of action. *See, e.g., Fine v. Ryan Int'l Airlines*, 305 F.3d 746 (7th Cir. 2002).

69. *Dearth v. Collins*, No. 103-204, 2005 U.S. Dist. LEXIS 47604, at *21 (S.D. Ga. 2005) *aff'd*, *Dearth v. Collins*, 441 F.3d 931 (11th Cir. 2006) (quoting *Del Castillo v. Pathmark Stores, Inc.*, 941 F. Supp. 437, 438-39 (S.D.N.Y. 1996)).

70. *Id.* at *29.

71. *Fitzgerald v. Henderson*, 251 F.3d 345, 366 (2d Cir. 2001).

72. *Id.*

IV. SOLUTION: EMPLOYEES SHOULD BRING SEXUAL HARASSMENT
CLAIMS UNDER § 2000E-2(A)(2) FOR RELIEF

As the circuit split illustrates, there is much debate surrounding whether an employee is engaging in protected activity by merely rejecting a supervisor's sexual advances. The fault in the courts' analysis, however, comes from the fact that the cases are being analyzed under Title VII's antiretaliation provision. The difficulty with this approach is that it forces courts to cram a particular set of facts into the established antiretaliation framework.⁷³ However, sex discrimination can take many forms; often, no two instances of sex discrimination are alike. Therefore, the courts are left with the task of fitting complex fact patterns into rigid, established frameworks. When a particular set of facts does not fit neatly into a framework, the victim is left without a remedy.

Furthermore, in an express rejection claim, the reality of a workplace sexual harassment claim is that it oftentimes blends into a retaliation claim. When an employee rejects a supervisor's sexual advance, a common reaction is that the supervisor retaliates by demoting the employee, rejecting promotions of the employee, or terminating the employee.

Some scholars argue that the courts should move away from established frameworks altogether and instead return to the broad language of Title VII.⁷⁴ However, another approach is available for the courts, and plaintiffs, to utilize in analyzing sexual harassment claims. The language of § 2000e-2(a)(2), along with the congressional intent behind Title VII and the subsequent 1991 amendments⁷⁵ envisions an alternative way to seek relief. First, however, it is important to recognize why the established frameworks, hostile work environment and antiretaliation, have failed to protect plaintiffs.

A. The Failure of the Current Frameworks

Sexual harassment claims are largely brought under the framework established for hostile work environment claims.⁷⁶ However, the established framework, as discussed in Part II(B) *supra*, sets a high burden by requiring that the discriminatory conduct be severe or

73. See generally Sandra Sperino, *Rethinking Discrimination Law*, 100 MICH. L. REV. (forthcoming 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1759458.

74. Sperino, *supra* note 73.

75. See *infra* Part IV(B).

76. Barry S. Roberts & Richard A. Mann, *Sexual Harassment in the Workplace: A Primer*, 29 AKRON L. REV. 269, 276 (1996).

pervasive. Many types of sexual discrimination do not meet this high burden, and the victims of sexual harassment are left without redress. The rationale behind hostile work environment claims brought under § 2000e-2(a)(1) is that an abusive or hostile work environment discriminates against women by affecting the conditions of their employment.⁷⁷ However, the courts have interpreted this to require excessive conduct, mainly due to the extreme facts of the cases that helped develop the hostile work environment framework.

In *Meritor*, the employee was subjected to four years of extreme harassment consisting of forty to fifty instances of coerced sexual intercourse, sometimes being forcibly raped, followed into the restroom, fondled during work, and having her boss expose himself to her.⁷⁸ In another case, a female employee was asked by her male boss to go to the Holiday Inn to negotiate her raise, forced to get coins from his front pockets, and was asked to bend over in front of him to pick up things he would throw on the floor.⁷⁹

The above cases are extreme examples of workplaces permeated with sexual harassment. When formulating the framework for hostile work environment, the Supreme Court was presented with these examples of severe and pervasive conduct. However, the courts have failed to adjust the antidiscrimination framework to fit the changing workplace norms, which oftentimes are not as extreme or severe as the original hostile work environment claim.

Around the time that courts were formulating the sexual harassment tests, studies conducted on workplace sexual harassment showed that 85% of women responding to the survey indicated that they were the victims of some form of workplace sexual harassment.⁸⁰ Another poll found that nine out of ten working women reported being the subject of unwanted sexual advances during work.⁸¹ These figures suggest that sexual harassment was happening frequently to women in the workplace and protection was thus needed. Current statistics, however, reveal that the issue is still pervasive in American workplaces. According to one study, one in six persons responded that they experienced sexual harassment in the workplace.⁸² Of those victims, 43% stated that the harassment was from a manager, and only 35% of those victims reported

77. Note, *Sexual Harassment Claims of Abusive Work Environment Under Title VII*, 97 HARV. L. REV. 1449, 1455 (1984); see also 42 U.S.C. § 2000e-2(a)(1) (2011).

78. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 60 (1986).

79. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 19 (1993).

80. *Roberts & Mann*, *supra* note 77, at n.13.

81. *Id.*

82. Pamela Mahabeer, *Sexual Harassment Still Pervasive in the Workplace*, AOL JOBS., Jan. 28, 2011, <http://jobs.aol.com/articles/2011/01/28/sexual-harassment-in-the-workplace>.

the incident.⁸³ A telephone survey conducted in 2008 revealed that out of the 782 U.S. workers polled, 31% of females said they had experienced sexual harassment.⁸⁴ Of those victims, only 38% reported it, which bolsters researchers' estimates that typically only 5%–15% of victims report instances of sexual harassment.⁸⁵ These figures reveal that sexual harassment is still a problem in American workplaces and most of it goes unreported, suggesting a need to reevaluate the current test used by courts.

This is not to suggest, however, that every subjective belief of sexual harassment is actionable. It has long been held that offhand jokes or epithets that are offensive to some do not violate Title VII.⁸⁶ However, the current framework does not capture the less extreme instances of sexual harassment occupying the middle ground between the conduct in *Harris* and nonactionable offhand remarks.

For example, a female employee brought a claim that her boss was spying on her and others through a peephole in the work bathroom, but this failed to meet the burden of hostile work environment because “she remained able to perform her employment duties and continued to use the restroom.”⁸⁷ This woman could not recover under the current antidiscrimination framework. However, as will be discussed in Subpart B, *infra*, the plain meaning of the language of § 2000e-2(a)(2) suggests that a hypothetical victim in this position should be protected. The woman who was spied on effectively was “limit[ed in her] employment opportunities . . . or adversely affect[ed in her] status”⁸⁸ as an employee due to the supervisor’s conduct. The boss “segregated” that female employee because of her sex. There is no reason this woman should be left without protection under Title VII.

In another case, a woman claimed sex discrimination after her male coworker said to her, “I hear making love to you is like making love to the Grand Canyon,”⁸⁹ and the Supreme Court held that “no one could reasonably believe that the incident . . . violated Title VII.”⁹⁰ This woman, too, would be left without redress under the current framework.

83. *Id.*

84. *Sexual Harassment in the Workplace*, WORKHARASSMENT.NET, <http://www.workharassment.net/index.php/sexual-harassment-in-the-workplace.html?tmpl=component&print=1&page=> (last visited Sept. 21, 2012).

85. *Id.* Specifically, researchers estimate that only 5–15% of women report instances of sexual harassment. *Id.*

86. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986) (citing *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971)).

87. *Cottrill v. MFA, Inc.*, 443 F.3d 629, 638 (8th Cir. 2006).

88. 42 U.S.C. § 2000e-2(a)(2) (2011).

89. *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 269 (2001).

90. *Id.* at 271.

In *LeMaire*, the Fifth Circuit explained that the comments made about LeMaire's friend being molested by the supervisor did not "rise to the level of actionable sexual harassment"⁹¹ under the burden of hostile work environment. However, LeMaire was limited in his ability to perform his job duties because his supervisor had set him apart from other workers by telling him sexually explicit stories about one of his friend's ex-husband and saying he would never be able to move up and would have to quit.⁹² These actions adversely affected LeMaire's status as an employee, and thus he should have been protected under § 2000e-2(a)(2).

The facts in the above-mentioned cases suggest that the employee is not a victim of mere offensive, offhand comments, but that the workplace is sufficiently abusive to create an actionable claim under Title VII.

Not only has the hostile work environment framework failed to provide relief to the victims of sexual harassment, but the antiretaliation framework has also failed.

The antiretaliation provision is supposed to protect employees based upon their conduct, as opposed to their status as a member of a protected class. The courts have traditionally held that conduct such as filing a formal complaint with the Equal Employment Opportunity Commission (EEOC) is sufficient for the establishment of protected activity under the antiretaliation provision.⁹³ The EEOC has also stated that making an informal complaint to a supervisor is protected activity.⁹⁴ Other established ways to make a protected complaint under the antiretaliation provision consist of filing a complaint with a human resources department or filing a police report.⁹⁵ Activities such as these do not easily fit the scenario where an employee merely rejects her supervisor's sexual advances when they happen. Before the employee has filed one of the above-mentioned complaints, this provision provides little relief.

The antiretaliation provision's failure to protect employees is illustrated by the circuit split discussed in Part III *supra*. In determining whether the express rejection of a supervisor's sexual advances is protected, the courts have analyzed the issue under the wrong provision. Attempting to fit the facts into the established antiretaliation provision

91. *LeMaire v. La. Dep't of Transp. & Dev.*, 480 F.3d 383, 394 (5th Cir. 2007) (DeMoss, J., dissenting).

92. *Id.* at 385 (majority opinion).

93. *Ray v. Henderson*, 217 F.3d 1234, 1240 (9th Cir. 2000) (stating that "the parties do not contest that Ray engaged in protected activities when he complained of the treatment . . . both informally and formally with the EEOC.").

94. *Id.* at 1240 n.3.

95. *Mariani-Colon v. Dept. of Homeland Sec.*, 511 F.3d 216, 223 (1st Cir. 2007) (human resource department); *Worth v. Tyer*, 276 F.3d 249, 265 (7th Cir. 2001) (police report).

has failed, causing a gap in protection for some victims of sex discrimination.⁹⁶

However, in a recent Supreme Court case, *Crawford v. Metropolitan Government of Nashville*,⁹⁷ the Court held that the antiretaliation provision protects employees who “speak out against sexual harassment.”⁹⁸ Crawford, an employee, answered questions regarding the sexual harassment of another employee during a company’s internal investigation.⁹⁹ The Court began the analysis by using a textual interpretation of “oppose” as used in the antiretaliation provision.¹⁰⁰ The Court held the definition of oppose can mean “to resist.”¹⁰¹ Therefore, the active opposition of sexual harassment by answering questions during a complaint is protected by the antiretaliation provision. However, the Court left open the question of whether an employee is protected when expressly rejecting the supervisor’s sexual advances before an internal investigation has started.¹⁰² Given the court’s willingness to expand the antiretaliation provision to address other discrimination-type issues, the court would probably agree to this broad reading.

However, the problem with using this approach is that a plaintiff’s facts in a sexual harassment claim often do not fit neatly within the antiretaliation provision. As shown above, the court analyzes the plaintiff’s conduct rather than the employer’s impermissible conduct. If an employer has not taken an adverse employment action, then a plaintiff does not reach the protections of this provision. Furthermore, if the courts fail to recognize that express rejection is protected activity, a plaintiff is further unprotected by this provision. This provision is not the most effective way to bring a sexual harassment claim, and this is yet another example of the courts attempting to force a plaintiff’s facts into a rigid, established framework that does not quite work.

B. The Use of § 2000e-2(a)(2) for Relief

As exemplified by the failure of the current established frameworks, the courts have created a difficult task for victims of sexual discrimination in seeking relief. One of the purposes of Title VII was to

96. See *supra* Part III(A) (discussing Fifth Circuit case).

97. 555 U.S. 271 (2009).

98. *Id.* at 273.

99. *Id.*

100. *Id.* at 276. The Court stated that since the term was left undefined in the statute they would use its ordinary meaning by looking to its dictionary definition. *Id.*

101. *Id.*

102. *Id.* at 275–80.

eliminate barriers in employment opportunities for protected classes.¹⁰³ In order to effectuate this purpose, the courts should utilize both the intent and the text of § 2000e-2(a)(2) to provide relief for victims of sexual discrimination.

The first approach in interpreting congressional intent is to look at the text of the relevant provision.¹⁰⁴ As discussed in Part II(A) *supra*, the text of § 2000e-2(a)(2) has been correlated with disparate impact cases. The provision states:

It shall be unlawful . . . to *limit, segregate, or classify* his employees . . . in any way which would *deprive or tend to deprive* any individual of employment opportunities or otherwise *adversely affect* his status as an employee, because of such individual's . . . sex¹⁰⁵

Currently, courts focus on the words “terms [or] conditions”¹⁰⁶ from § 2000e-2(a)(1) to define what constitutes discrimination. However, the language from § 2000e-2(a)(2) implies there are other ways to discriminate against an employee other than the terms or conditions of their employment.

During the debates of Title VII in the House and Senate, some legislators commented on the broad understanding of the term “discrimination.” In an interpretative memorandum, Senators Clark and Case¹⁰⁷ stated that “to discriminate is to make a distinction, to make a difference in treatment or favor”¹⁰⁸ that is based on a forbidden criterion, such as sex or race. Clark also stated that the text is intended to have its common dictionary meaning, except if expressly qualified by the act.¹⁰⁹ Therefore, it can be helpful to look at the traditional definitions of the terms used in § 2000e-2(a)(2).

According to Webster’s dictionary, the definition of “limit” is “something that bounds, restrains, or confines.”¹¹⁰ The definition of “segregate” is “to set apart . . . or to cut off from others . . . or to separate”¹¹¹ The definition of “classify” is “to arrange . . . or to assign”¹¹² These terms are broad in coverage and meant to cover

103. *See supra* note 3.

104. *Cf. Desert Palace, Inc. v. Costa*, 539 U.S. 90, 92–93 (2003) (court reviewing text of 42 U.S.C. § 2000e-2 in analysis).

105. 42 U.S.C. § 2000e-2(a)(2) (2011) (emphasis added).

106. *Id.* § 2000e-2(a)(1).

107. Clifford P. Case was a Republican of New Jersey, and Joseph S. Clark was a Democrat of Pennsylvania. Herbert Hill, *Lichtenstein’s Fictions: Meany, Reuther and the 1964 Civil Rights Act*, 7 NEW POLITICS (1998), available at <http://nova.wpunj.edu/newpolitics/issue25/hill25.htm>.

108. 110 CONG. REC. 7212 (daily ed. Apr. 8, 1964) (statement by Sen. Clark and Sen. Case).

109. *Id.* at 7216.

110. MERRIAM–WEBSTER DICTIONARY 722 (11th ed. 2003).

111. *Id.* at 1125.

112. *Id.* at 228.

various types of conduct that could be used to discriminate. The remaining words used in § 2000e-2(a)(2) show the drafter's intent to eliminate broad discriminatory acts. The provision states that employers cannot discriminate in a way that "deprives or tends to deprive,"¹¹³ or that "adversely affects the status"¹¹⁴ of an employee.

Looking at the textual interpretation of the provision, it can be argued that sexual harassment should be protected against under this section. As mentioned in Part IV(A) *supra*, sexual harassment can take many forms and consist of complex fact patterns. Instead of attempting to characterize the facts as severe or pervasive to fit the hostile work environment framework, an argument can be made that the particular harassment at issue limited or segregated the employee in a way that deprived him or her or tended to limit or otherwise adversely affect his or her employment opportunities. Additionally, instead of attempting to fit a sexual harassment claim into the rigid antiretaliation framework, the victim of sexual harassment would be protected against the harasser's conduct because it limited or segregated the victim from employment opportunities on the basis of sex. As the Supreme Court has previously stated, "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor discriminates on the basis of sex."¹¹⁵ Therefore, under this interpretation, the task for plaintiffs would be to demonstrate how the alleged sexual harassment limited, segregated, or classified them in a way to deprive or adversely affect their status as an employee.

Textual analysis alone is not the only argument for reading § 2000e-2(a)(2) as providing relief for sexual discrimination plaintiffs. Additionally, the congressional intent behind the 1991 amendments¹¹⁶ to Title VII indicates that § 2000e-2(a)(2) can be used for sexual harassment suits.

The Civil Rights Act of 1991 added new provisions to Title VII that have particularly changed the disparate impact provisions.¹¹⁷ First, Congress announced that its purpose in amending Title VII was to "provide statutory guidelines for . . . disparate impact suits . . . and to expand the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination."¹¹⁸ The guidelines set a framework for disparate impact suits and the burden of proof standard

113. 42 U.S.C. § 2000e-2(a)(2) (2011).

114. *Id.*

115. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1986).

116. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended at 42 U.S.C. § 1981 (2011)).

117. *Id.*

118. *Id.*

was effectuated by adding a new subsection, § 2000e-2(k)(1)(A):

Disparate impact is established . . . *only if*: (i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.¹¹⁹

The effect of this amendment is that disparate impact claims can only be brought under this new subsection, § 2000e-2(k)(1)(A). Therefore, § 2000e-2(a)(2) is left intact by Congress. Furthermore, Congress did not use the same terms as in § 2000e-2(a)(2), such as “limit,” “segregate,” “classify,” or “tend to deprive.” When Congress amended other provisions of Title VII, it made sure to strike out the old language or to add the new language to the original language.¹²⁰ Thus, Congress purposefully left § 2000e-2(a)(2) untouched, and “when Congress amends one statutory provision but not another, it is presumed to have acted intentionally.”¹²¹

To align this text with the congressional intent of “providing adequate protection to victims of discrimination,”¹²² courts should look to § 2000e-2(a)(2) to provide relief. Critics may argue that the word “segregate” used in § 2000e-2(a)(2) is meant to redress the racial inequities prevalent during the adoption of the Act. It is well known that the initial purpose behind the Civil Rights Act of 1964 was to provide equality for African-American workers.¹²³ However, the courts have stressed that despite the initial use of a provision to address racial discrimination, there is no prohibition in Title VII to likewise use it to apply to another protected class.¹²⁴ Additionally, as stated previously, the term “segregate” is given its common dictionary meaning of “to set apart from others.”¹²⁵ This definition is broader than racial segregation and can be used effectively in the sexual harassment context.

For example, a female employee subjected to sexual harassment in

119. 42 U.S.C. § 2000e-2(k)(1)(A) (2011) (emphasis added).

120. *See* 42 U.S.C. 1981 § 101(2) (1991) (Congress inserts new language); *see also* 42 U.S.C. 2000e-16 § 114(1) (1991) (Congress strikes certain language).

121. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 168 (2009) (determining whether or not the mixed-motive requirement from Title VII applied to the ADEA when Title VII was amended).

122. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended at 42 U.S.C. § 1981 (2011)).

123. *United Steelworkers v. Weber*, 443 U.S. 193, 230 (quoting House Judiciary Committee Report).

124. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 66 (1986). The Court drew this distinction when addressing that hostile environments were initially meant for racial hostility, but nothing prohibited Title VII from protecting against hostile sexual environments. *Id.*

125. *See supra* note 112.

the workplace is set apart from her coworkers in her treatment by the harasser. She is set apart not only in her treatment by the harasser, but also in her ability to perform her job adequately or to continue meaningful job opportunities. Typically, victims of sexual harassment are not given the same opportunities to promotions, raises, or positive evaluations.¹²⁶ Title VII was intended to protect against this type of discrimination and should be interpreted in a way that would afford such protection.

Using a pragmatic approach to reading the entirety of Title VII, with the 1991 amendments, allows the courts to fashion relief for plaintiffs left unprotected under the current frameworks. Disparate impact claims have been traditionally used for cases involving statistical disparities due to employer's testing or promotion practices.¹²⁷ However, three provisions other than § 2000e-2(a)(2) provide relief for those claims.

For seniority or merit-based tests or practices, § 2000e-2(h)¹²⁸ provides relief. In effect, this provision commands employers to make sure their testing procedures are not a pretext for intentional discrimination.¹²⁹ For suits alleging preferential treatment, § 2000e-2(j)¹³⁰ provides relief. This provision tells employers that Title VII does not force employers to grant preferential treatment to any protected group because of any imbalance in percentages of that group in the workforce.¹³¹ As stated above, the 1991 amendments added § 2000e-2(k), which now sets out the requirements of a prima facie case for disparate impact suits. Therefore, traditional statistical or testing disparity claims are sufficiently protected under other provisions of Title VII. Courts should not read the original § 2000e-2(a)(2) as a nullity.

C. Legal Feminist Theory and Scholarly Critiques

Legal feminist theory supports the view that sexual harassment is a pervasive problem in American workplaces and continuing change is needed. Not only have labor statistics, referenced in Part IV(A) *supra*,

126. See generally *Ogden v. Wax Works, Inc.*, 214 F.3d 999 (8th Cir. 2000) (after supervisor refused to give plaintiff evaluation that would affect her raise, her motivation to perform well at work decreased and she was subjected to emotional distress); see also *Frederick v. Spring/United Mgmt. Co.*, 246 F.3d 1305 (11th Cir. 2001) (sexual harassment plaintiff denied promotions or transfers from supervisor who harassed her).

127. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (merit-based testing procedures); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1977) (statistical disparities from subjective hiring procedures).

128. 42 U.S.C. § 2000e-2(h) (2011).

129. *Id.*

130. 42 U.S.C. § 2000e-2(j) (2011).

131. *Id.*

showcased the failure of the current approach, but legal feminists argue that the law itself has not “propelled working women into full equality . . . and has severely limited potential as an agent of social change.”¹³² Legal feminists argue that although open discrimination has subsided to a certain degree, employers are now subtly discriminating against women, mainly due to inherent and structural bias.¹³³ Scholars also argue that structural bias typically puts women in lower-level positions, thereby increasing the instances of supervisor harassment.¹³⁴ Furthermore, since women traditionally experience more sexual harassment than men, sexual harassment itself “creates a barrier to success that men rarely experience.”¹³⁵

Katharine MacKinnon, a prominent feminist legal scholar, views both of the sections of Title VII, § 2000e-2(a)(1) and § 2000e-2(a)(2), as prohibiting sexual harassment.¹³⁶ Although her work was written before the 1991 amendments, her theory of sexual harassment supports the idea that sexual harassment deserves broader legal recognition. She argues “unwanted sexual advances, made simply because [the employee] is a woman, can be a daily part of a woman’s work life.”¹³⁷ The consequences of sexual harassment can have an impact on women’s work, thus falling within the prohibitions in § 2000e-2(a)(2) of limiting, segregating, classifying, or depriving women of employment opportunities.

MacKinnon states sexual harassment makes women feel “humiliated . . . embarrassed, and . . . angry.”¹³⁸ Studies show that harassment costs large companies typically \$6.7 million each year due to turnover, loss of productivity, and absenteeism.¹³⁹ The study revealed that although half the women who were victims attempted to ignore the harassment, they tended to lose an average of 10% productivity.¹⁴⁰ The study concluded that about 24% of the victims took leave time to avoid the harasser, while 10% decided to leave their job because of the harassment.¹⁴¹

132. JUDITH A. BAER, *WOMEN IN AMERICAN LAW: THE STRUGGLE TOWARD EQUALITY FROM THE NEW DEAL TO THE PRESENT* 68 (3rd ed. 2002).

133. *Id.* at 76–78.

134. *Id.* at 87.

135. *Id.*

136. CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 6 (1979).

137. *Id.* at 40.

138. *Id.* at 47.

139. Pamela Mahabeer, *Sexual Harassment Still Pervasive in the Workplace*, AOL JOBS., Jan. 28, 2011, <http://jobs.aol.com/articles/2011/01/28/sexual-harassment-in-the-workplace> (1988 study surveying Fortune 500 companies).

140. *Id.*

141. *Id.*

These studies suggest the need for a broader reading of the sexual harassment provision. As evidenced by the study, most instances of harassment go unreported. Furthermore, supervisor harassment is a continuing problem, revealing why many of the victims most likely fail to report the harassment.

D. Practicalities of the New Approach

This new interpretation of § 2000e-2(a)(2) should not be a broad, open-ended provision for all sexual harassment claims. There must be some limitation. Following the traditional principles of fairness and allocation of burdens, “Title VII actions [should] be tried like any lawsuit.”¹⁴² Therefore, the plaintiff should retain the burden of persuading the court that he or she was the subject of sexual harassment. One option for the courts is to follow the requirements of a disparate impact claim, thereby requiring plaintiff to point to a “particular employment practice”¹⁴³ as the cause of the sexual discrimination. This requirement aims to prevent statements that the courts are already concerned about from becoming actionable, such as offhand comments or mere epithets.¹⁴⁴ The specific act that a plaintiff claims is sexual harassment must also conform to the language of § 2000e-2(a)(2). An actionable claim of sexual discrimination under this interpretation would require proof of specific sexual advances, comments, or conduct that effectively limited, segregated, or classified plaintiff in a way to deprive him or her of employment opportunities or to affect his or her status as an employee adversely.

For example, a supervisor who makes a sexual advance upon a female employee would be liable under this interpretation only if the plaintiff adequately proved she suffered some form of injury, whether tangible or emotional, that limited her employment opportunities or deprived her of employment opportunities. The courts could continue to rely upon the Faragher/Ellerth¹⁴⁵ analysis for imputing liability to the individual.

V. CONCLUSION

The intent behind Title VII, and particularly the 1991 amendments, is to provide relief for victims of discrimination. Sex discrimination is an

142. *Wards Cove Packing Co. Inc., v. Atonio*, 490 U.S. 642, 673 (Blackmun, J., dissenting).

143. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2011).

144. *See Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986) (citing *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971)).

145. *See supra* text accompanying note 31.

ongoing problem in the workplace,¹⁴⁶ and the current frameworks established by the courts often do not provide relief.

Instead of courts attempting to fit the facts of a complex sexual harassment claim into the rigid frameworks of hostile work environment or retaliation, the courts should look to the language of § 2000e-2(a)(2) as an alternative way to provide relief. Using a pragmatic approach that looks to both the text and congressional intent, courts should recognize that Congress has intentionally left § 2000e-2(a)(2) as part of Title VII and that it is intended to be functional for victims of discrimination. With the use of a pragmatic approach such as this, there can be hope that eventually victims of sexual harassment who do not meet the requirements of the other established frameworks will at last have relief.

146. *See supra* notes 81–83.