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DO REINDEER GAMES COUNT AS TERMS, CONDITIONS OR PRIVILEGES OF EMPLOYMENT UNDER TITLE VII?

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INTRODUCTION

The Civil Rights Act of 1991¹ has expanded the type of relief available under Title VII of the Civil Rights Act of 1964 ("Title VII")² and related legislation³ and has solidified the theories of relief under that law. Despite these improvements, there still is a need for gap-filling in the way Title VII is applied. Many commentators and governmental authorities have recognized the "glass ceiling,"⁴ but few have under-

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¹ Civil Rights Act of 1991, Pub. L. No. 102-66, 105 Stat. 1071.

² 42 U.S.C. §§ 2000e-2000e-17 (1988).

³ See, e.g., Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (1996); 42 U.S.C. §§ 1981, 1983 (1988); Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101-12117 (1988). The ADEA prohibits discrimination in employment of those age 40 and older. See generally 29 U.S.C. §§ 621-634. Sections 1981 and 1983 prohibit discrimination in employment contracts based on race and discrimination, respectively, under color of state law. See generally 42 U.S.C. §§ 1981, 1983. The ADA prohibits discrimination by employers against qualified disabled persons. See generally 42 U.S.C. §§ 12101-12117.

⁴ Congress recognized the glass ceiling as a real phenomenon, leading to legislation to further delineate and identify the problem. See Civil Rights Act of 1991, Pub. L. No. 102-166,

taken an examination of ways to control and eliminate some of the employer practices that lead to the glass ceiling using current Title VII jurisprudence.⁵ Title VII, the Age Discrimination in Employment Act ("ADEA"), and the Americans with Disabilities Act ("ADA") prohibit discrimination in the "terms, conditions, or privileges of employment."⁶ Yet, aside from the notable expansion of Title VII into sexual harassment,⁷ few litigants have used Title VII as a creative weapon of attack for many pervasive employer practices that greatly undermine the success and promotional opportunities of employees who fall into the traditional protected classes.⁸ While case law makes clear that terms, conditions or privileges include benefits such as insurance and pension plans,⁹ few courts and litigants have addressed what I call "reindeer games."

Title II, The Glass Ceiling Act of 1991, § 202(a)(1)-(2), 105 Stat. 1081; U.S. DEP'T OF LABOR, A REPORT ON THE GLASS CEILING INITIATIVE 1 (1991); see also Ramona L. Paetzold & Rafael Gelu, *Through the Looking Glass: Can Title VII Help Women and Minorities Shatter the Glass Ceiling?*, 31 Hous. L. Rev. 1517, 1520 (1995) (discussing the glass ceiling and Title VII's failure to aid women in breaking through it); Grace M. Giesel, *The Business Client Is a Woman: The Effect of Women as In-House Counsel on Women in Law Firms and the Legal Profession*, 72 NEB. L. REV. 760, 761 (1993) ("[T]he presence of female in-house attorneys may lessen or eliminate barriers to success which women in law firms have traditionally faced."); Daniel Gyebi, *The Civil Rights Act of 1991: Favoring Women and Minorities in Disparate Impact Discrimination Cases Involving High-Level Jobs*, 36 How. L.J. 97, 112-14 (1993) (arguing for application of Civil Rights Act of 1991 and affirmative action to eliminate glass ceiling); Mark S. Kende, *Shatter the Glass Ceiling: A Legal Theory for Attacking Discrimination Against Women Partners*, 46 HASTINGS L.J. 17, 18 (1994) (suggesting alternatives to Title VII liability in the context of women law firm partners).

⁵ Some scholars have argued for application of Title VII to more novel types of claims. See, e.g., Gyebi, *supra* note 4, at 112-14 (arguing for extended use of affirmative action to eliminate glass ceiling); Nadine Taub, *Keeping Women in Their Place: Stereotyping Per Se as a Form of Employment Discrimination*, 21 B.C. L. Rev. 345, 418 (1980) (arguing for making stereotyping a per se violation of Title VII).

⁶ 29 U.S.C. § 623(a)(1) (1988); 42 U.S.C. § 2000e-2(a)(1) (1988); 42 U.S.C. § 12112(a) (1988).

⁷ See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986).

⁸ By "traditional protected classes," I refer to the groups that the anti-discrimination laws were mainly aimed at: women and minorities. See *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 (1982) (women); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 306 (1978) (racial minorities); *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (women); *Affirmative Action Review, Report to President Clinton*, 1995 Daily Lab. Rep. (BNA) 139, § 2.1 (1995). The focus of this article, however, is on sex discrimination in part because discrimination against women often takes more subtle forms. This makes it more difficult to hold employers liable for acts that are harmful to the employment opportunities of women. See *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 709 (1978) (justifying finding of sex discrimination by noting that similar employer policy, if aimed at race, would clearly violate Title VII); *Rabidue v. Osceola Ref. Co.*, 805 F.2d 611, 626-27 (6th Cir. 1986) (Keith, J., dissenting) (arguing that claimant made out sexual harassment claim where conduct, if anti-semitic or racially motivated, would have been actionable).

⁹ See, e.g., *Newport News Shipbldg. & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682 (1983) (insurance); *Manhart*, 435 U.S. at 710-11 (pension plan); *Chastang v. Flynn Emrich Co.*, 541 F.2d

The term reindeer games refers to outside activities that give employees exposure to persons with power at their place of employment. I am using the term reindeer games from the holiday song, "Rudolph the Red-Nosed Reindeer."¹⁰ For those of you unfamiliar with the song, Rudolph was ostracized by his fellow reindeer because he was different—he had a red nose. Because of this difference, Rudolph was not permitted to join in any "reindeer games," which included instruction on flying techniques as well as opportunities to "bond" with other young reindeer. Those reindeer games were a prerequisite for any young reindeer to be considered for the highest position within the North Pole community, leading Santa's sleigh.¹¹ An example of a reindeer game in the employment context would be golfing with the boss or having lunch with a supervisor. While many might view these sorts of reindeer games as trivial, for those, like Rudolph, who are left out, the career ramifications can be quite palpable.¹²

At first glance, reindeer games do not appear particularly heinous. After all, it is natural for employees to form friendships at work. However, the nefarious effects of reindeer games become apparent after a review of sociological data regarding the perception of women in the workplace and a common sense analysis of how these games can affect employment decisions.

Two aspects of reindeer games cause problems for employees who are non-participants. First, these outside activities generally give the participating employee a "leg up" from increased exposure to the boss or others in power. Second, even if a non-participating employee is given an opportunity to participate, he or she may have no interest in the particular activity involved. This may lead the boss to think the employee is "not a team player," and result in adverse employment decisions with respect to that employee. A decision not to play golf,

1040 (4th Cir. 1976) (profit sharing and retirement plan); *Peters v. Missouri-Pacific R.R.*, 483 F.2d 490, 492 n.3 (5th Cir.) (pension plan), *cert. denied*, 414 U.S. 1002 (1973); *Bartmess v. Drewrys U.S.A., Inc.*, 444 F.2d 1186, 1189 (7th Cir. 1971) (retirement plan).

¹⁰ As the song goes, "[a]ll of the other reindeer used to laugh and call him names. They never let poor Rudolph join in any reindeer games." By referring to this phenomenon as a "game," I do not mean to trivialize its impact on employment opportunities. Rather, the term "game" is appropriate because these activities are not obviously work-related and, instead, are often considered part of "playing the game" that leads to success. In addition, they often have a game component, e.g., golfing, playing softball, etc.

¹¹ The analogy is not perfect, because there was an instruction (or training) component to the reindeer games—reindeer learned how to fly. In the employment context, discrimination in training opportunities clearly implicates a term, condition, or privilege of employment and, therefore, violates Title VII. *See infra* note 78 and accompanying text.

¹² Rudolph experienced emotional harm from being ostracized from the reindeer games and actually ran away from home, considering himself a "misfit."

however, obviously has no effect on an employee's ability, for example, to fill out and file a tax return on behalf of a client. Nevertheless, the reindeer games phenomenon often gives effect to what are non-job-related criteria.

While both Congress and learned legal scholars have addressed concerns regarding the "glass ceiling" that keeps both women and minorities from advancing within corporate America,¹³ no one has addressed whether Title VII may be an effective tool in remedying the inequities, and the consequential disparity in advancement, resulting from reindeer games.¹⁴ In this article, I suggest several ways in which litigants¹⁵ could use Title VII as a means of addressing inequities that result from a lack of participation in reindeer games. As a starting point, I review sociological data that indicates why reindeer games are important in career advancement. From there, I review the meaning given by courts to the phrase "term, condition or privilege of employment" under Title VII. Based on current usage by the courts, I suggest ways that potential plaintiffs can use Title VII as a means of addressing the unfairness that often results from reindeer games. Finally, I look to the potential for reform in the law so that reindeer games themselves, and not simply their effects, can be eliminated and working persons can be assured of equal treatment in the workplace.

I. WHY ARE REINDEER GAMES SO IMPORTANT?

The influence of reindeer games on employment decisions as well as on an employee's success in his or her job is obvious. Anyone who has worked has seen what happens to the boss's favorites. These individuals get the better assignments, the better offices, and eventually the better raises and promotions.

In addition, and perhaps more importantly, these individuals often are "cut slack" where others are not. If a "favorite" makes an error, it is often excused, while the error of someone not occupying

¹³ See *supra* notes 4-5 and accompanying text.

¹⁴ See, e.g., Pactzhold & Gelu, *supra* note 4, at 1520 (noting Title VII's failure to aid women in breaking through glass ceiling); see also Gyebi, *supra* note 4, at 114-18, 130-37 (arguing that affirmative action could be used to eliminate some effects of glass ceiling).

¹⁵ I focus on the plight of women, because there is consensus on the existence of a glass ceiling that stalls their advancement in employment. However, the same logic applies to minorities. Further, there is no reason why a white male could not use the methodologies examined in this article in an appropriate case. However, the courts have been reluctant to recognize certain types of discrimination as applicable to males. See, e.g., *Garcia v. Elf Atochem N. Am.*, 28 F.3d 446, 451-52 (5th Cir. 1994) (male on male sexual harassment does not violate Title VII); *Hopkins v. Baltimore Gas & Elec. Co.*, 871 F. Supp. 822, 833 (D. Md. 1994) (same). But see *Quick v.*

"favorite" status is not similarly excused. Reindeer games allow an individual employee to develop that "favorite" status by prolonged exposure to the boss or supervisors in a low stress environment. The result is that, instead of perceiving the favored employee as simply an employee, he or she becomes a friend.¹⁶ It is much more difficult to fire or demote a friend than it is to fire or demote a mere "employee." Likewise, it gives the boss more pleasure to see his or her friends succeed than those who enjoy only employee status.¹⁷ In addition, the favorite employee can benefit from the mentor relationship that naturally develops due to participation in reindeer games.¹⁸

In addition, reindeer games have an effect on those who refuse to participate. Many women are burdened with both career and family duties.¹⁹ Although more males are becoming involved in parenting obligations, the responsibility for children still falls disproportionately on working women.²⁰ Because of this, women often have less time and inclination to participate in reindeer games even if asked. Further, many women do not engage in the same outside activities as their

Donaldson Co., 895 F. Supp. 1288, 1294 (S.D. Iowa 1995) (acknowledging that Title VII protects males from sexual harassment, while granting summary judgment in case of male on male harassment); *Showalter v. Allison Reed Group*, 767 F. Supp. 1205, 1211-12 (D.R.I. 1991) (male on male harassment). Like harassment law, the main beneficiaries of the extension of Title VII to reindeer games likely would be those who have been traditionally discriminated against, i.e., women and minorities.

¹⁶This also works against women when the contact involves clients. Women lawyers, in particular, have difficulty becoming "rainmakers"—the most powerful position in the law firm—due to the lack of business contacts that can be developed through reindeer games. See Kende, *supra* note 4, at 37 n.80.

¹⁷I use "he" and "his" throughout this article to refer to bosses and supervisors, because most upper level managers are, in fact, male. For example, according to recent statistics, 95-97% of Fortune 500 and Fortune 1000 senior managers are male. *Female and Minority Executives Face Glass (Concrete?) Ceiling*, 13 RES. ALERT No. 14 (July 21, 1995); see also U.S. DEP'T OF LABOR, A REPORT ON THE GLASS CEILING INITIATIVE 6 (1991) (minorities and women hold less than 5% of top managerial positions in top 1000 largest American corporations) (citing KORN/FERRY INTERNATIONAL & JOHN E. ANDERSON GRADUATE SCHOOL OF MANAGEMENT, KORN/FERRY INTERNATIONAL'S EXECUTIVE PROFILE 1990: A SURVEY OF CORPORATE LEADERS (1990)).

¹⁸See David N. Laband & Bernard F. Leitz, *Workplace Mentoring in the Legal Profession*, 61 S. ECON. J. 783, 784 (1995) (studies show individuals with mentors have greater job satisfaction and earn more than those without mentors).

¹⁹Jane R. Wilkie, *Marriage, Family, Life, and Women's Employment*, in WOMEN WORKING 153-55 (Stromberg & Harkess eds., 2d ed. 1988). Wilkie notes that this is changing, and men are taking on more household responsibilities, although male participation time still does not equal the time spent by women with such responsibilities. *Id.*; see also Arlie Hochschild, *The Awful Quandary of Working Mothers for Labor Day*, SACRAMENTO BEE, Sept. 3, 1989, at F1.

²⁰Mary F. Radford, *Sex Stereotyping and the Promotion of Women to Positions of Power*, 41 HASTINGS L.J. 471, 500 (1990); Deborah L. Rhode, *The "No-Problem" Problem: Feminist Challenges and Cultural Change*, 100 YALE L.J. 1731, 1748-49 & n.80, 1772 & n.202 (1991); Wilkie, *supra* note 19, at 153-55; Hochschild, *supra* note 19, at F1 (recounting statistics showing that working

mostly male bosses.²¹ For example, the number of men who golf greatly exceeds the number of women who hold that interest.²² For these reasons, even if a boss invited a woman to golf with him, it is unlikely that she would be able to participate and/or be interested in participating. The result of her failure to participate can be just as devastating to her career as not being invited to participate: the loss of the opportunity to get to know the boss better and benefit from the boss's viewing her as an individual and not just another worker. This could lead to a valuable mentor relationship with the boss.²³ In addition, there is the added stigma of not being a "team player" because she is not interested in participating.²⁴ Yet, a woman's ability or desire to play golf has no impact on her ability to do her job.

mothers spend more time on housework than their male partners). See also U.S. MERIT SYS. PROTECTIONS BD., A QUESTION OF EQUITY: WOMEN AND THE GLASS CEILING IN THE FEDERAL GOVERNMENT 21 (1992) (noting that women with children received fewer promotions than women without children and fewer than men regardless of whether they had children). The number of working mothers with small children has increased according to studies, to anywhere from 60% to 80%. See *After-School Care: Two Sides Have Their Day*, ATLANTA J. & CONST., Sept. 15, 1996, at J11; Della DaLafuente, *Family Illness Hard on Workers Study: Sick Leave Often Inadequate*, CHI. SUN-TIMES, Aug. 14, 1996, at 4 (noting that 75.9% of women in workforce have school-age children); Jackie Ripley, *More Busy Couples Are Turning to Nannies*, ST. PETERSBURG TIMES, Aug. 25, 1996, at B6 (noting that 60% of women with children under age six work outside of home).

²¹ NAT'L SPORTING GOODS ASS'N, SPORTS PARTICIPATION 258 (1992) (showing that far fewer women participate in traditional male sports activities such as baseball, basketball, fishing, hunting and golf).

²² According to National Sporting Goods Association statistics, 18,459,000 men golf, while only 5,562,000 women golf. *Id.* Indeed, even if a woman did want to play golf, she might be perceived negatively for possessing what can be characterized as a "less feminine" trait. See Radford, *supra* note 20, at 502-03. I will leave the discussion of whether this is based on nature or nurture to other commentators. See generally, C. GILLIGAN, IN A DIFFERENT VOICE (1982); DEBORAH L. RHODE, JUSTICE AND GENDER 306-15 (1989); Kingsley R. Browne, *Biology, Equality, and the Law: The Legal Significance of Biological Sex Differences*, 38 SW. L.J. 617 (1984); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987); Catherine MacKinnon, *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 BUFF. L. REV. 11, 27 (1985).

²³ See Giesel, *supra* note 4, at 777-79 (noting that few women attorneys have mentors and that this has had detrimental effects on their careers).

²⁴ A similar phenomenon occurs based on economic status. Golfing is generally considered a "rich man's sport." See NATIONAL SPORTING GOODS, *supra* note 21, at 258 (the majority of persons who play golf earn over \$35,000/year). Those from more economically disadvantaged backgrounds, therefore, likely have had little to no exposure to the sport. *Id.* Women make on average less than white males. *Affirmative Action Review, Report to President Clinton*, 1995 Daily Lab. Rep. (BNA) 139, § 4.1 (1995). With so many minorities living below the poverty line as compared to their white counterparts, this no doubt has an impact upon minority employees similar to the one that it has upon female employees. See *id.* (33.3% of African Americans and 29.3% of Hispanics live in poverty; 11.6% of whites live in poverty). For an example of the "team player" analysis affecting an employment decision, see *Ezold v. Wolf*, 751 F. Supp. 1175, 1178 (E.D. Pa. 1990), *rev'd*, 983 F.2d 509 (3d Cir. 1992).

Even in situations in which the reindeer game has no obvious effect on firing, promotions and related employment decisions, it does have a psychological effect on those who are not asked to participate.²⁵ The reasonable conclusions to be drawn from being excluded is that the boss does not like that employee or, at least, likes other employees more. The less favored employee believes that her being "left out" signals a less favored status that might have an effect on her ability to succeed at that place of employment. This can be demoralizing and can lead to frustration, causing the employee's job performance to suffer.²⁶ The situation becomes exacerbated for the less favored employee if that perception is validated by increased opportunities and promotions for those having favorite status. This results in a higher turnover rate for women because they believe advancement is not possible.²⁷

While there is little direct sociological data on the effects of reindeer games on promotions, anecdotal evidence suggests their importance in promotional opportunities.²⁸ The federal government, in a study of federal employees, noted the role reindeer games play in advancement and related career opportunities. As one woman who participated in the study commented:

We have a [high official], his subordinate supervisor, and several of their supervisors who go jogging together. And I'm hearing rumblings from some of the women in the branch that if one of those male subordinates gets an advancement, they're going to see it as quid pro quo for having jogged with their supervisor and their supervisor's supervisor, regardless of whether they discuss business.²⁹

²⁵ See, e.g., *Soto v. Adams Elevator Equip. Co.*, 941 F.2d 543, 546-47 (7th Cir. 1991) (recounting plaintiff's stress due to ostracism, including failure to invite her to company Christmas party and to buy her birthday cake).

²⁶ Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749, 1829 (1990). Indeed, studies have shown that "women's work aspirations and orientations are . . . shaped by their opportunities for mobility and the social organization of their jobs." *Id.*

²⁷ Unfortunately, the high turnover rate often justifies employers' stereotyped thinking about women—specifically that they are not as dedicated to their careers. See Paetzold & Gelu, *supra* note 4, at 1547-48; see also Schultz, *supra* note 26, at 1825-27 (noting that women often leave higher level jobs).

²⁸ See, e.g., GLASS CEILING COMM'N, GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION'S HUMAN CAPITAL 33-34 (1995) (describing anecdotal evidence of reindeer games and their effects on the advancement of women); COMM'N ON WOMEN IN THE PROFESSION, A.B.A. REPORT TO THE HOUSE OF DELEGATES 11-12 (1988) (describing reindeer games in context of women lawyers).

²⁹ U.S. MERIT SYS. PROTECTION BD., *supra* note 20, at 25.

In a study of the practices of nine corporations, the United States Department of Labor's Report on the Glass Ceiling acknowledges that casual interviews, including lunches and dinners with potential job applicants, were part of the promotion and recruitment practices that tended to favor men.³⁰

Recent studies regarding gender distinctions made in the employment context demonstrate that sex discrimination is prevalent, if perhaps a bit subtle, making it all the more important for women to have equal opportunities in all aspects of the employment relationship.³¹ Other scholars have recounted the social science data through the late 1980s, which showed significant discrimination against women in employment.³² Unfortunately, more recent studies show that women have not made the gains necessary to reach parity with men, let alone crash through the "glass ceiling."³³ Studies show that, in certain circumstances, women do not enjoy parity with regards to promotions,³⁴ are not perceived to have the qualities necessary to be good managers,³⁵ and are victims of an ever-widening gender gap, even in salary.³⁶

Oddly enough, the legal community (including legal academia) is a leader in discrimination against women.³⁷ Women are half as likely to become law firm partners.³⁸ While women are making gains in

³⁰ U.S. DEP'T OF LABOR, *supra* note 17, at 18-22; see also Patricia A. Roos & Barbara F. Reskin, *Institutional Factors Contributing to Sex Segregation in the Workplace*, in *SEX SEGREGATION IN THE WORKPLACE: TRENDS, EXPLANATION, REMEDIES* 252 (Barbara F. Reskin ed., 1984).

³¹ There is a significant amount of research on entrance barriers to the employment of women. See Roos & Reskin, *supra* note 30, at 235.

³² See, e.g., Radford, *supra* note 20, at 489-503 (describing sociological and psychological evidence of sex stereotyping in employment contexts); Taub, *supra* note 5, at 349-61. In describing "recent" studies, I have attempted to gather the most recent data on differences in perceptions of, and actual employment gains made by, women in the workplace.

³³ See U.S. DEP'T OF LABOR, *supra* note 17, at 1; Kende, *supra* note 4, at 18-21 (describing phenomenon in context of women lawyers).

³⁴ Stephen J. Spurr, *Sex Discrimination in the Legal Profession: A Study of Promotion*, 43 INDUS. & LAB. REL. REV. 406, 415 (1990).

³⁵ Virginia E. Schein et al., *The Relationship Between Sex Role Stereotypes and Requisite Management Characteristics Among College Students*, 20 SEX ROLES 103, 108-09 (1989) (both male managers and male management students believe men are more likely to possess characteristics necessary for managerial success); see also Radford, *supra* note 20, at 496-99 (recounting earlier studies showing similar results).

³⁶ John Hagan, *The Gender Stratification of Income Inequality Among Lawyers*, 68 SOC. FORCES 835, 849 (1990) (study of lawyers in Toronto, Canada). But see *Affirmative Action Review, Report to President Clinton* 1995 Daily Lab. Rep. (BNA) 139, § 3.2.2 (1995) (recounting data that suggests no wage gap if salaries are controlled for experience and education levels).

³⁷ See Giesel, *supra* note 4, at 776-86 (describing discrimination experienced by female associates); Kende, *supra* note 4, at 24-41 (discussing history of discrimination against women in legal profession).

³⁸ Spurr, *supra* note 34, at 409, 415; see Giesel, *supra* note 4, at 774-86.

entry-level hiring, they have not broken through into the partnership ranks with the same ease as men.³⁹ As was noted in a law firm partnership study, women must meet a higher standard for promotion, "either because of male lawyers' preference for male business associates, or because of the preferences of clients for male lawyers, or both."⁴⁰ Even taking into account factors such as school rank and quality of law school, women are not succeeding at the same rate as men, leading one social scientist to conclude that the "evidence tends to refute an explanation of promotion differences based on the consequences of affirmative action."⁴¹ As one group of researchers reported:

In private sector workplaces, almost one-half [of women studied] report inequities in salary and promotion and believe that their assignments, and therefore their opportunities, are restricted. Regardless of where they work, disparagement is pervasive, and, for certain women, the risk of being harassed is high. Consequently, within the context of their daily work, many are forced to cope with situations in which their aspirations are thwarted and their professional standing subverted.⁴²

Likewise, studies have shown that, even controlling for factors such as years in academia, gender negatively affects tenure decisions for female legal academics.⁴³

Studies indicate that gender segregation in job classifications has not been reduced significantly within the overall workforce hierarchy.⁴⁴ Indeed, white men "enjoy greater access than do educated members

³⁹ Spurr, *supra* note 34, at 411 (noting that affirmative action has helped to increase hiring of women).

⁴⁰ *Id.* at 412.

⁴¹ *Id.* at 411-12.

⁴² J. Rosenberg et al., *Now That We Are Here: Discrimination, Disparagement, and Harassment at Work and the Experience of Women Lawyers*, 7 GENDER & SOC'Y 415, 428-29 (1993).

⁴³ Bruce D. Fisher et al., *Effects of Gender and Other Factors on the Rank of Law Professors in Colleges of Business: Evidence of a Glass Ceiling*, 12 J. BUS. ETHICS 771, 776 (1993) (study of law professors in business colleges). In addition, gender has an impact upon students' performances in law school. See generally Lani Guinier et al., *Becoming Gentlemen: Women's Experiences at One Ivy League Law School*, 143 U. PA. L. REV. 1 (1994); Suzanne Homer & Lois Schwartz, *Admitted But Not Accepted: Outsiders Take an Inside Look at Law School*, 5 BERKELEY WOMEN'S L.J. 1, 4 n.7 (1989) (citing studies of women's experiences of alienation in law school); Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299 (1988) (describing alienation of women attending law school). But see LINDA F. WIGHTMAN, *WOMEN IN LEGAL EDUCATION: A COMPARISON OF LAW SCHOOL PERFORMANCE AND LAW SCHOOL EXPERIENCES OF MEN AND WOMEN* (1996) (showing a "modest difference" in first year grades for men and women).

⁴⁴ See Thomas L. Steiger & Mark Wardell, *Gender and Employment in the Service Sector*, 42 SOC. PROBS. 91, 93 (1995) (studies cited).

of other groups to jobs that entail a degree of subjective evaluation for hiring and promotion."⁴⁵ Women with increased education do not make the same sorts of gains that men make.⁴⁶

Yet, the promotion of women into the upper ranks of business, including law firm partnerships, has been linked to the success of other women within that same organization. In the context of law school faculties, it has been observed that "the presence of a certain size core of tenured [female] faculty significantly improves the likelihood that junior level women will successfully leap the tenure hurdle."⁴⁷ In addition, more women at a business or in a particular job reduces the effects of tokenism, which leads to members of less dominant groups (in this case, women) being treated as symbols representing the characteristics of their particular group rather than being treated as individuals.⁴⁸ Finally, men who have had experience with women in authority positions tend to be more accepting of women in the work place than men who have not.⁴⁹ Therefore, the presence of women in the upper levels of employment is important to the success and acceptance of women as managers.

Several sociologists researching this topic conclude that affirmative action efforts have not been wholly effective for women⁵⁰ and, therefore, that affirmative action efforts should be maintained.⁵¹ Studies indicate that, rather than leading to the promotion of women, affirmative action might well have had the opposite effect. In a 1989 study of male and female management students, social scientists found

⁴⁵ Mary C. King, *Occupational Segregation by Race and Sex, 1940-88*, 115 MONTHLY LAB. REV. 30, 35 (1992).

⁴⁶ Randy P. Albelda, *Occupational Segregation by Race and Gender, 1958-1981*, 39 INDUS. & LAB. REL. REV. 404, 410 (1986).

⁴⁷ Richard Chused, *The Hiring and Retention of Minorities and Women on American Law School Faculties*, 137 U. PA. L. REV. 537, 550 (1988).

⁴⁸ See Terri C. Fain & Douglas L. Anderton, *Sexual Harassment: Organizational Context and Diffuse Status*, 17 SEX ROLES 291, 293 (1987) (studies cited). One study in particular discussed the difficulties attributable to women lawyers in terms of tokenism. P. MacCorquodale & G. Jensen, *Women in the Law: Partners or Tokens?* 7 GENDER & SOC'Y 582 (1993). The concept of tokenism was first identified and discussed by Kanter, who argued that in balanced groups only will organizational outcomes for individuals depend more on structural and personal factors than on the dynamics established by the group itself. For more on her theory, see ROSABETH M. KANTER, *MEN AND WOMEN OF THE CORPORATION* (1977). See also Radford, *supra* note 20, at 500-01 (discussing tokenism); Taub, *supra* note 5, at 358-59 (same).

⁴⁹ J. Siltaen, *Visual Cues and Gendered Thinking*, 6 SOC. STUD. REV. 56, 57 (1990).

⁵⁰ See, e.g., Schein et al., *supra* note 35, at 109; Spurr, *supra* note 34, at 412; Steiger & Wardell, *supra* note 44, at 106.

⁵¹ O.C. Brenner et al., *The Relationship Between Sex Role Stereotypes and Requisite Management Characteristics Revisited*, 32 ACAD. MGMT. J. 662, 668 (1989).

that male students perceived management positions in the same way as male managers who were already working: management positions required characteristics that men were more likely to possess than women.⁵² The authors of the study opined that a male "may perceive the increased competition from women as a threat both to his self-esteem and to his career opportunities. Hence, he may resist such [affirmative action] efforts, making the possibility of change remote."⁵³ The authors concluded that the results of their study "suggest that the structural mechanisms and legal actions designed to circumvent biased attitudes and provide women equal opportunity in the workplace may well have to remain in place for some time to come."⁵⁴ Indeed, one social scientist has documented that white men consciously and actively resist equal opportunities for women and minorities in the workplace.⁵⁵

These studies show that women still face significant barriers to advancement and that stereotypical beliefs regarding the success of women managers help to create those barriers. The use of subjective criteria in upper level management decisions exacerbates the situation.⁵⁶ Reindeer games have their fullest effect in instances of subjective decision making. When a decision is subjective, the decision maker has the most leeway to let personal influences, including the effects of reindeer games, inform the decision making process. In addition, regardless of that effect, reindeer games undoubtedly undermine the less favored employee's (here, women) psychological well-being on the job as well as her status among fellow employees. On these bases, the importance of reindeer games should not be minimized. Indeed, it seems natural that they would be encompassed in employer activities that are prohibited under Title VII.

⁵² Schein et al., *supra* note 35, at 108-109.

⁵³ *Id.* at 109.

⁵⁴ *Id.* In a study of male and female managers, Brenner, Tomkiewicz and Schein showed that female managers' perception of appropriate characteristics for managers has changed. Brenner et al., *supra* note 51, at 662. While their earlier study had shown that both men and women believed that typical male characteristics were necessary for good managers, their updated study showed that women believed characteristics possessed by both men and women were necessary for good managers. *Id.* This shift shows some progress for perceptions on the part of women in the workplace; however, given that most promotion decisions are made by men, the gains for women based on these changes may not be all that significant. *See id.* at 668.

⁵⁵ *See* C. COCKBURN, IN THE WAY OF WOMEN: MEN'S RESISTANCE TO SEX EQUALITY IN ORGANIZATIONS (1992).

⁵⁶ *See* Gyebe, *supra* note 4, at 114-18 (describing subjective evaluations and their impact on glass ceiling).

II. REINDEER GAMES AS A TERM, CONDITION OR PRIVILEGE OF EMPLOYMENT FOR PURPOSES OF TITLE VII

Title VII can be expanded to include reindeer games if they fall within the "terms, conditions, or privileges of employment" that Title VII explicitly covers. Title VII provides that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."⁵⁷ The language of this section is extremely broad; it appears on its face to apply to a vast array of employer practices. While the courts have repeatedly emphasized the broad nature of the "terms, conditions, or privileges" language,⁵⁸ its exact parameters remain unrefined. Indeed, for purposes of Title VII, the Equal Employment Opportunity Commission ("EEOC") has not even attempted to define the terms.⁵⁹ However, a review of how the courts have used these terms helps to determine how reindeer games can result in Title VII violations.

⁵⁷ 42 U.S.C. § 2000e-2(a)(1) (1988). In addition, Title VII prohibits an employer from limiting, segregating or classifying his employees in any way that 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." *Id.* § 2000e-2(a)(2). Courts have used this section for expansion of Title VII into disparate impact claims, which require no intent to discriminate on the part of the employer. *See, e.g., Connecticut v. Teal*, 457 U.S. 440, 448 n.9 (1982) (using this section to analyze disparate impact claims). It may be easier to infer intent from reindeer games because the employer is making a distinct choice to prefer men to women. In this regard, it does not make sense to say, for example, that a male supervisor does not intend to ask only males to play golf with him. *But see* 42 U.S.C. § 2000e-2(k)(1)(A) (1994) (applying disparate impact to "employment practice[s]" generally); *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1485 (9th Cir. 1993) (applying disparate impact to English-only policy, which court admitted was out of mainstream of cases under Section 703(a)(2) of Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1988) ("Section 703")); *Lynch v. Freeman*, 817 F.2d 380, 387 (6th Cir. 1987) (applying impact to filthy toilets insofar as practice had adverse impact on women). Commentators have argued that Title VII, as currently used and applied, has been insufficient to ensure the advancement of women through the glass ceiling. *See, e.g., Pactzold & Gelu, supra* note 4, at 1546-49. While this might be true to date, my position in this article is that there are natural extensions of Title VII that can increase its effectiveness in combatting many forms of discrimination that lead to the glass ceiling.

⁵⁸ *See, e.g., Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66 (1986); *Keenan v. American Cast Iron Pipe Co.*, 707 F.2d 1274, 1276 (11th Cir. 1983); *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972); *see also Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367, 371 (1993) (noting Title VII's broad rule of workplace equality).

⁵⁹ It has, however, set out a list of unlawful activities for purposes of the ADA. This definition includes discrimination based on "selection and financial support for . . . professional meetings, conferences and other related activities . . . [and a]ctivities sponsored by a covered entity includ-

A. *Employer Activity for Purposes of Title VII*

Before delving into the courts' interpretations of these terms in specific contexts, a preliminary problem of interpretation must be resolved because of the context in which reindeer games occur. Obviously, there must be some sort of employer action or practice at issue before a reindeer game could be actionable as a term, condition, or privilege of employment. The language extends to "unlawful *employment practices*" of an *employer*.⁶⁰ Thus, the question of who is an employer for purposes of Title VII is relevant.

While Title VII encompasses the acts of "agents of employers" within its proscription of discriminatory practices,⁶¹ it is not clear how this language will work in the context of reindeer games. In the hypothetical situations posited thus far in this article, the supervisors have engaged in activities with subordinates outside of work. While actions of supervisors are often imputed to the employer under Title VII, this generally is limited to situations in which the supervisor is acting within the scope of his employment.⁶² If reindeer games play a part in the supervisor's decision with respect to the employee's status as an employee, that supervisor is acting within the scope of his employment in taking into consideration that reindeer game. In addition, if the reindeer game encompasses some employment-related activity, for example, if there is a discussion of work-related problems or issues at lunch or the employer pays for lunch, this would appear to be an employer action for purposes of Title VII. This is perhaps the easiest manner in

ing social and recreational programs." 29 C.F.R. §§ 1630.4(g)-(h) (1990). This regulation does include certain types of reindeer games within its proscription of discrimination in social and recreational programs. *See id.* In addition, the regulation includes a catch-all applying it to "[a]ny other term, condition, or privilege of employment." *Id.* § 1630.4(i).

It seems natural to include social and recreational programs within the terms or conditions of employment with respect to discrimination based on disability. Because the ADA covers physical disabilities that might affect an employee's ability to participate, for example, on the employer's company softball team, it makes sense that the EEOC would promulgate a regulation that encompassed such terms or conditions. It is far less obvious that women, because of their status as women, would not be permitted to participate. In practice, however, women often are not asked to play.

⁶⁰ 42 U.S.C. § 2000e-2(a)(1) (1988) (emphasis added).

⁶¹ *Id.* § 2000e(b).

⁶² *See Meritor*, 477 U.S. at 72 (citing RESTATEMENT (SECOND) OF AGENCY §§ 219-37 (1958) and advising court to use agency principles in assessing employer liability). There is a significant amount of confusion in the courts regarding employers' liability for harassment by their employees. *See* David Benjamin Oppenheimer, *Exacerbating the Exasperating: Title VII Liability for Employers for Sexual Harassment Committed by Their Supervisors*, 81 CORNELL L. REV. 66, 72 (1995). For more on agency principles underlying sexual harassment law, see *infra* notes 230-57 and accompanying text.

which to hold reindeer games actionable under Title VII—when they are linked to some other employment-related decision. Perhaps not coincidentally, this is the area in which the courts have held less clear employer activities actionable.

B. "Normal" Terms, Conditions, or Privileges of Employment

Title VII itself refers to the most obvious "terms, conditions, or privileges of employment" that are actionable in its proscription of discrimination on the basis of race, color, sex, religion or national origin by failing or refusing to hire, to discharge, or to compensate persons similarly.⁶³ After its reference to these fundamental employment-related actions, Congress apparently used the more general "terms, conditions, or privileges of employment" language as a catch-all to cover other discriminatory activities.⁶⁴ Most courts either simply have assumed that an employment practice constituted a "term, condition, or privilege of employment" or perfunctorily have concluded that the alleged practice fell within those terms.

With the notable exceptions of sexual and racial harassment,⁶⁵ the courts have not been creative in their approach to what they consider a term, condition, or privilege of employment for purposes of Title VII. Prior to *Meritor Savings Bank v. Vinson*, *Hishon v. King & Spaulding* was the case in which the United States Supreme Court addressed what constitutes a "term, condition, or privilege of employment."⁶⁶ In *Hishon*, the Court at first adopted a contractual approach to those terms. While adopting a liberal notion of when such a contract is formed,⁶⁷ the Court explained that it was the "contractual relationship of employment" that triggered the "provision of Title VII governing 'terms, conditions, or privileges of employment.'"⁶⁸ Therefore, the underlying employment contract defined what fell within the "terms, conditions, or privileges of employment" and "clearly include[d] benefits that are part of an employment contract."⁶⁹

⁶³ 42 U.S.C. § 2000e-2(a)(1).

⁶⁴ *Hubbard v. Rubbermaid, Inc.*, 436 F. Supp. 1184, 1193 n.11 (D. Md. 1977) (acknowledging the phrase as a "catch-all provision").

⁶⁵ A more detailed discussion of the expansion of "terms, conditions, or privileges" into the harassment area follows. See *infra* notes 135-76 and accompanying text.

⁶⁶ 467 U.S. 69, 74 (1984).

⁶⁷ *Id.* The Court explained that such a contract could be written or oral, formal or informal. *Id.* Indeed, "the simple act of handing a job applicant a shovel and providing a workplace" can amount to a contract of employment. *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

From there, the *Hishon* Court expanded what could be considered a "term, condition, or privilege of employment." As the Court explained, an actual contractual term is not necessary:

An employer may provide its employees with many benefits that it is under no obligation to furnish by any express or implied contract. Such a benefit, though not a contractual *right* of employment may qualify as a "privileg[e]" of employment under Title VII. A benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free under the employment contract simply not to provide the benefit at all.⁷⁰

The plaintiff in *Hishon* did not have a written contract with her law firm.⁷¹ Instead, the Court gave effect to what amounted to an oral obligation to consider her for partnership.

An easy expansion from *Hishon* is to define the terms, conditions, or privileges of employment as whatever is set out in an employee or personnel manual. Some jurisdictions recognize implied contracts based on statements made in such manuals.⁷² However, even though employee manuals often extensively cover the terms of an employment relationship, reindeer games, with their social component, are not likely to be covered.

Aside from contract-related cases, the first area of expansion of Title VII from the run-of-the-mill hire/fire/differential pay situations was into employment actions that were closely linked to these basic three. For example, promotions were considered to fall within employer activities covered by Title VII.⁷³ Promotions are generally linked to pay increases and constitute a type of internal hiring. Therefore, they are easily encompassed within Title VII's proscription against discriminatory practices.⁷⁴ Likewise, refusals to reinstate, linkable to

⁷⁰ *Id.* at 75 (emphasis in original).

⁷¹ *Hishon*, 467 U.S. at 71-72.

⁷² See, e.g., *Dykes v. Lane Trucking, Inc.*, 652 So. 2d 248, 250 (Ala. 1994); *Duldulao v. Saint Mary of Nazareth Hosp.*, 505 N.E.2d 314 (Ill. 1987). But see *Atkins v. Industrial Telecomm. Ass'n, Inc.*, 660 A.2d 885, 891 (D.C. 1995) (employee manual with unequivocal disclaimers did not create binding contract); *Falczyński v. Amoco Oil Co.*, 533 N.W.2d 226, 235 (Iowa 1995); *Figueroa v. West*, 902 S.W.2d 701, 705 (Tex. Ct. App. 1995).

⁷³ See, e.g., *United States v. Criminal Sheriff*, 19 F.3d 238, 241 (5th Cir. 1994); *Scales v. J.C. Bradford Co.*, 925 F.2d 901, 910 (6th Cir. 1991); *EEOC v. Ball Corp.*, 661 F.2d 531, 536 (6th Cir. 1981); *Police Officers for Equal Rights v. City of Columbus*, 644 F. Supp. 393 (S.D. Ohio 1985).

⁷⁴ See, e.g., *Hishon*, 467 U.S. 69, 76; *Lucido v. Cravath, Swaine & Moore*, 425 F. Supp. 123, 127 (S.D.N.Y. 1977) (partnership decision).

terminations, were also considered covered by Title VII.⁷⁵ In addition, other practices related to terminations, such as reprimands, layoffs, and discipline policies, fell within Title VII's ambit.⁷⁶

Conditions attendant to on-the-job opportunities, such as training⁷⁷ and shift differentials (including hours of employment as well as work assignments)⁷⁸ were considered within the scope of "terms, conditions, or privileges of employment."⁷⁹ All of these conditions or terms of employment can be linked to promotional opportunities. The best shifts and assignments usually go to the best workers: those who are at the "top" of their fields. In addition, training opportunities are directly linked to an employee's ability to move up within a company, as they provide the employee with the abilities he or she needs to succeed and rise internally. Therefore, none of these types of terms, conditions, or privileges of employment were too far a reach for the courts.

Beyond those employer practices that could be linked to hiring and firing, courts also placed employer practices that essentially affected compensation within Title VII's proscribed activities. The most notable expansion was in the area of benefits.⁸⁰ Courts have held that Title VII covered profit sharing and retirement plans.⁸¹ In addition,

⁷⁵ *Weise v. Syracuse Univ.*, 522 F.2d 397, 409 (2d Cir. 1975); *Al-Hamdani v. State Univ. of New York*, 438 F. Supp. 299, 301 (W.D.N.Y. 1977); see also *Abramson v. University of Hawaii*, 594 F.2d 202, 209 (9th Cir. 1979) (refusing to reconsider denial of tenure).

⁷⁶ *Keenan v. American Cast Iron Pipe Co.*, 707 F.2d 1274 (11th Cir. 1983) (discharge and discipline policies); *Piva v. Xerox Corp.*, 70 F.R.D. 378 (N.D. Cal. 1975) (layoff, demotion and discharge).

⁷⁷ See, e.g., *Langston v. Illinois Bell Tel. Co.*, 1990 WL 129567 (N.D. Ill. 1990); *Holden v. Burlington N., Inc.*, 665 F. Supp. 1398, 1410-11 (D. Minn. 1987).

⁷⁸ *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482, 1491-92 (10th Cir. 1994) (redistribution of brokerage accounts); *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 180, 184-85 (6th Cir.) (reassignment for one day), *cert. denied*, 113 S. Ct. 931 (1992); *O'Connor v. Peru State College*, 781 F.2d 632, 634-35 (8th Cir. 1986) (college coach assigned heavier load of classes and outside duties); *EEOC v. Ball Corp.*, 661 F.2d 531, 540 (6th Cir. 1981) (difference in pay for lunch hours); *Langston*, 1990 WL 129567 (inequities in assignments); *Piva*, 70 F.R.D. 378 (discriminatory assignments).

⁷⁹ *Criminal Sheriff*, 19 F.3d at 241; *Viette v. Swiss Grand Hotel*, 1994 WL 118514 (N.D. Ill. 1994) (hours of employment); *Holden*, 665 F. Supp. 1398 (assignments); *Piva*, 70 F.R.D. 378 (assignments).

⁸⁰ *Keenan*, 707 F.2d at 1277. While courts have lumped certain "terms, conditions, or privileges of employment" into the term "fringe benefits," or simply "benefits," it is debatable as to what these terms cover. Therefore, the use of that term has not really clarified what is meant by "terms, conditions, or privileges of employment."

⁸¹ *City of Los Angeles v. Manhart*, 435 U.S. 702, 710-11 (1978) (pension plan); *Chastang v. Flynn & Enrich Co.*, 541 F.2d 1040, 1043 (4th Cir. 1976) (profit sharing and retirement plan); *Peters v. Missouri-Pac. R.R.*, 483 F.2d 490, 495-98 (5th Cir.) (pension plan), *cert. denied*, 414 U.S.

insurance programs were considered covered.⁸² The Eleventh Circuit Court of Appeals, in *Keenan v. American Cast Iron Pipe Co.*, characterized credit given employees without reprimands on their records as a "fringe benefit."⁸³ The *Keenan* court, to determine whether the credit program fell within its ambit, quoted from the EEOC guidelines defining that term: "Fringe benefits,' as used herein, includes medical, hospital, accident, life insurance and retirement benefits; profit-sharing and bonus plans; leave; and other terms, conditions, and privileges of employment."⁸⁴ The court reasoned that this definition was expansive enough to include the employer's credit program.⁸⁵

All of these types of programs are essentially terms linked to compensation, whether they affect the amount an employee pays into an insurance or retirement plan or the amount an employee may ultimately take out. The United States District Court for the District of Maryland, in *Hubbard v. Rubbermaid, Inc.*,⁸⁶ made this link explicit, stating that the terms of employment encompassed "all forms of monetary and nonmonetary compensation which are integrally related to [the employer's] wage structure."⁸⁷ As is obvious from a review of these "easy cases," if an employer's action can be linked with an employment practice specifically designated as proscribed under Title VII,⁸⁸ namely discriminatory hiring, firing and compensation, a court is much more likely to label the practice a "term, condition, or privilege" covered by Title VII.⁸⁹

Two cases involving situations in which law enforcement agencies required Spanish-speaking officers to speak Spanish on the job shed

1002 (1973); *Bartmess v. Drewrys U.S.A., Inc.*, 444 F.2d 1186, 1188 (7th Cir. 1971) (retirement plan).

⁸² See, e.g., *Newport News Shipbldg. & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682 (1983).

⁸³ 707 F.2d at 1277.

⁸⁴ *Id.* at 1278 (quoting 29 C.F.R. § 1604.9(a)).

⁸⁵ *Id.* at 1277-78. The particular regulation cited in *Keenan* was developed for sex discrimination cases. The *Keenan* court, therefore, was also expanding the use of this regulation by applying it to race discrimination, which it believed was in keeping with the broad nature of the terms. *Id.* at 1278.

⁸⁶ 436 F. Supp. 1184 (D. Md. 1977).

⁸⁷ *Id.* at 1193 n.11.

⁸⁸ The link to adverse employment actions has also resulted in the courts holding certain stereotyped attitudes actionable under Title VII as sex discrimination. See *Hopkins*, 109 S. Ct. at 1793; Radford, *supra* note 20, at 516-17 & n.200, and cases cited therein.

⁸⁹ The term "condition" of employment is not only used in the Title VII context. It is also used under the National Labor Relations Act to connote areas of the public sector employment relationship that are subject to collective bargaining. 5 U.S.C. § 7103(a)(14) (1994). In that context, courts have held that "[t]he record must establish that there is a direct link between the proposal and the work situation or employment relationship of the bargaining unit employees"

light on how linking reindeer games to another employment action might be useful in attacking reindeer games and their effects. In *Perez v. Federal Bureau of Investigation*⁹⁰ and *Cota v. Tucson Police Department*,⁹¹ two district courts confronted policies requiring Spanish speakers to use this skill on the job. In *Perez*, the plaintiffs were successful, while in *Cota*, the plaintiffs were not successful. The two cases can be distinguished: in *Perez*, the plaintiffs were able to link their Spanish-speaking job duties to denial of promotions and benefits, whereas the plaintiffs in *Cota* were not.⁹²

The plaintiffs in *Cota* tried to link the Spanish-speaking requirement to compensation, arguing that they experienced more stress on the job due to speaking Spanish and also had to do more work for which they did not get credit.⁹³ Thus, the Spanish-speaking policy required that they receive greater compensation.⁹⁴ The United States District Court for the District of Arizona held that the policy did not "detrimentally affect the Spanish speakers, nor does it result in extra work. Rather, it results in *different* work. Moreover, the Court finds that such use is incidental to the job and is not a major component thereof."⁹⁵ The link to compensation was tenuous at best. The ability of an employee to link the particular employment practice to a "term, condition, or privilege of employment" clearly recognized under Title VII appears to be the key to a plaintiff's success in challenging more novel "terms, conditions, or privileges of employment."

By way of contrast, in *Perez*, the plaintiffs attacked the Federal Bureau of Investigation's ("FBI") practice of assigning arduous wiretap duties to Hispanic agents because of their Spanish-speaking skills. The

in order for a practice to be considered a condition of employment subject to collective bargaining. *American Fed'n of Gov't Employees Local 2094 v. Federal Labor Relations Auth.*, 833 F.2d 1037, 1043 (D.C. Cir. 1987). The court distinguished private sector labor law, "which has permitted negotiations over a variety of proposals for employees engaging in nonduty activity during nonduty hours." *Id.* at 1045. In addition, private sector employers are prohibited from discriminating against employees in "any term or condition of employment [so as] to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3) (1994). Employers are also required to bargain collectively regarding "terms and conditions of employment." *Id.* § 158(d). The terms in this context have been used to combat a wide array of employer conduct. *See, e.g., Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 894 (1984) (addressing conduct leading to intolerable working conditions); *N.L.R.B. v. Bestway Trucking, Inc.*, 22 F.3d 177, 180-81 (7th Cir. 1994) (addressing discrimination in work assignments).

⁹⁰ 707 F. Supp. 891 (W.D. Tex. 1988).

⁹¹ 783 F. Supp. 458 (D. Ariz. 1992).

⁹² *Id.* at 463; *Perez*, 707 F. Supp. at 908.

⁹³ 783 F. Supp. at 463.

⁹⁴ *Id.*

⁹⁵ *Id.*

United States District Court for the Western District of Texas concluded that the "evidence demonstrated that the practice of the [FBI] is to place the weight of deplored assignments on Hispanic Special Agents. Whereas Anglos are relieved from the requirement of using their language skills and focus on other skills which would enhance promotional prospects, the same opportunity is denied Hispanic agents."⁹⁶ In addition, the court believed that the practice affected the "conditions" of employment because the wiretap duties associated with Spanish-speaking assignments required longer shifts, were involuntary, often took agents off assigned cases, and resulted in periods away from home and family.⁹⁷

The court linked these "conditions of employment" to promotional opportunities, stating that the language skill "becomes significant in relation to the duty assignments made to Spanish-speaking Special Agents and the result of these assignments on promotional opportunities."⁹⁸ Specifically, because the Hispanic officers' cases were reassigned, they did not have the opportunity to close cases and develop informant contacts. This put them behind when it came time for promotions.⁹⁹ While the agents did have letters of appreciation placed in their employment files, the court held that this was not enough:

Testimony throughout trial demonstrated that small differences and nuances in subjective evaluations have great significance for the true import of the evaluation. Discriminatory animus is elusive; Title VII analysis focuses on the effects of prohibited discrimination and permits this Court, upon consideration of the entire record, to infer the cause.¹⁰⁰

The court noted another result of the Spanish-speaking assignments: "Hispanic agents are not exposed to the managers who make the subjective evaluations and determinations for career advancements."¹⁰¹ In addition, although Hispanic agents could technically say "no" to such assignments, such a refusal would reflect badly on

⁹⁶ *Perez*, 707 F. Supp. at 908. Another distinction between the two cases is that in *Perez*, the FBI also trained English speakers to speak Spanish, yet did not give them the same jobs as those who were Hispanic Spanish speakers. *Id.* at 909. In *Cota*, on the other hand, the requirement was only imposed on those who came to the police department speaking Spanish. 783 F. Supp. at 461.

⁹⁷ *Perez*, 707 F. Supp. at 908.

⁹⁸ *Id.*

⁹⁹ *Id.* at 910.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

an agent and "transfers into evaluation whereby the agent is judged 'not aggressive,' or 'not dedicated.'" ¹⁰²

The Spanish-speaking requirement had a similar effect to that of reindeer games.¹⁰³ It prevented Hispanic employees from obtaining experience necessary for promotional opportunities. It limited their exposure to "the boss"—the supervisor who made promotion decisions. In addition, the court recognized the effects of "small differences and nuances in subjective evaluations" on promotional opportunities. Finally the court noted the implications of saying "no." Refusal results in the employer's questioning of the employee's dedication.

Reindeer games have a similar effect. Like the Spanish-speaking requirement, they can limit less favored employees' opportunities for exposure to the boss. Because of the frequently subjective nature of upper level management decisions, what might be termed subtle differences between employees brought about by exposure to the boss through reindeer games will have an effect on promotional opportunities. In addition, the *Perez* court noted the implications of saying "no" to the boss. "No" often resulted in the employer's considering the employee not to be a team player. Based on the above analysis, the plaintiffs effectively linked the FBI's bilingual policy with promotions.

The linkage requirement is consistent with the reasoning of courts that have held that a variety of different employer activities do not violate Title VII. For example, the courts have held that differences in grooming requirements between men and women are not actionable.¹⁰⁴ Likewise, an employer's reputation for discrimination does not state a claim.¹⁰⁵ In addition, a variety of other differences in treatment based on race or sex have been attacked with limited success under Title VII. For example, in *O'Connor v. Peru State College*,¹⁰⁶ the plaintiff, a female college basketball coach, alleged she was assigned a heavier load of classes and outside duties than male coaches.¹⁰⁷ In addition,

¹⁰² *Perez*, 707 F. Supp. at 912.

¹⁰³ The *Perez* plaintiffs challenged the policies under both disparate treatment and disparate impact theories. *Id.* at 898. See *supra* note 55 and *infra* notes 183 & 252 for a discussion of the three primary modes of proof under Title VII. The court upheld the disparate treatment claim based on the Spanish speaking requirement. *Id.* at 909.

¹⁰⁴ *Willingham v. Macon Tel. Publ'g Co.*, 352 F. Supp. 1018, 1021 (M.D. Ga. 1972); *Boyce v. Safeway Stores, Inc.*, 351 F. Supp. 402, 403 (D.D.C. 1972); *Baker v. California Land Title Co.*, 349 F. Supp. 235, 237 (C.D. Cal. 1972); *Rafford v. Randle E. Ambulance Serv., Inc.*, 348 F. Supp. 316, 317 (S.D. Fla. 1972). But see *Aros v. McDonnell Douglas Corp.*, 348 F. Supp. 661, 664 (C.D. Cal. 1972).

¹⁰⁵ *EEOC v. Sheet Metal Workers Local 122*, 463 F. Supp. 388, 424-25 (D. Md. 1978).

¹⁰⁶ 781 F.2d 632 (8th Cir. 1986).

¹⁰⁷ *Id.* at 634.

she alleged a disparity in recruiting and that she had to report absences whereas males did not.¹⁰⁸ The Court of Appeals for the Eighth Circuit upheld the trial court's decision against the plaintiff, stating that her duties were not inconsistent with those of male coaches.¹⁰⁹ Blacklisting an employee has also been held lawful under Title VII.¹¹⁰ In all of these cases, the plaintiffs did not make the necessary "link" to hiring, firing or compensation.

C. *Application to Reindeer Games*

The implications for reindeer games in the linkage context is obvious. It is apparent from *Perez* that if an employer policy or action can be linked to more traditional terms, conditions or privileges of employment, then that reindeer game can be used to bolster a plaintiff's case.¹¹¹ In *Perez*, the Spanish-speaking requirement resulted in some effects similar to reindeer games: Spanish speakers suffered in employment opportunities (and specifically in promotions) from limited exposure to their supervisors. In addition, the court noted the effect of saying "no" to the boss: the employee would not be considered a "team player."

At least one court has made this link in the context of sex discrimination. In *Hubbard v. Rubbermaid, Inc.*,¹¹² the United States District Court for the District of Maryland discussed what is meant by "terms or conditions of employment" in a sex discrimination suit involving allegations of reindeer games. The plaintiff's complaint made several novel allegations, including, among other things, that all male salespersons were invited to a conference with their spouses, while the class

¹⁰⁸ *Id.* at 635.

¹⁰⁹ *Id.* at 635-36.

¹¹⁰ *Ferguson v. Mobil Oil Corp.*, 443 F. Supp. 1334, 1339 (S.D.N.Y. 1978).

¹¹¹ Several early cases held reindeer games actionable in the context of "across the board" class actions. In across the board cases, employees were permitted to attack virtually all employer actions that were discriminatory in nature. The Supreme Court significantly limited such lawsuits by requiring strict adherence to the class action requirements of Rule 23 of the Federal Rules of Civil Procedure ("Rule 2"). *General Tel. Co. v. Falcon*, 457 U.S. 147, 156 (1982) (holding that individual litigant seeking to initiate Title VII class action must meet all requirements of Rule 23). Prior to that, reindeer games allegations often arose in such cases. *See, e.g.*, *Walker v. World Tire Corp.*, 563 F.2d 918, 920 (8th Cir. 1977) (allegations included that company bought birthday cakes for white employees, but not for African-American employees). For more on across the board cases, see *Griffin v. Dugger*, 823 F.2d 1476, 1484-87 (11th Cir. 1987) (going through history of such litigation); Howard M. Downs, *Federal Class Actions: Due Process by Adequacy of Representation (Identity of Claims) and the Impact of General Telephone v. Falcon*, 54 *OHIO ST. L.J.* 607 (1993); Marcy O'Brien, Comment, *Jenson v. Eveleth Taconite Co.: A Legal Standard for Class Action Sexual Harassment*, 19 *J. CORP. L.* 417, 421-24 (1994).

¹¹² 436 F. Supp. 1184 (D. Md. 1977).

of female salespersons were not.¹¹³ In concluding that not all employer actions constitute "terms and conditions of employment," the court reasoned that:

[the term is] an amorphous phrase which takes on significance only when placed in the context of a specific charge of discrimination. Under the facts of this case, the expression means all forms of monetary and nonmonetary compensation which are integrally related to Rubbermaid's wage structure. These would include, for example, the type of automobile assigned to employees, limitations on familial travel at company expense, or other nonenumerative fringe benefits such as the eligibility for bonus and incentive plans. While "terms and conditions of employment" is a catch-all provision, under no circumstances in this case could it be said to include the range of employment policies plaintiff seeks to litigate.¹¹⁴

Other courts have used reindeer games as evidence of discrimination in the compensation context. In *EEOC v. Shelby County Government*,¹¹⁵ the plaintiffs used reindeer game allegations to bolster a pay discrimination case.¹¹⁶ The plaintiffs alleged that male employees of the county clerk's office participated in the local bar picnic and golf tournament, whereas female employees were not invited.¹¹⁷ Male employees also were permitted to leave work early to referee sports events. Finally, the boss, Mr. Blackwell, took male employees to lunch but did not invite female employees.¹¹⁸ The court attributed this conduct to "thoughtless preservation of outdated custom, rather than to a conscious consideration of sex in determining conditions of employment."¹¹⁹ The court reasoned that "[b]ecause women have not traditionally refereed sports events, men who left early did receive a benefit that female employees did not have. Yet it can hardly be said that any female employee was denied an opportunity to leave early to referee a sports event."¹²⁰ Using these practices to "lend credence" to allegations of wage discrimination,¹²¹ the court concluded:

¹¹³ *Id.* at 1187 n.2.

¹¹⁴ *Id.* at 1193 n.11.

¹¹⁵ 707 F. Supp. 969 (W.D. Tenn. 1988).

¹¹⁶ Plaintiffs also challenged wage disparities. *Id.* at 979.

¹¹⁷ *Id.* at 985.

¹¹⁸ *Id.* at 980. There was also testimony that men received raises when they married or had a child, which reflects stereotyped notions of who is the primary wage-earner in a family. *Id.*

¹¹⁹ *Id.* at 985.

¹²⁰ *Shelby*, 707 F. Supp. at 985-86.

¹²¹ *Id.* at 979.

[The] evidence taken together—statistics of salaries and raise histories, the background and performance of employees, Blackwell's own testimony about the reasons for his actions and, *to a lesser extent*, proof about differing treatment of male and female employees—strongly supports a conclusion that the existing pay disparities would not have occurred in the absence of consideration of sex.¹²²

The subjective nature of Blackwell's determinations was helpful to plaintiffs' case, with the court admitting that the subjective nature of the decision making process allowed Blackwell's decision to become infected with sex discriminatory criteria.¹²³

The logic of *Hubbard* and *Shelby* can be applied to reindeer games that are employer-sponsored. For example, a round of golf or lunch for which the employer picks up the tab (no doubt under the supposition that business discussions will take place) would affect compensation under the *Hubbard* court's analysis and therefore be actionable under Title VII. This would also apply to client entertaining opportunities. For example, a supervisor's inclusion of subordinates in taking a client to a play or some other social activity, which is paid for by the employer, should implicate Title VII. The employer can receive a tax deduction for such entertaining expenses, making them clearly "part and parcel of the employment relationship."¹²⁴ These forms of reindeer games can be linked to compensation: an employee receives a good lunch, a day of golf, or an evening at the opera courtesy of his employer. In addition, the employer often receives a benefit. For example, increased sales from that client are attributable, in part, to the social contact provided by the reindeer games.

Beyond mere compensation terms, however, the logic of *Perez* can be extended to promotion situations. Certainly if a female employee can show that she was not promoted while a similarly situated male, who happened to play golf with the boss every Saturday, was promoted, the reindeer game would constitute admissible evidence that could be used to bolster the female employee's case of sex discrimination. Patterns of such discrimination—e.g., a male boss takes only male employees to lunch—could support a case of systemic disparate treatment or could be used to support an individual disparate treatment case under

¹²² *Id.* at 986 (emphasis added).

¹²³ *Id.*

¹²⁴ *Hishon v. King & Spaulding*, 467 U.S. 69, 75 (1984); see I.R.C. § 274(a) (1988) (allowing tax deduction to employer for entertainment activities directly related to or associated with active conduct of employer's trade or business).

appropriate circumstances. The more difficult problem arises when the reindeer game is the only act of discrimination. Holding it actionable under circumstances in which there is no obvious link to another adverse employment action becomes a much trickier business.

D. *Reindeer Games that Are Actionable Without the Link*

While the *Shelby* court did not come right out and say it, it is clear that it did not believe reindeer games to be all that important and not likely, in and of themselves, to be actionable.¹²⁵ Instead, the court found them useful in showing a general predilection on the part of the employer to discriminate. The United States District Court for the District of Puerto Rico, in *Selgas v. American Airlines, Inc.*,¹²⁶ unlike the *Shelby* court, made a firm statement about its position against such activities. In *Selgas*, the plaintiff challenged a variety of employer practices, including her exclusion from company events where male employees were included.¹²⁷ Some of these events included entertainment functions for customers.¹²⁸ This is a particularly heinous form of reindeer game, as it cuts off the employee from the real source of influence in a company: its customers. The court used this as evidence of discrimination, stating that the jury could have held that this was direct evidence of discrimination. Rather than being merely circumstantial evidence that bolsters a discrimination case, this reindeer game could prove the case in and of itself.¹²⁹

¹²⁵ EEOC v. Shelby County Gov't, 707 F. Supp. 969, 986 (W.D. Tenn. 1988); see also Langston v. Illinois Bell Tel. Co., 1990 WL 129567 (N.D. Ill. 1990). Langston claimed age discrimination under the ADEA as well as national origin discrimination under Title VII. Langston argued that the following discriminatory acts provided sufficient evidence of discrimination to withstand a summary judgment motion: (1) she was not given training materials; (2) her work was reassigned to younger employees; and (3) none of the managers went out to lunch with her, but they did dine with others at her same level. *Id.* at *6-7. Despite plaintiff's linking the reindeer game—not dining with managers—with other more traditional “terms, conditions, or privileges of employment,” the court concluded that “[n]one of this evidence, if believed, is enough to support a finding of discrimination on the basis of age or national origin.” *Id.* at *7. On the specific lunch allegations, the court explained “passing on the question whether this involves the terms and conditions of her employment, Langston has not pointed to any facts suggesting that this had anything to do with her age or national origin.” *Id.* at *8. On this basis, the court granted defendant's motion for summary judgment. *Id.*

¹²⁶ 858 F. Supp. 316 (D.P.R. 1994).

¹²⁷ *Id.* at 322. It is not entirely clear what was the exact nature of these events from the facts given in the case, but it appears that they did include client entertainment. *Id.* at 322 n.8. Plaintiff also challenged discrimination in salary and in expense account. *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* There was also other evidence to lend credence to the direct evidence case. “For example, there was testimony that during a company function, Kerr's [plaintiff's] supervisor told

Aside from *Selgas*, there are few cases suggesting that reindeer games, in and of themselves, are actionable as a term, condition or privilege of employment. In *Marcing v. Fluor Daniel, Inc.*,¹³⁰ the plaintiff attacked a variety of distinctions made between her and male employees, among them being: (1) she was required to obtain a superior's signature authorizing purchases; (2) she was removed from a distribution list and excluded from procurement staff meetings; (3) she was required to keep a daily log in addition to her usual time sheets;¹³¹ and (4) she was given typing duties that were not given to male employees.¹³² The United State District Court for the Northern District of Illinois held that the testimony of plaintiff's superiors "manifested their unexpressed but actual view of [plaintiff] as inferior because she was a woman who had worked her way up from a clerical position: she was not 'one of the boys' (either literally or figuratively)."¹³³ *Marcing* is one of the few cases recognizing that "subtle" distinctions can make a difference and, therefore, are actionable under Title VII. As the court explained, "'adverse employment action' is not limited solely to loss or reduction of pay or monetary benefits, but can also encompass other forms of adversity, including subtle distinctions in the terms and conditions of her employment."¹³⁴

As a general matter, the majority of these cases more obviously implicate terms, conditions or privileges of employment. The court's reasoning in *Selgas*, however, shows some promise for the use of Title VII to combat distinctions based on reindeer games.

III. REINDEER GAMES AS HARASSMENT

A. *The Development of Harassment Law*

While reindeer games should constitute evidence of discrimination in "linkage" cases, simply linking reindeer games to the denial of other terms, conditions, or privileges of employment does not help employees who cannot yet make that link, but still feel left out, isolated,

her that she should go home and take care of her children and that one of the American [defendant] managers from Miami stated that certain functions where American's customers were entertained were 'male' events." *Id.*

¹³⁰ 826 F. Supp. 1128 (N.D. Ill. 1993).

¹³¹ *Id.* at 1134.

¹³² *Id.* at 1135. Plaintiff also argued that there were distinctions made in assignments as well as in salaries and benefits. *Id.* at 1134-35.

¹³³ *Id.* at 1135.

¹³⁴ *Id.* at 1140; *see also* Taub, *supra* note 5, at 418 (arguing that stereotypes should constitute a per se violation of Title VII).

and doomed to failure because of their "less favored" status. Without the necessary linkage to another traditionally actionable term, condition, or privilege of employment, a reindeer game will likely not be held actionable without some sort of extension of Title VII to cover it. The obvious place to turn is to the area of expansion that has spawned the most notable discussion of what constitutes a term, condition, or privilege of employment: cases involving racial and sexual harassment. In an effort to expand Title VII jurisprudence to incorporate harassment, several courts necessarily engaged in a discussion of what constituted a term, condition, or privilege of employment for purposes of Title VII. Based on the reasoning of these cases, which were also relied upon by the court in *Meritor* in recognizing sexual harassment as actionable, reindeer games should be actionable as a form of harassment in appropriate cases.¹³⁵

In *Rogers v. EEOC*,¹³⁶ Judge Goldberg¹³⁷ of the United States Court of Appeals for the Fifth Circuit authored an opinion that became the basis for expanding Title VII into the harassment area for many other jurisdictions.¹³⁸ In that opinion, Judge Goldberg considered whether an employer's policy of segregating optometry patients based on their ethnic origins constituted a hostile environment for employees and therefore violated Title VII.¹³⁹ The lower court had determined that this did not constitute an unlawful employment practice within the meaning of Title VII.¹⁴⁰ In concluding that the district court was wrong, Judge Goldberg noted "that the relationship between an employee and his working environment is of such significance as to be entitled to

¹³⁵ The Civil Rights Act of 1991 greatly expanded the relief available to a plaintiff in a sexual harassment case. The Act makes compensatory and punitive damages available to the victims of sexual harassment. 42 U.S.C. § 1981a(a) (1994); see I ALBA CONTE, *SEXUAL HARASSMENT IN THE WORKPLACE: LAW AND PRACTICE* § 2.21 (2d ed. 1994); Barry S. Roberts & Richard A. Mann, *Sexual Harassment in the Workplace: A Primer*, 29 AKRON L. REV. 269, 273-74 (1996) (noting increase in relief under 1991 Act).

¹³⁶ 454 F.2d 234 (5th Cir.), *cert. denied*, 406 U.S. 957 (1971).

¹³⁷ Only one other circuit judge concurred in the result. *Id.*

¹³⁸ See, e.g., *Keenan v. American Cast Iron Pipe Co.*, 707 F.2d 1274, 1276 (11th Cir. 1983); *Bundy v. Jackson*, 641 F.2d 934, 944 (D.C. Cir. 1981); *Firefighters Inst. for Racial Equality v. City of St. Louis*, 549 F.2d 506, 514-15 (8th Cir. 1977); *Haskins v. Owens-Corning Fiberglass Corp.*, 811 F. Supp. 534, 537 (D. Or. 1992); *Minority Police Officers Ass'n v. City of South Bend*, 617 F. Supp. 1330, 1352 (N.D. Ind. 1985); see also *Oppenheimer*, *supra* note 62, at 101 (noting that *Rogers* was "the first reported appellate decision to address on-the-job harassment").

¹³⁹ *Rogers*, 454 F.2d at 237. There was some debate as to whether the claimant was complaining about this practice or the practice of giving plaintiff patients of her own ethnic background, in this case Hispanic. Justice Goldbold interpreted the plaintiff's claim in this latter manner in his concurring decision. See *id.* at 241.

¹⁴⁰ *Id.* at 237 (quoting *Rogers v. EEOC*, 316 F. Supp. 422, 425 (E.D. Tex. 1970)).

statutory protection.”¹⁴¹ Judge Goldberg interpreted the “term, condition, or privilege” language to evince a broad congressional approach to prohibited conduct:

This language evinces a Congressional intention to define discrimination in the broadest possible terms. Congress chose neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameter of such nefarious activities. Rather, it pursued the path of wisdom by being unconstructive, knowing that constant change is the order of our day and that the seemingly reasonable practices of the present can easily become the injustices of the morrow. Time was when employment discrimination tended to be viewed as a series of isolated and distinguishable events, manifesting itself, for example, in an employer’s practices of hiring, firing, and promoting. But today employment discrimination is a far more complex and pervasive phenomenon, as the nuances and subtleties of discriminatory employment practices are no longer confined to bread and butter issues. As wages and hours of employment take subordinate roles in management-labor relationships, the modern employee makes ever-increasing demands in the nature of intangible fringe benefits. Recognizing the importance of these benefits, we should neither ignore their need for protection nor blind ourselves to their potential misuse.¹⁴²

Judge Goldberg also explained that courts must give Title VII a liberal construction to effectuate Congress’s purpose in enacting the legislation: “to eliminate the inconvenience, unfairness and humiliation” of discrimination.¹⁴³ Because of the broad nature of this congressional mandate, he reasoned that both economic and psychological aspects of employment are covered by the terms.¹⁴⁴ Indeed, “the phrase ‘terms, conditions, or privileges of employment’ in Section 703 is an

¹⁴¹ *Id.* at 237–38.

¹⁴² *Id.* at 238.

¹⁴³ *Id.* Judge Goldberg discussed these goals in terms of ethnic discrimination because that was the type of discrimination with which he was confronted in the case. However, insofar as Title VII also applies to sex and religious discrimination, it would seem that such forms of discrimination would be accorded the same treatment. See *Bundy v. Jackson*, 641 F.2d 934, 944–45 (D.C. Cir. 1981) (relying on *Rogers* and essentially equating racial harassment with sexual harassment for purposes of analysis). But see *Hopkins v. Baltimore Gas & Elec. Co.*, 871 F. Supp. 822, 834 n.21 (D. Md. 1994) (stating that racial harassment is not a “proper analogy” for sexual harassment under Title VII).

¹⁴⁴ *Rogers*, 454 F.2d at 238.

expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination."¹⁴⁵ Based on *Griggs v. Duke Power Co.*,¹⁴⁶ he determined that because a lack of intent by the employer does not immunize an otherwise discriminatory employer practice, Title VII is concerned with the consequences and effects of the employer's practices—not simply the employer's motivations.¹⁴⁷ Under this reasoning, the employer's policy could violate Title VII, even though it was arguably directed only at patients and not at employees, because the policy could be construed as a "subtle scheme designed to create a working environment imbued with discrimination and directed ultimately at minority group employees."¹⁴⁸ The acceptance of non-economic or non-monetary "fringes" as actionable practices under Title VII has been upheld by the Supreme Court.¹⁴⁹

In *Henson v. Dundee*,¹⁵⁰ another case relied upon by the Supreme Court in *Meritor*,¹⁵¹ the Eleventh Circuit became the second circuit court to apply hostile environment law to harassment based on sex.¹⁵² Relying in part on Judge Goldberg's decision,¹⁵³ the court explained that there need not be a tangible job detriment in order for an employment practice to be actionable.¹⁵⁴ Equating sexual harassment with racial harassment, the court stated that "[a] pattern of sexual harassment inflicted upon an employee because of her sex is a pattern of behavior that inflicts disparate treatment upon a member of one sex

¹⁴⁵ *Id.*

¹⁴⁶ 401 U.S. 424 (1971). *Griggs* represents the Supreme Court's expansion of Title VII claims into disparate impact cases. Disparate impact requires no discriminatory intent on the part of the employer. Rather, the employer policy need only have a disproportionate impact based on a protected status.

¹⁴⁷ *Rogers*, 454 F.2d at 239.

¹⁴⁸ *Id.*

¹⁴⁹ *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367 (1993).

¹⁵⁰ 682 F.2d 897 (11th Cir. 1982).

¹⁵¹ See *Meritor*, 477 U.S. at 67.

¹⁵² *Henson*, 682 F.2d at 903–05. In *Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981), the United States Court of Appeals for the District of Columbia Circuit first extended hostile environment claims to discrimination based on sex, although the plaintiff's claim also contained a quid pro quo element. *Id.* at 938. Prior to *Bundy*, courts did hold quid pro quo harassment to be actionable. See, e.g., *Barnes v. Train*, 561 F.2d 983 (D.C. Cir. 1977); *Garber v. Saxon Bus. Prods., Inc.*, 552 F.2d 1032 (4th Cir. 1977) (per curiam).

¹⁵³ *Henson*, 682 F.2d at 901. The Eleventh Circuit was formerly part of the Fifth Circuit. Therefore, Judge Goldberg's decision, being in the Fifth Circuit, would have some impact on the Eleventh Circuit decision in *Henson*. *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1207 (11th Cir. 1981).

¹⁵⁴ *Henson*, 682 F.2d at 901.

with respect to terms, conditions, or privileges of employment."¹⁵⁵ The court followed *Rogers* in determining that an employee's psychological well-being is a term, condition or privilege of employment within the meaning of Title VII.¹⁵⁶ The court went on to explain that, in order to be actionable, this harassment must be "sufficiently pervasive so as to alter the conditions of employment and create an abusive working environment."¹⁵⁷

In *Keenan v. American Cast Iron Pipe Co.*,¹⁵⁸ the United States Court of Appeals for the Eleventh Circuit discussed what constitutes psychological harm that implicates a "term, condition, or privilege of employment" for purposes of Title VII. The court had to decide whether a garnishment policy whereby employees were reprimanded for the first and second garnishments of their salaries and were discharged for the third garnishment had a disparate impact based on race.¹⁵⁹ The issue arose as to whether such a garnishment practice could be considered a "term, condition, or privilege of employment" for purposes of Title VII.¹⁶⁰ In making this determination, the court reviewed both case law and EEOC guidelines interpreting the provision.¹⁶¹ Noting that Title VII "protects an employee's psychological as well as economic well-being," the court stated that the reprimands themselves may so affect the conditions of employment as to make them actionable under Title VII.¹⁶² As the court explained:

Because Title VII protects an employee's psychological as well as economic well-being, . . . and because it is not necessary for a protected employee to demonstrate a "tangible job detriment" . . . to prove a violation of Title VII, a reprimand that has a meaningful adverse effect on an employee's working conditions may be prohibited.¹⁶³

¹⁵⁵ *Id.* at 902.

¹⁵⁶ *Id.* at 904 (citing *Rogers*, 454 F.2d at 238).

¹⁵⁷ *Id.*

¹⁵⁸ 707 F.2d 1274 (11th Cir. 1983).

¹⁵⁹ *Id.* at 1275.

¹⁶⁰ *Id.* at 1276.

¹⁶¹ *Id.* at 1276-78. The courts have both ignored and relied upon the EEOC guidelines, depending on whether they supported the courts' position or not. See, e.g., *General Elec. Co. v. Gilbert*, 429 U.S. 125, 140-42 (1976) (level of deference given to EEOC guidelines depends on numerous factors); *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971) (EEOC guidelines entitled to great deference).

¹⁶² *Keenan*, 707 F.2d at 1277.

¹⁶³ *Id.*

In addition, the court linked the reprimands to the possible denial of credit, which it considered a term, condition, or privilege of employment because of that employer's offering an "extensive credit network" to its employees.¹⁶⁴ Therefore, the reprimand could constitute a denial of a "fringe benefit."¹⁶⁵

In *Meritor Savings Bank v. Vinson*, the United States Supreme Court adopted the reasoning of both Judge Goldberg and the *Henson* court in extending Title VII to hostile work environment claims of sexual harassment.¹⁶⁶ In *Meritor*, the Court explained that "[t]he phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment."¹⁶⁷ The Court relied on EEOC guidelines defining "sexual harassment" to include situations where "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."¹⁶⁸ The Court also relied upon *Rogers*, and quoted its expansive language regarding actionable conduct under Title VII.¹⁶⁹ It quoted the following relevant section from the Eleventh Circuit decision *Henson v. Dundee*:¹⁷⁰

Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.¹⁷¹

Based on *Rogers*, *Henson* and the EEOC guidelines, the Court concluded that non-economic sexual harassment in the form of a hostile work environment that is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment'" is actionable.¹⁷²

¹⁶⁴ *Id.* at 1277 & n.2.

¹⁶⁵ *Id.* at 1277.

¹⁶⁶ 477 U.S. 57 (1985).

¹⁶⁷ *Id.* at 64 (quoting *City of Los Angeles Dep't of Water and Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978) (quoting *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971))).

¹⁶⁸ *Id.* at 65 (quoting 29 C.F.R. § 1604.11(a)(3) (1996)).

¹⁶⁹ *Id.* at 65-66.

¹⁷⁰ 682 F.2d 897 (11th Cir. 1982).

¹⁷¹ *Meritor*, 477 U.S. at 67 (quoting *Henson*, 682 F.2d at 902).

¹⁷² *Id.*

The United States Supreme Court, in *Harris v. Forklift Systems, Inc.*,¹⁷³ reiterated this standard, explaining that it “takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury.”¹⁷⁴ Justice Ginsburg, in her concurrence, explained that the key issue in analyzing a hostile work environment claim “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.”¹⁷⁵ Since *Meritor*, many courts have echoed this language, stating that it is meant to sweep in a broad range of employment practices.¹⁷⁶ While the broad language of *Meritor* has been the law for some nine years now, its implications for expansion into the area of reindeer games have been examined by few courts.

B. Gender Discrimination and Hostile Work Environments

The classic sexual harassment hostile work environment case involves sexual innuendo or sexually explicit materials. Reindeer games do not suggest the same sort of sexually-oriented motive. In this regard, the courts and commentators have distinguished between hostile work environment cases that involved sexual innuendo and those that involved, what has been termed, “gender discrimination”—cases in which an employee is simply treated poorly because of her sex.¹⁷⁷ It is not clear, at first, whether hostile environment cases should be extended to the latter variety of cases: those in which the plaintiffs were subjected to mistreatment (though not of a sexually connotative nature) because of their sex.¹⁷⁸

The *Harris* court’s language addressing what constitutes actionable conduct is broad. Unlike most employment practices that are actionable under Title VII, hostile work environment harassment does not require a tangible harm. Instead, the key issue is “whether mem-

¹⁷³ 114 S. Ct. 367 (1993).

¹⁷⁴ *Id.* at 370.

¹⁷⁵ *Id.* at 372 (Ginsburg, J., concurring).

¹⁷⁶ See, e.g., *Garcia v. Spun Steak Co.*, 998 F.2d 1480, 1485–86 (9th Cir. 1993); *Marshall v. Nelson Elec.*, 766 F. Supp. 1018, 1038 (N.D. Okla. 1991).

¹⁷⁷ See, e.g., *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3d Cir. 1990); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1013–14 (8th Cir. 1988); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1415 (10th Cir. 1987); *Bell v. Crackin Good Bakers, Inc.*, 777 F.2d 1497, 1503 (11th Cir. 1985); *McKinney v. Dole*, 765 F.2d 1129, 1138–39 (D.C. Cir. 1985); *Billbrey v. Werts Novelty Co.*, 881 F. Supp. 370, 375 (S.D. Ind. 1994); see also Joshua F. Thorpe, *Gender-Based Harassment and the Hostile Work Environment*, 1990 DUKE L.J. 1361, 1361–62 (1990).

¹⁷⁸ See Thorpe, *supra* note 177, at 1364–65 (arguing in favor of liability in such cases).

bers of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."¹⁷⁹

Based in part on this language, the trend in the courts is to hold that employer conduct need not have sexual overtones to be actionable under Title VII. Instead, for example, "conduct of a nonsexual nature that ridicules women or treats them as inferior can constitute prohibited sexual harassment."¹⁸⁰ As the Court of Appeals for the District of Columbia Circuit, in *McKinney v. Dole*,¹⁸¹ explained in one of the earliest decisions to make the distinction between conduct involving sexual overtones and other sexually harassing conduct:

We have never held that sexual harassment or other unequal treatment of an employee or group of employees that occurs because of the sex of the employee must, to be illegal under Title VII, take the form of sexual advances or of other incidents with clearly sexual overtones. And we decline to do so now. Rather, we hold that any harassment or otherwise unequal treatment of an employee or group of employees that would not occur but for the sex of the employee or employees may, if sufficiently patterned or pervasive, comprise an illegal condition of employment under Title VII.¹⁸²

While the court in *McKinney* discussed conduct that was of a violent nature (the plaintiff's supervisor had grabbed and twisted her arm), the logic used by the court applies equally to reindeer games. Reindeer games are a source of unequal treatment of an employee, and sometimes of whole groups of employees, that would not occur but for the sex of the employee. It seems clear that the reasoning of this case, as well as other cases recognizing conduct that is not sexual in nature as harassing,¹⁸³ supports holding reindeer games actionable as harassment if such games are sufficiently patterned or pervasive. For

¹⁷⁹ *Harris*, 114 S. Ct. at 372 (Ginsburg, J., concurring).

¹⁸⁰ *Cronin v. United Serv. Stations, Inc.*, 809 F. Supp. 922, 929 (M.D. Ala. 1992); see also *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1326 (8th Cir. 1994); *Kopp v. Samaritan Health Sys., Inc.*, 13 F.3d 264, 269 (8th Cir. 1993); *Andreus*, 895 F.2d at 1485; *Hall*, 842 F.2d at 1014; *Hicks*, 833 F.2d at 1415; *McKinney*, 765 F.2d at 1138-39 & nn.20-21; *Bilbrey*, 881 F. Supp. at 375; see also *Thorpe*, *supra* note 177, at 1364. At the time that article was written, there was some debate regarding whether this type of harassment was actionable as gender discrimination. *Thorpe*, *supra* note 177, at 1364-65. However, since then, the consensus among courts is that such discrimination, even though lacking in sexual overtones, is actionable. See 58 Fed. Reg. 51,267 n.2 (1993) (to be codified at 29 C.F.R. pt. 1,609) (proposed Oct. 1, 1993).

¹⁸¹ 765 F.2d 1129 (D.C. Cir. 1985).

¹⁸² *Id.* at 1138 (footnote omitted).

¹⁸³ See *supra* note 177 and accompanying text.

example, if they occur on a frequent basis—e.g., the boss takes all the men out for lunch on Fridays but leaves all the women behind—the reindeer games should be actionable as harassment. In addition, if the harassment, although only occurring once, is sufficiently severe, it likewise would be actionable.

One recent case made use of reindeer games in just such a context. In *Campbell v. Florida Steel Corp.*, the Supreme Court of Tennessee decided whether “cold-shoulder” treatment that is not overtly based on race or sex is actionable as harassment under the Tennessee Human Rights Act and/or Title VII.¹⁸⁴ The plaintiff, Brenda Campbell, an African-American female, complained to her employer of both racial and sexual harassment on the job.¹⁸⁵ Her employer, Florida Steel, took measures that ended the harassment. However, that did not stop Campbell’s fellow employees from giving her the “cold-shoulder treatment”¹⁸⁶ as a result of her complaints. Campbell alleged that “her fellow employees would ignore her completely, shun her, and prevent her from sitting down in the lunch and break areas.”¹⁸⁷ Campbell informed her supervisor of this conduct, although she would not name the particular employees involved.¹⁸⁸ Two weeks after the initial harassment, Campbell resigned.¹⁸⁹

The trial court reasoned that this cold shoulder treatment resulted in Campbell’s constructive discharge.¹⁹⁰ The district court reversed, holding that neither law “require[d] employers ‘to ensure a pleasant social environment.’”¹⁹¹ The district court reasoned that because the cold-shoulder treatment was not related to race or sex, Florida Steel was under no obligation to eliminate it.¹⁹² The Court of Appeals reversed on this issue. The court held that conduct need not be “sexual in nature” to constitute sexual harassment.¹⁹³ However, it still held against Campbell. It reasoned that Florida Steel did all it could to eliminate the hostile environment, given that Campbell refused to

¹⁸⁴ *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26 (Tenn. 1996). The Court used the same standard to assess the claim under both acts. *Id.* at 31.

¹⁸⁵ *Id.* at 28.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at 29.

¹⁸⁸ *Id.* at 30. She also alleged that co-workers made comments such as “shh, here comes the snitch” as she approached. Because she did not inform her supervisor of such treatment, the trial court held that Florida Steel had no knowledge of such actions by her co-workers. *Id.*

¹⁸⁹ *Campbell*, 919 S.W.2d at 30.

¹⁹⁰ *Id.* at 28.

¹⁹¹ *Id.* at 30.

¹⁹² *Id.*

¹⁹³ *Id.* at 32.

identify the harassers.¹⁹⁴ While Campbell ultimately lost because she would not name her harassers, this case suggests that co-worker shunning could form a basis for a sexual harassment claim even though it did not involve "sexual" conduct.

C. *Application to Reindeer Games*

Harassment law is useful in making reindeer games that are not easily linked with the usual terms, conditions, or privileges of employment (i.e., compensation and promotion) actionable. Further, it can be used to attack co-worker discrimination. While the paradigm case of reindeer games involves supervisor actions, reindeer games have a significant psychological effect when an employee is singled out for exclusion by co-workers because of, for example, her sex.¹⁹⁵ While few courts have addressed this type of harassment in the co-worker context, those that have done so have opened up the possibility for expansion of Title VII into this form of reindeer game.

Once again, a case involving bilingual workers sheds light on how harassment might apply to reindeer games. In *Garcia v. Spun Steak Co.*, bilingual workers were required to speak English on the job.¹⁹⁶ Proceeding under a disparate impact model,¹⁹⁷ plaintiffs alleged that the ability to make small talk on the job was a privilege of employment, the denial of which was actionable under Title VII based on three arguments: (1) the employer's policy denied them the ability to express their cultural heritage on the job; (2) it denied them a privilege of employment enjoyed by monolingual speakers of English; and (3) it created an atmosphere of inferiority, isolation and intimidation.¹⁹⁸ The challenge to the English-only policy definitely implicates, although not

¹⁹⁴ *Campbell*, 919 S.W.2d at 33. The Court did note that Campbell was faced with a "Hobson's choice—identify the offenders, be labeled a snitch and suffer the consequences, or refuse to identify them, making it impossible for the company to alleviate the problem, and continue to suffer." *Id.* Unfortunately, the Court determined that Campbell should suffer the brunt of this choice—not her employer.

¹⁹⁵ This could also be used in a racial harassment context.

¹⁹⁶ 998 F.2d 1480, 1483 (9th Cir. 1993).

¹⁹⁷ There are three general types of proof recognized under Title VII: (1) individual disparate treatment; (2) systemic disparate treatment; and (3) disparate impact. First recognized by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), disparate impact is different from the other two in that it requires no intent to discriminate on the part of the employer in order for the employer to be held liable for its actions. Instead, the plaintiff need only show that the employer's actions have a disparate impact based on one of the criteria protected under Title VII. While disparate impact is easiest to apply to objective employer criteria, e.g., tests, degree requirements, etc., the Supreme Court has held that it applies to subjective employer practices as well. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 990-91 (1988).

¹⁹⁸ *Garcia*, 998 F.2d at 1486-87.

directly, harassment law concerned, as the plaintiffs were, with an atmosphere of inferiority, isolation and intimidation.

While, in *Garcia*, the United States Court of Appeals for the Eleventh Circuit court noted the broad nature of the "terms, conditions, or privileges of employment" falling within Title VII's protection, it held that the monolingual policy of the employer in that case was not actionable. In doing so, the court reasoned that "[t]here is no disparate impact' with respect to a privilege of employment 'if the rule is one that the affected employee can readily observe and nonobservance is a matter of individual preference.'"¹⁹⁹ In addition, the court did not believe the policy had a significant enough impact to be actionable under Title VII because bilingual speakers were still free to converse in English on the job.²⁰⁰ Because "Title VII protects against only those policies that have a *significant* impact," the English-only policy did not affect a "term, condition, or privilege of employment."²⁰¹ The court likewise held that the English-only policy did not create an abusive atmosphere that would be actionable under the reasoning of *Meritor v. Vinson*.²⁰² Nonetheless,

[The court did] not foreclose the prospect that in some circumstances English-only rules can exacerbate existing tensions, or, when combined with other discriminatory behavior, contribute to the overall environment of discrimination. Likewise, we can envision a case in which such rules are enforced in such a draconian manner that the enforcement itself amounts to harassment. In evaluating such a claim, however, a court must look to the totality of the circumstances in the particular factual context in which the claim arises.²⁰³

While the *Garcia* court did not find the English-only policy actionable as harassment, it left the door open for a harassment claim under the right fact pattern.

An example of what might constitute the right fact pattern for a harassment claim has been suggested in other contexts. In *Firefighters*

¹⁹⁹ *Id.* at 1487 (quoting *Garcia v. Gloor*, 618 F.2d 264, 270 (5th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981)).

²⁰⁰ *Id.* at 1488. The court explained that one worker who spoke only Spanish was not bothered by the English-only policy. *Id.*

²⁰¹ *Id.*

²⁰² *Id.* at 1489.

²⁰³ *Garcia*, 998 F.2d at 1489. The court also rejected the EEOC guideline that provided that such policies were actionable. *Id.*

Institute for Racial Equality v. City of St. Louis,²⁰⁴ the United States Court of Appeals for the Eighth Circuit considered whether the informal exclusion of African-American firefighters from "supper clubs" created by the firefighters themselves could be considered a term, condition, or privilege of employment covered by Title VII. These clubs were not organized or regulated by the fire department.²⁰⁵ In spite of this, the court still held that discrimination in club membership could be actionable under Title VII. The trial court had concluded that, although the exclusion of African-Americans was offensive, because no fire department order promoted the discrimination, it was not actionable.²⁰⁶ Quoting from *Rogers*, the court relied on Judge Goldberg's interpretation of Title VII as including employment conditions that affect an employee's psychological well-being in ordering the district court to supervise the fire department's promulgation of regulations that would eliminate supper club segregation.²⁰⁷ The court did note that the city provided the cooking facilities and that city officials were aware of the segregated eating arrangements.²⁰⁸ However, it is unclear what role this relationship to the city played in the court's opinion.

Likewise, in *Berkman v. City of New York*,²⁰⁹ before the United States District Court for the Eastern District of New York, a group of women firefighters also challenged exclusion from firehouse communal activities.²¹⁰ The plaintiffs were given the "silent treatment," whereby their fellow firefighters refused to answer their questions about the job, refused to dine with them and refused to discuss each others' performances on the job.²¹¹ They challenged these actions in the context of retaliation, as both named plaintiffs were allegedly terminated in retaliation for complaints regarding sexism on the job. They successfully used the reindeer games as evidence of that retaliation.²¹²

In a reported decision by the EEOC's Office of Federal Operations,²¹³ the EEOC held a form of reindeer games not actionable as

²⁰⁴ 549 F.2d 506 (8th Cir. 1977).

²⁰⁵ *Id.* at 514.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 515.

²⁰⁸ *Id.*

²⁰⁹ 580 F. Supp. 226 (E.D.N.Y. 1983).

²¹⁰ *Id.* at 232.

²¹¹ *Id.* at 239 n.16.

²¹² The named plaintiffs also complained of sexually harassing incidents, including crude graffiti, sexual comments, and sexually-oriented pranks. *Id.* at 231.

²¹³ The Office of Federal Operations, on behalf of the EEOC, reviews allegations of discrimination within the federal government. 29 C.F.R. §§ 1614.401-405.

harassment.²¹⁴ The claimant alleged, among other things, that her supervisor failed to engage her in conversation based on her race (white), color (white), religion (Catholic) and sex (female).²¹⁵ In addition to this allegation, the claimant stated that she was denied overtime, denied annual leave, and was not permitted to eat in the same places as other co-workers.²¹⁶ The reindeer games allegations were limited to one incident: on one day in particular, the claimant's supervisor and a co-worker engaged in conversation, while the supervisor did not do the same with the claimant.²¹⁷ The EEOC considered this incident along with the claimant's allegation that on several dates she was forced to work in what she termed "unhealthy working conditions" (near an employee with poor personal hygiene). The EEOC stated that for purposes of the regulations applicable to public employees, the term "aggrieved employee" was one "who suffers a present harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy."²¹⁸ The court emphasized that the claimant had to show "'direct, personal deprivation at the hands of the employer,' that is, a present and unresolved harm or loss affecting a term, condition or privilege of his/her employment."²¹⁹ The claimant had not shown how she was harmed by these incidents.²²⁰

The claimant, apparently in an effort to get around this "harm" requirement, argued that these allegations constituted actionable harassment.²²¹ The EEOC considered the conversation incident as well as the claimant's exposure to unhealthy working conditions as potential instances of harassment.²²² Consistent with *Meritor v. Vinson*, the EEOC explained that the harassment must be sufficiently severe or pervasive to create a hostile or abusive working environment.²²³

This environment is judged by both a subjective and objective standard. It must be hostile or abusive to both the victim herself as well as to a reasonable person.²²⁴ In this regard, the EEOC noted that "unless the conduct is very severe, a single incident or group of isolated

²¹⁴ *Riley v. Runyon*, No. 01943960, 1995 WL 406074 (EEOC July 3, 1995).

²¹⁵ *Id.* at *1.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.* at *2 (citing *Diaz v. Dep't of the Air Force*, EEOC Request No. 05931049 (April 21, 1994)).

²¹⁹ *Riley*, 1995 WL 406074, at *2 (quoting *Diaz*, EEOC Request No. 05931049).

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ *Riley*, 1995 WL 406074, at *2.

incidents will not be regarded as discriminatory harassment."²²⁵ The EEOC found that the claimant had not alleged sufficient facts to constitute a discriminatory working environment under these standards.²²⁶ In this regard, the EEOC held that the overtime and leave allegations were "distinct" from the instances of alleged harassment.²²⁷ Standing alone, the incidents involving conversations and lunches were "isolated incidents which are not sufficiently severe so as to be regarded as discriminatory harassment."²²⁸

While these cases do not show a distinct fact pattern for holding reindeer games actionable, they do give some indication of the level of activity necessary in order to hold them actionable as harassment. If the practice is sufficiently pervasive, i.e., women are consistently and openly left out, it could be actionable, like the firefighters' refusal to dine with their colleagues. A single incident likely would be insufficient,²²⁹ but if an employer excluded all women from a significant event, i.e., a weekend retreat with the biggest client or customer, it still might be actionable. Certainly, harassment law provides a way to approach such co-worker activities. However, there are additional problems related to employer liability for harassing behavior.

D. Agency Implications of Sexual Harassment Liability

Holding employers liable for the actions of employees becomes a problem when the discrimination is not directly linked to some other employment-related action (i.e., *quid pro quo*),²³⁰ but instead is based on a hostile work environment. There are two distinct agency problems in hostile work environment cases: determining when an employer is liable for harassment by a supervisor and when an employer is liable for harassment by a co-worker. Both forms of harassment, as described above, could occur through reindeer games. While the hypotheticals thus far posed have focused more on supervisor conduct, it is clear that co-workers could just as easily shun a fellow worker with resulting

²²⁵ *Id.* (quoting *Diaz*, EEOC Request No. 05931049).

²²⁶ *Id.* at *3.

²²⁷ *Id.* (quoting *Diaz*, EEOC Request No. 05931049).

²²⁸ *Id.* (quoting *Diaz*, EEOC Request No. 05931049).

²²⁹ This is consistent with harassment law as it has developed. See, e.g., *Lowe v. Angelo's Italian Foods*, 87 F.3d 1170, 1175 (10th Cir. 1996) ("Casual or isolated manifestations of discriminatory conduct, such as a few comments or slurs, may not support a cause of action."); *Barber v. International Bhd. of Boilermakers*, 778 F.2d 750, 761 (11th Cir. 1985) ("mere utterance" insufficient to carry burden of proof under Title VII); *Torres v. County of Oakland*, 758 F.2d 147, 152 (6th Cir. 1985) (occasional or sporadic slurs do not violate Title VII).

²³⁰ See, e.g., *Goldsmith v. City of Atmore*, 996 F.2d 1155, 1162 (11th Cir. 1993) (liability for retaliation by supervisor mayor linked to transfer of complaining employee); see also Rachel E.

psychological damage to that worker.²³¹ Holding both the supervisor and, to a lesser extent, co-workers liable for hostile work environment harassment poses difficult questions of agency that must be discussed in order to determine whether there is a practical way of holding reindeer games actionable as harassment under current Title VII law.²³²

In *Meritor v. Vinson*, the United States Supreme Court discussed how to approach employer liability in the harassment context. Unfortunately, the Court did not come up with a definite rule for the courts and potential litigants to follow. Instead, the Court set up general parameters of employer liability and adopted general agency principles (which it did not describe in detail) as a guide for determining employer liability. Confronted with a trial court that had held that an employer must have actual notice of the supervisor's misconduct in order to be held liable and an appellate court that held the employer to a strict liability standard for the actions of its supervisors, the Court took a vague middle-of-the-road position.²³³ Acknowledging that common law agency principles might not be transferable to harassment law wholesale, the Court concluded that Congress intended the courts to look to agency principles for "guidance in this area."²³⁴ For this reason, the Court rejected both the trial court and court of appeals' views of the case, specifically, that an employer is automatically liable for harassment by its supervisors and the employer is not liable absent actual notice.²³⁵ Further, the existence of a sexual harassment policy, whereby

Lutner, *Employer Liability for Sexual Harassment: The Morass of Agency Principles and Respondent Superior*, 1993 U. ILL. L. REV. 589, 594, 601-02 & n.7 (1993) (describing and citing cases that apply strict liability to quid pro quo harassment cases); Oppenheimer, *supra* note 62, at 119 (noting that courts have adopted strict liability for quid pro quo harassment by supervisors); Michael J. Phillips, *Employer Sexual Harassment Liability Under Agency Principles: A Second Look at Meritor Savings Bank, FSB v. Vinson*, 44 VAND. L. REV. 1229, 1234 n.30 (1991) (citing cases applying strict liability to quid pro quo cases).

²³¹ See, e.g., *Campbell*, 919 S.W.2d 26.

²³² A thorough discussion of the issue of agency in the hostile work environment context is beyond the scope of this article. For purposes of reindeer games, it is enough that there is a possibility of holding an employer liable for them as a form of harassment. For a more detailed discussion of the agency principles underlying sexual harassment law and the confusion they have spawned, see Lutner, *supra* note 230, at 589; Oppenheimer, *supra* note 62, at 59; Phillips, *supra* note 230, at 1246-55; Glen A. Staszewski, *Using Agency Principles for Guidance in Finding Employer Liability for a Supervisor's Hostile Work Environment Harassment*, 48 VAND. L. REV. 1057, 1062 (1995); N. James Turner, *Employer Liability for Acts of Sexual Harassment in the Workplace: Respondent Superior and Beyond*, 68 FLA. B.J. 41, 42 (1994); J. Hoult Verkerke, *Notice Liability in Employment Discrimination Law*, 81 VA. L. REV. 273, 282 (1995).

²³³ *Meritor*, 477 U.S. at 70, 72.

²³⁴ *Id.* at 72. The use of agency principles in the sexual harassment context has been criticized by various commentators. See, e.g., Lutner, *supra* note 230, at 589; Phillips, *supra* note 230, at 1255-56; *contra* Oppenheimer, *supra* note 62, at 41; Staszewski, *supra* note 232, at 1096-104.

²³⁵ *Meritor*, 477 U.S. at 72.

an employee can complain about such harassment, does not always insulate the employer from liability even if the employee chooses not to invoke the policy.²³⁶ The procedure in place must be effective to remedy the harassment; otherwise, it will not insulate the employer.²³⁷ The EEOC has interpreted *Meritor* as requiring an examination of whether the harassing employee was acting in a "supervisory or agency capacity."²³⁸

With these general guidelines in place, the lower courts have reached a consensus on employer liability for co-worker harassment²³⁹ and issued a variety of rulings applying principles of agency to cases involving harassment by supervisors.²⁴⁰ In cases of co-worker harassment, courts have held employers liable if they knew or should have known of the harassment and failed to take effective remedial measures.²⁴¹

The standard for supervisors has caused much greater controversy. Some courts seemingly have held employers either to a strict liability standard, or to what comes close to a strict liability standard, for the acts of its supervisors.²⁴² Several of these courts reasoned that if the supervisor/harasser is aided in harassing the plaintiff by the

²³⁶ *Id.* at 72-73.

²³⁷ *Id.* at 73. In *Meritor*, the employer's policy required the plaintiff to report the harassment to her supervisor, who was also her harasser. Obviously, such a policy is not an effective means for that employee to use to eliminate harassment. See also Anne C. Levy, *The Change in Employer Liability for Supervisor Sexual Harassment After Meritor: Much Ado About Nothing*, 42 ARK. L. REV. 795, 823 (1989); Phillips, *supra* note 230, at 1235-37 (discussing *Meritor* holding); Brian P. Conway, Note, *A View Against Strict Employer Liability Under Title VII for Sexually Offensive Work Environments Created by Supervisory Personnel*: *Meritor Savings Bank v. Vinson*, 91 DICK. L. REV. 1157, 1175 (1987).

²³⁸ 29 C.F.R. § 1604.11(c) (1996); see also Staszewski, *supra* note 232, at 1071-98 (arguing for strict application of principles enunciated in RESTATEMENT OF AGENCY § 219 (1958)).

²³⁹ Oppenheimer, *supra* note 62, at 103-06 (describing cases of co-worker harassment); Phillips, *supra* note 230, at 1235 & n.34, 1237 n.50 (noting that this standard has been consistent since before *Meritor*).

²⁴⁰ For a discussion of agency principles as applied by the courts to sexual harassment cases immediately following *Meritor*, see Lutner, *supra* note 230, at 598-602. Commentators have argued for a variety of standards, and there remains great controversy regarding imputing liability to employers. See Oppenheimer, *supra* note 62, at 74, 131; Phillips, *supra* note 230, at 1256-57.

²⁴¹ 29 C.F.R. § 1604.11(d) (1996); see *supra* note 229, and accompanying text.

²⁴² *Karibian v. Columbia Univ.*, 14 F.3d 773, 780 (2d Cir.) (issue of fact existed as to whether supervisor abused his delegated authority to create abusive and discriminatory work environment), *cert. denied*, 114 S. Ct. 2693 (1994); *Levendos v. Stern Entertainment, Inc.*, 909 F.2d 747, 751-52 (3d Cir. 1990) (actions of supervisory employees imputed to operators of restaurant under agency principles); *Huddleston v. Roger Dean Chevrolet, Inc.*, 845 F.2d 900, 904 (11th Cir. 1988) (finding employer strictly liable for hostile environment harassment if harasser had actual or apparent authority to alter plaintiff's employment status); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1559-60 (11th Cir. 1987) (supervisor used employer-vested authority to fire

existence of an agency relationship, the employer can be held liable.²⁴³ These courts, however, have given employers another way out. If the employer has a complaint system in place, it likely will be able to avoid liability by adequately addressing the alleged harassment.²⁴⁴ This results in the plaintiffs' having to prove direct liability in spite of the ostensible strict liability standard.²⁴⁵

Other courts emphasize whether the supervisor's harassment took place within the course and scope of employment.²⁴⁶ These courts consider where the harassment has occurred, i.e., in or out of the office, as part of the key to holding the employer liable for the acts of the supervisor. Under the analysis of these courts, the employer should foresee such harassment on the job.²⁴⁷ This test is based on principles of respondeat superior,²⁴⁸ although courts have used respondeat superior to support a variety of tests applicable to employer liability under Title VII.²⁴⁹ Like courts purporting to apply a more "strict liability"

employees and to harass plaintiff, making agency relationship instrumental in harassment); *Yates v. Avco Corp.*, 819 F.2d 630, 636 (6th Cir. 1987) (employer could be held liable for supervisor's conduct because it put supervisor in position of authority and therefore harassment was foreseeable); *Hastings v. Hancock*, 842 F. Supp. 1315, 1319-1320 (D. Kan. 1993) (under Title IX, director aided in accomplishing harassment by agency relationship with school); *Sims v. Montgomery County Comm'n*, 766 F. Supp. 1052, 1069 (M.D. Ala. 1990) (several harassing police officers had sufficient authority to be considered agents for purposes of Title VII liability). The standard for sexual harassment is different than that used for racial harassment in that most courts agree that employers are strictly liable for racial harassment by a supervisor. *Lutner*, *supra* note 230, at 618.

²⁴³ See, e.g., *Karibian*, 14 F.3d at 780; *Huddleston*, 845 F.2d at 904; *Sparks*, 830 F.2d at 1558; *Hastings*, 842 F. Supp. at 1319, 1320; *Sims*, 766 F. Supp. at 1069; see also *Rauh v. Coyne*, 744 F. Supp. 1186, 1190 (D.D.C. 1990) (motion to dismiss denied in part because supervisor was aided in abuse by agency relationship).

²⁴⁴ *Oppenheimer*, *supra* note 62, at 132-36 (arguing that this results in employees' having to prove both direct and vicarious liability).

²⁴⁵ *Id.* at 132; *Verkerke*, *supra* note 232, at 277.

²⁴⁶ See, e.g., *Kauffman*, 970 F.2d at 185; *Yates*, 819 F.2d at 636; *Stafford v. State*, 835 F. Supp. 1136, 1150 (W.D. Mo. 1993). But see *Guess*, 913 F.2d at 465 (respondent superior does not apply to sexual harassment because it results in strict liability contrary to *Meritor*).

²⁴⁷ See, e.g., *Yates*, 819 F.2d at 636; *Stafford*, 835 F. Supp. at 1150; *Shrout v. Black Clawson Co.*, 689 F. Supp. 774, 781 (S.D. Ohio 1988).

²⁴⁸ See RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958) (stating principle of respondeat superior as "[a] master is subject to liability for the torts of his servants committed while acting in the scope of their employment"). Commentators have also argued that it does not fit well within the sexual harassment liability scheme because most employers prohibit harassment on the job. On this basis, harassment could never be within the course and scope of employment for purposes of liability. See, e.g., *Sparks*, 830 F.2d at 1558-59; see also *Lutner*, *supra* note 230, at 606-07; *Phillips*, *supra* note 230, at 1245.

²⁴⁹ See *Lutner*, *supra* note 230, at 606-07 & n.143; *Phillips*, *supra* note 230, at 1245-46 & n.97; *Verkerke*, *supra* note 232, at 286 n.33 (observing that courts apply respondeat superior incorrectly).

standard, these courts generally absolve an employer who takes appropriate corrective action.²⁵⁰

Other courts overtly hold that, to impose liability on the employer, the employer either had to have actual knowledge of the harassment or should have known about it.²⁵¹ Of these courts, several have reasoned that if an employer places an employee in a position of authority and that supervisor harasses an employee on the job, the employer is liable because it was foreseeable that the harassment would occur.²⁵² Other courts have looked at the context of the harassment to determine whether the harassment was so pervasive that the employer essentially had constructive knowledge of it.²⁵³ Finally, in spite of *Meritor*, some courts still hold plaintiffs to an actual knowledge standard, i.e., they will not hold the employer liable absent actual knowledge of the harassment by a supervisor.²⁵⁴ At least one commentator has argued that the existence of an effective complaint system results in an actual knowledge in many jurisdictions.²⁵⁵ This commentator has argued in favor of strict liability on the part of employers for the acts of their supervisors.²⁵⁶

²⁵⁰ See Oppenheimer, *supra* note 62, at 131-36.

²⁵¹ *Juarez v. Ameritech Mobile Communications, Inc.*, 957 F.2d 317, 320 (7th Cir. 1992); *Woods v. Graphic Communications*, 925 F.2d 1195, 1202 (9th Cir. 1991) (union had actual and constructive notice of pervasively hostile environment); *Hirschfield v. New Mexico Corrections Dep't*, 916 F.2d 572, 576 (10th Cir. 1990); *Baker v. Weyerhaeuser Co.*, 903 F.2d 1342, 1345-46 (10th Cir. 1990); *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1515-16 (9th Cir. 1989) (atmosphere so seriously tainted that employer knew or should have known about it); *Sparks v. Regional Med. Ctr. Bd.*, 792 F. Supp. 735, 744 (N.D. Ala. 1992) (hostile work environment harassment requires that employer knew or should have known of harassment and failed to take remedial action); *Marshall v. Nelson Elec.*, 766 F. Supp. 1018, 1040-41 (N.D. Okla. 1991) (employer liable only if it knew or should have known of harassment and failed to take remedial measures); *Rauh*, 744 F. Supp. at 1189-90 (allegations in complaint provided basis for finding defendant had reason to know of harassment); see also Phillips, *supra* note 230, at 1237-38 (noting that this is the predominant view).

²⁵² See, e.g., *Yates*, 819 F.2d at 636; *Stafford*, 835 F. Supp. at 1150.

²⁵³ *Woods*, 925 F.2d at 1202; *Hacienda Hotel*, 881 F.2d at 1515; *Laughinghouse v. Risser*, 754 F. Supp. 836, 840-41 (D. Kan. 1990).

²⁵⁴ See, e.g., *Carrero v. New York City Hous. Auth.*, 668 F. Supp. 196, 202 (S.D.N.Y. 1987). The validity of this decision is called into question by later Second Circuit decisions. See, e.g., *Kotcher v. Rosa & Sullivan Appliance Ctr., Inc.*, 957 F.2d 59, 63 (2d Cir. 1992) (applying "knew or should have known" test to harassment by both supervisors and co-workers). In addition, where an employer has an effective complaint system in place, the employee is required to give the employer notice of the alleged harassment; otherwise, the employer may be absolved of responsibility for the supervisor's actions. Oppenheimer, *supra* note 62, at 132-36.

²⁵⁵ Oppenheimer, *supra* note 62, at 132-36; see also Verkerke, *supra* note 232, at 282-83 (noting that most circuits apply actual notice standard for supervisor harassment).

²⁵⁶ Oppenheimer, *supra* note 62, at 132-36.

While these cases provide unclear guidance on the agency standard applicable to sexual harassment claims involving supervisors,²⁵⁷ it is clear that reindeer games, in the appropriate case, could provide a basis for employer liability under principles currently being applied by the courts. For those courts adopting a strict liability standard, agency principles will pose no difficulty to plaintiffs attempting to hold employers liable for reindeer games-related harassment, so long as the reindeer games are sufficiently severe or pervasive to amount to a hostile work environment. At the least, these courts require the employer to remedy the alleged harassing situation effectively. Even if the Supreme Court ultimately adopts a "knew or should have known" standard for both supervisor and co-worker harassment, reindeer games could still be held actionable as harassment. For example, if the supervisor takes male employees out to lunch on a consistent basis, but leaves out the female employees, the employer would know (or at least, it should know) about the hostile or offensive conduct. The lunch group, for example, might gather in a common area, i.e., the reception area of the business. Alternately, the employer likely possesses records of off-site lunches for purposes of reimbursement or tax deductions. In any case, if the conduct is sufficiently pervasive for employees to become aware of it, it is likely open enough for the employer to be aware of it. If the female employees complain about being left out, the employer will have actual knowledge. If this conduct was coupled with other instances of hostility, such as derogatory comments, women being given less favorable assignments, etc., it would become easier to make out a claim based on a hostile work environment.

E. Associational Rights or "I Want to Golf with My Friends"

Part of the problem with addressing reindeer games in a Title VII context is that, at some level, it would allow the courts to intrude on personal relationships. Individuals should be able to choose their friends, in and out of the office, without interference by the federal government. Isn't the concept of reindeer games just a bit too intrusive into our private lives? Further, isn't this an attempt to regulate what amounts to at most a very minor form of discrimination? Indeed, the courts have been reluctant to extend Title VII to what they consider more trivial cases. For example, the courts have held that isolated incidents of sexist or racist comments do not give rise to a claim of

²⁵⁷ See Phillips, *supra* note 230, at 1239-40.

discrimination.²⁵⁸ It is possible to classify reindeer games as such incidental forms of discrimination and, further, to argue it is simply impossible to stop people from socializing outside of the office with whomever they please. Such court intervention into private lives implicates associational rights.

The issue of associational rights in the context of anti-discrimination legislation has already been addressed by the Supreme Court. In *Roberts v. United States Jaycees*,²⁵⁹ the United States Supreme Court held that the Minnesota Human Rights Act, which forbade discrimination on the basis of sex in "places of public accommodation," did not violate the constitutionally protected freedom of association.²⁶⁰ In *Roberts*, the Court discussed two types of constitutionally protected "freedom of association." The first concerns "choices to enter into and maintain certain intimate human relationships," mostly those involving the creation and sustenance of family—marriage, childbirth, raising and educating children and cohabitation with relatives.²⁶¹ The second involves the right to associate for the "purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion."²⁶² Reindeer games arguably could involve either of these relations.

Friendships can be analogized to familial relationships. Friendships are personal relationships from which individuals obtain personal enjoyment. Prohibiting, for example, a supervisor from inviting a subordinate whom he likes to dinner at his home amounts to the courts or Congress dictating with whom that supervisor can be friends. However, the Court in *Roberts* drew a distinction between familial relations and those involving employees. As the Court explained, "the Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse that would not apply to regulations affecting the choice of one's fellow employees."²⁶³ To the extent that reindeer games affect an employee's ability to succeed by increased exposure to supervisory employees, it should fall squarely within *Roberts*. A problematic situation arises where employees gather

²⁵⁸ *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982) (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972), in sexual harassment case); *Rogers*, 454 F.2d at 238 (race); *Ross v. Double Diamond, Inc.*, 672 F. Supp. 261, 269 (N.D. Tex. 1987) (citing *Rogers*, 454 F.2d at 238, in sexual harassment context).

²⁵⁹ 468 U.S. 609 (1984).

²⁶⁰ *Id.* at 623.

²⁶¹ *Id.* at 617-19.

²⁶² *Id.* at 618.

²⁶³ *Id.* at 620.

together after work for purely social purposes and no supervisor is involved. It is difficult to see how an employer can be held liable for such individual choices, even though they might likely have the same ostracizing effect as reindeer games.

While the Court has recognized the freedom to associate in familial relationships,²⁶⁴ it has not extended this analysis directly to friendships. In the context of reindeer games, if a supervisor invites a subordinate to a purely social gathering, having no obvious work-related implications, should this still implicate Title VII liability? Even though no work may be discussed and no clients may be present, the subordinate is gaining an advantage over his co-workers by this casual exposure to the boss. This relationship could be characterized as more like friendship than a supervisor/subordinate relationship. This is a more difficult situation from both an intuitive and associational rights standpoint; yet, it is not clear under current Supreme Court precedent that this would be protected by the First Amendment.

In *City of Dallas v. Stanglin*,²⁶⁵ the Court expressly stated that "we do not think the Constitution recognizes a generalized right of 'social association.'"²⁶⁶ The context of the Court's decision in *Stanglin* is, perhaps, a less compelling case for finding associational rights implicated. In *Stanglin*, the owner of a teenage dance hall challenged a Dallas ordinance that restricted the admission to his dance hall to persons between the ages of fourteen and eighteen.²⁶⁷ The owner claimed, among other things, that this violated the associational rights of these teens by limiting their interaction with persons outside this age group.²⁶⁸ In distinguishing this case from its earlier decision in *Griswold v. Connecticut*,²⁶⁹ the Court stated that although the right to associate does include "social" situations, this simply means that the "right of expressive association extends to groups organized to engage in speech that does not pertain directly to politics."²⁷⁰

While *Stanglin* appears to limit the types of purely social relationships that are covered by the freedom to associate, other courts have extended protection to relationships that appear more social. The leading example of this is the pre-*Roberts* case, *Wilson v. Taylor*.²⁷¹ In

²⁶⁴ *Roberts*, 468 U.S. at 617-19.

²⁶⁵ 490 U.S. 19 (1989).

²⁶⁶ *Id.* at 25.

²⁶⁷ *Id.* at 20.

²⁶⁸ *Id.* at 24.

²⁶⁹ 381 U.S. 479 (1965).

²⁷⁰ *Roberts*, 490 U.S. at 25.

²⁷¹ 733 F.2d 1539 (11th Cir. 1984).

Wilson, the Eleventh Circuit considered whether firing a police officer for dating the daughter of a reputed organized crime figure violated the officer's associational rights.²⁷² The court had to "determine whether dating is a type of association protected by the First Amendment's freedom of association."²⁷³ Relying in part on the Fifth Circuit decision in *Sawyer v. Sandstrom*²⁷⁴ and the United States District Court for the Southern District of New York decision in *McKenna v. Peekskill Housing Authority*,²⁷⁵ the court held that "the First Amendment freedom of association applies not only to situations where an advancing of common beliefs occurs, but also to purely social and personal associations."²⁷⁶ While dating is a much more intimate relationship than merely being social friends, it would not take too much of an extension of *Wilson* to encompass either the boss inviting a subordinate to a clearly social event unrelated to work or a group of co-workers gathering outside the office for a party or other purely social gathering.

In the context of employment discrimination, the second type of "associational rights" analysis was addressed by the United States Supreme Court in *Hishon v. King & Spalding*.²⁷⁷ In *Hishon*, the law firm of King & Spalding argued that the application of Title VII to law firm partnership decisions would infringe on the firm's partners' constitutional rights of expression and association.²⁷⁸ The Court reasoned that "[a]lthough we have recognized that the activities of lawyers may make a 'distinctive contribution . . . to the ideas and beliefs of our society,' respondent has not shown how its ability to fulfill such a function would be inhibited by a requirement that it consider petitioner for

²⁷² *Id.* at 1540-41.

²⁷³ *Id.* at 1543.

²⁷⁴ 615 F.2d 311 (5th Cir. 1980). The court in *Sawyer* held that an overly-broad loitering ordinance violated the right to freedom of association. The court reasoned that the only illegal act was the association with certain individuals who possessed illegal drugs. *Id.* at 316. The *Wilson* court characterized this case as "teach[ing] that one's first amendment right to associate encompasses the right to simply meet with others." *Wilson*, 733 F.2d at 1543. Given the language and the holding of the Supreme Court in *Stanglin*, it is unclear whether the freedom to associate currently reaches so far. See *Stanglin*, 490 U.S. at 24 ("It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.").

²⁷⁵ 497 F. Supp. 1217 (S.D.N.Y. 1980), modified, 647 F.2d 332 (1981), and cited in *Wilson*, 733 F.2d at 1544. *McKenna* involved the association of parent and child, a much more intimate association for purposes of First Amendment analysis. See *id.* at 1222-23.

²⁷⁶ *Wilson*, 733 F.2d at 1544.

²⁷⁷ 467 U.S. 69 (1984).

²⁷⁸ *Id.* at 78.

partnership on her merits.”²⁷⁹ The Court further noted that while it is possible to characterize discrimination as involving freedom of association, such discrimination has “never been accorded affirmative constitutional protections.”²⁸⁰ As the Court explained, “[t]here is no constitutional right, for example, to discriminate in the selection of who may attend a private school or join a labor union.”²⁸¹ Obviously, the firm’s partnership decision is a privilege of employment that is clearly linked to a form of promotion.²⁸² While this case clearly places employment rights guaranteed by Title VII above associated rights, without some sort of link to the employer, it may be difficult to hold an employer liable for purely social activities.²⁸³

CONCLUSION

With the current backlash against affirmative action and other efforts to bring more women and minorities into the workplace,²⁸⁴ there seems to be little hope of expansion by Congress of employment rights laws to encompass additional employment practices. While the existence of the Glass Ceiling Commission does give women and minorities some hope that glass ceiling related problems may someday be addressed by Congress, the wait may be long. In the meantime, Title VII is still the best hope for shattering the glass ceiling.

Reindeer games, a particular manifestation of employer practices that create the glass ceiling, can be addressed through the use of current Title VII jurisprudence. There are three principle ways to use Title VII to combat reindeer games. First, the courts could simply find that reindeer games constitute a term, condition or privilege of employment under Title VII. Certainly, some forms of reindeer games, for example, when they are employer-sponsored, would fall within the terms, conditions or privileges of employment. Second, the courts could hold other forms of reindeer games actionable because of their

²⁷⁹ *Id.* (quoting *NAACP v. Button*, 371 U.S. 415, 431 (1963)).

²⁸⁰ *Id.* (quoting *Norwood v. Harrison*, 413 U.S. 455, 470 (1973)).

²⁸¹ *Id.*

²⁸² *Hishon*, 467 U.S. at 75–76.

²⁸³ A full exploration of the associated rights implications is beyond the scope of this article. It is sufficient that associated rights arguments would not bar all actions based on reindeer games.

²⁸⁴ See, e.g., Robert Shogan, *Affirmative Action Stirs Unforeseen Division in GOP Series*, L.A. TIMES, Aug. 20, 1995, at A1. The recent California Civil Rights Initiative, which will arguably operate to end affirmative action efforts by the State of California, is but one manifestation of that backlash. See Dan Walters, *37-Word Bomb Ready to Blow*, SACRAMENTO BEE, Nov. 5, 1995, at A3.

link with more traditional terms, conditions or privileges of employment. For example, if an employer consistently promotes males who have played golf with the CEO, the reindeer game—golfing with the boss—is linked to promotional opportunities. Therefore, a woman who was not promoted could use the reindeer game to bolster her case, either using it as direct evidence of discrimination or to show pretext.²⁸⁵ Third, harassment law could be used to cover those situations in which the reindeer games are not linked to another employment action but, instead, are part of a pervasive employer policy that undermines the ability of women to work. The conduct would have to be sufficiently severe or pervasive to create a hostile work environment. If women are never asked to participate in reindeer games, which are either a fairly consistent practice or sufficiently important—e.g., dinner with a very important client—it could be viewed as harassment.

The potential for real gains to women by applying Title VII to these practices remains to be seen. Thus far, litigants have not often attempted to use reindeer games, and when they have done so, they have met with mixed results. One of the policies behind Title VII is to tear down arbitrary barriers to the advancement of women.²⁸⁶ Application of Title VII to reindeer games is consistent with this policy. To the extent that the actions can be viewed as a more subtle (although not so subtle from a woman's perspective) form of intentional discrimination, they certainly fall within Title VII's proscription of discrimination in employment.

²⁸⁵ Pretext becomes an issue in the *McDonnell Douglas* three-part inferential showing of disparate treatment. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973); see also Michael J. Zimmer, *The Emerging Uniform Structure of Disparate Treatment Litigation*, 30 GA. L. REV. 563 (1996) (discussing recent developments in disparate treatment law). After the plaintiff makes out her prima facie case, the burden of production (not persuasion) shifts to the employer to articulate a legitimate, non-discriminatory reason for its decision. *McDonnell Douglas*, 411 U.S. at 802-03. If the employer meets this burden, the employee must furnish evidence of pretext. *Id.* at 804. The employee can do so directly, by showing that the employer more likely discriminated, or indirectly, by showing that the employer's proffered reasons are not credible. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981). But see *Saint Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993) (suggesting that showing that the employer's proffered reason is not credible is not enough to carry the plaintiff's case). Evidence of reindeer games can be used to show that the employer more likely discriminated, because the employer showed a preference for men in this regard and left women out.

²⁸⁶ *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).