

(Un)Equal Opportunity Shaming

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Wendy N. Hess, [Slut-Shaming in the Workplace: Sexual Rumors & Hostile Environment Claims](#), 40 *N.Y.U. Rev. L. & Soc. Change* 581 (2016).

This article, by Professor Wendy N. Hess, picks up on an important issue, largely ignored in the legal literature until now: so-called “slut-shaming” in the workplace. “Slut-shaming” involves denigrating a person – most often a woman – on the basis of her actual or perceived sexual activity. It reportedly takes place quite a bit in the workplace, and usually with deleterious effects on victims’ reputations, work product, and career trajectories. This article thus picks up on a salient issue in the contemporary American workplace and provides an excellent exposition of a split among courts that reveals the unwillingness of some judges to acknowledge the empirical truth that men who are perceived as promiscuous are often seen as “studs,” while women so perceived are seen as “sluts,” and subsequently downgraded in the esteem of co-workers and employers. Once so thoroughly presented, this collision between this double standard and the antidiscrimination mandate of Title VII crystallizes and cannot be ignored.

The article critiques the ways in which courts have dealt with hostile work environment sexual harassment claims stemming from rumors and/or attacks premised on the plaintiff’s perceived sexual promiscuity. The article expertly lays out courts’ historic confusion as to when alleged harassment has occurred “because of” the victim’s sex, as required by Title VII, and makes the compelling point that “Courts have often failed to recognize the gendered aspect of sexual rumors about women.” It boils down to the fact that, as Professor Hess contends, in many situations, due to the so-called “double bind” or “double standard,” seemingly similarly situated men and women could not, in reality, be any more differently situated. And when it comes to “slut-shaming,” Professor Hess could not have found more fertile ground upon which to make her point. She thus exhorts courts to identify the double standard that makes rumors about a female employee’s sexual promiscuity “uniquely insulting to women.”

One major contribution of the article is its substantiation with social science research of a matter that seems intuitively true: rumors of promiscuity undermine a woman’s professional, social, and intellectual credibility in a way that they do not undermine men’s. Particularly interesting is Professor Hess’s extrapolation of the phenomenon of “slut-shaming” in adolescents to adults in the workplace, and her citation to sources for her contention that “Sexually permissive women are judged more negatively than sexually permissive men, not just on the basis of sexual morality, but also on a variety of competency measures relevant to a person’s success in the workplace.” Of use to Title VII litigators, she amply articulates a basis upon which courts could find that despite the dissemination of rumors about men and women, women are uniquely harmed because of their sex.

The phenomenon that Professor Hess describes is similar to family responsibility discrimination (“FRD”), a legal doctrine that protects from workplace discrimination a woman who experiences prejudice based upon her status as the mother of small children. Courts recognized FRD because women are more likely than men to be judged negatively for their caretaking roles, even though either a man or a woman could in theory be discriminated against because of their family responsibilities. Professor Hess describes slut-shaming in much the same way. While both men and women are susceptible to attacks, speculation, and gossip about their sexual activities and feelings, women are made to suffer from these things in a uniquely harmful way. Given Professor Hess’s analysis, the potential doctrinal parallels are clear.

Particularly standout features of this article include Professor Hess’s exposition of the confusion over Title VII’s “because of” requirement and the various evidentiary routes that plaintiffs can use to move a court to the conclusion

that their injury stems from discrimination or harassment “because of” their sex. Also of particular interest is Professor Hess’s nuanced critique of the misguided view that “because of” be construed to require that the harasser consciously desire to harass his victim because of her sex. As she incisively notes, this premise “incorrectly assumes that most harassers are self-aware enough to articulate a conscious motive,” and she reminds the reader that “it is conceivable that a harasser can [act]...without awareness that [he]...was *motivated* by hostility to a woman in the workplace.” Her characterization of rumors about promiscuity in the case of female plaintiffs as “gender-based insults” is astute, and it serves to guide the reader through her discussion of courts’ split over whether such rumors are inflicted because of sex and land them at her conclusion that “Women who are made the subject of sexual rumors in the workplace should be able to seek redress under Title VII because the harassing conduct meets the...requirement that it be ‘because of’ sex.”

Finally, Professor Hess’s discussion of the putative “equal opportunity harasser,” whom many courts would say could not be seen to have acted “because of sex,” is very important. Her characterization of this reasoning as an invidious stumbling block to sound analysis is excellent. Scholars have long decried the “equal opportunity harasser” and the perverse effect of his additional harassment of men as a form of insulation from liability arising from, or perceived mitigation of, the harm inflicted by his harassment of women. This article’s examination of “slut-shaming” through the lens of the equal opportunity harasser problem brings the issue into sharper focus and ultimately lends tremendous credence to her argument about the split she is addressing and her suggestion as to how it should be resolved. All in all, this is an important article about a largely ignored issue and doctrinal split, and it makes for an enlightening and enjoyable read.

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