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Bipolar Injustice: 
The Moral Code

Dr. Jean Jew, an Asian-American woman, is a tenured professor at the University of Iowa College of Medicine.¹ In the 1980s, she was subjected to a relentless campaign of racial and sexual slurs because of her purported relationship with her supervisor, Dr. Terence Williams. Jew was referred to as a "slut," "bitch," "whore," and "chink," and "lesbian"² and denied promotion to full professor. Williams was forced to step down as Department Chair. Jew brought a Title VII³ claim alleging sexual harassment and gender discrimination stemming from the denial of promotion. After a decade of litigation, she prevailed on the merits in a federal district court and obtained a favorable settlement from the University.⁴

J. Mario Carreno, a white man, was a licensed journeyman electrician.⁵ He was subjected to derogatory comments such as "Mary" and "faggot,"⁶ and was physically harassed by having his genitals and buttocks caressed as well as by having people simulate sexual intercourse or sodomy with him.⁷ He brought suit in federal court under Title VII alleging sexual harassment and a gender-based constructive discharge. He lost.
After Sylvia DeAngelis, a white woman, became the first female sergeant on the El Paso Police Department, monthly columns in the association newsletter called her a dingbat and persistently stated that all women police officers were inherently incompetent. These comments were then repeated by some of her male subordinates. She brought suit in federal court under Title VII alleging sexual harassment. She lost.

Allan Bakke, a white man, was not admitted at two dozen medical schools including the University of California at Davis. Because of his race, Bakke was not eligible to compete for sixteen slots at Davis Medical School that were reserved for disadvantaged racial minorities and because of his socio-economic status, he was not eligible to compete for five slots reserved for applicants from wealthy families. Bakke had also been informed at Davis and elsewhere that his age (33) was a negative factor in his application. He brought suit in state court under Title VI of the Civil Rights act of 1964 and the equal protection clause of the United States Constitution alleging race discrimination stemming from his failure to be admitted. He won.

Melvin Hicks, an African-American shift commander, was suspended, reprimanded, and eventually discharged for rules infractions for which similarly situated whites were not even reprimanded. These actions occurred after a report was authored recommending that blacks be demoted or discharged from supervisory positions to avoid racial tension within the prison system where he worked. He sued in federal court under Title VII alleging race discrimination stemming from his discharge. He lost.

These five cases reflect the moral code underlying federal anti-discrimination law. Women who are presumed to be heterosexual, such as Jean Jew, frequently prevail if they can show
that they have been sexualized; merely showing gender-based conduct, such as in the case of Sylvia DeAngelis, is usually not sufficient. Men who are presumed to be homosexual,¹⁵ such as Mario Carreno, rarely prevail upon a showing that they have been sexualized even if it is clear that the conduct is also gender-based. Whites who are presumed to be competent, such as Allan Bakke, frequently prevail upon a showing that race was a factor in an adverse decision. Blacks who are presumed to be incompetent, such as Melvin Hicks, rarely prevail upon a showing that race was a factor unless they can also present evidence of racial slurs or epithets. In other words, there is not one justice for all. Justice often depends upon plaintiff’s race, gender, and sexual orientation.

The general outlines of Title VII’s moral code are well known. Transsexuals,¹⁶ cross-dressers,¹⁷ and gay and lesbian people¹⁸ are rarely successful in gender discrimination cases under Title VII. The role that sexual harassment doctrine plays in preserving this moral code, however, is usually not noticed, and the racial implications of this code are invisible.

I. Winner No. 1: Presumptively Heterosexual Women

Barbara Stacks’s employer had “closed parties” in which men were instructed not to bring their wives so that male representatives could bring their “dates” who were referred to as “road whores.”¹⁹ A party videotape showed two managers sitting in the front seat of an automobile with two female sales representatives in the back seat. After the men chanted, “Show us your tits,” the women lifted their blouses and exposed their breasts.²⁰ The manager told another woman that she looked liked a “madam” and would not be promoted unless she had breast
reduction surgery. Ultimately, Stacks was fired for reasons that she alleged were pretextual.

The federal district court ruled against Stacks, concluding that she was not harassed because of her sex. The court believed that her supervisor was "unpleasant toward everybody." As to her discharge claim, the trial court noted that Stacks was a "crackerjack salesperson" but nonetheless found for the defendant. On appeal, the Eighth Circuit reversed. Creditig Stacks's testimony that the harassment made her feel "less than human," the court found that the district court had erred and should enter judgment in favor of Stacks.25 Being unpleasant toward everyone was not a proper defense when highly sexualized comments were made to a woman.

Other courts have agreed with the Eighth Circuit in Stacks that sexualized comments and behavior directed toward women constitute sexual harassment even if men are also exposed to sexual banter or insulting comments. For example, in Faragher v. City of Boca Raton, the district court found for plaintiffs in a case involving harassment against female lifeguards. Male supervisors touched female lifeguards on their buttocks and breast without consent, used offensive language such as "cunts" and "bitches," mimicked cunnilingus in the presence of some of the women, and made repeated sexually suggestive comments. Defendants unsuccessfully tried to excuse the behavior by noting the commonplace sexual banter and boisterousness at the pool. The court found that defense unavailing due to the "lack of respect" toward the female lifeguards evidenced by the men's conduct. The highly sexualized nature of the comments allowed the women to prove gender discrimination even though the men were also the targets of sexual comments.

In other cases, defendants have tried to avoid liability by claiming that the supervisor was bisexual and therefore did not
prey upon plaintiff *because of her sex*. In *Ryczek v. Guest Services, Inc.*, Francine Ryczek alleged that defendant Catherine O'Brien sexually harassed her by telling plaintiff about her sexual preference for females, inquiring about plaintiff's sexual practices, dipping plaintiff's finger into a pot of sauce and licking the finger, looking at plaintiff suggestively and leaning against her, and removing her shirt when she was riding with plaintiff in an elevator. Defendant Guest Services defended the lawsuit by arguing that the actions were not gender-based, relying on precedent from the D.C. Circuit concerning bisexual supervisors, because O'Brien was a bisexual not a lesbian. The court did not rule on this issue but noted the problems that argument raised in Title VII litigation:

This would be an anomalous result: a victim of sexual harassment in the District of Columbia would have a Title VII remedy in all situations except those in which the victim is harassed by a particularly unspeakable cad who harassed both men and women. In addition to this troubling possibility, the prospect of having litigants debate and juries determine the sexual orientation of Title VII defendants is a rather unpleasant one.

Rather than engage in such an inquiry in the case before it, the court ruled against plaintiff on other grounds. The court did, however, pause to consider how to get around the bisexual supervisor defense problem. The court commented that it could simply “interpret the statute to cover sexual harassment by any individual, regardless of gender. This last interpretation would appear to require the court to interpret the word ‘sex’ as used in Title VII to mean something more than gender.”

In contending with the bisexual supervisor defense, the court did not really understand how that defense fits into Title VII doctrine generally. The word “sex” in Title VII already means...
something more than gender; it means sexualized harassment against heterosexual women. That is why women have been able to prevail in the “he’s mean to everyone defense.” If a woman is treated sexually, it does not seem to matter if men are also treated derogatorily. Thus, Jean Jew, an unmarried woman, prevailed in her case against the University of Iowa because she was repeatedly referred to as a “slut” for allegedly having an affair with her married supervisor. The court acknowledged that the sexual relationship rumors also implicated her male supervisor. Under pressure to resign, Williams, in fact, stepped down as head of the department shortly before Jew’s promotion case was considered.

The court found that Jew had been subjected to unlawful gender-based sexual harassment because: “Were Dr. Jew not a woman, it would not likely have been rumored that Dr. Jew gained favor with the Department Head by a sexual relationship with him.” That response, however, does not respond to the argument that Jew (a woman) and Williams (a man) were both maligned by the rumors of a sexual relationship. It only tells us that Williams was considered to be a heterosexual and Jew was considered to be a heterosexual. Had their sexual orientations been different, such allegations would have been unlikely. Thus, there was no direct evidence that Jew’s gender caused the rumors although the rumors did seem dependent on her and Williams’s perceived sexual orientation.

Another factor which caused the court to be persuaded that Jew was a victim of gender-based harassment was that the two men in the department who were friends with Williams did not have their sexual habits or professional competency questioned. One of them, in fact, was the subject of a graffiti incident which the court considered to be an isolated incident. But, unlike Jew, the two male co-workers did not suffer adverse
assessments of their professional competency due to their relationship with Williams. The two male co-workers, however, did not come up for promotion during this time period so that one could determine whether a man's association with Williams would have had the same detrimental effect. The court presumed that there would have been a difference in treatment without such evidence. The evidence that Jew was sexualized and the men were rarely sexualized was sufficient evidence for the court to support that presumption.

Because of the weight attached to sexualized evidence in harassment cases involving female plaintiffs, reaching bisexual supervisors who harass women would require no great modification to existing Title VII doctrine. A Wyoming district court has agreed that Title VII can reach an "equal opportunity harasser," finding liability when a supervisor verbally harassed members of both genders. In a rather remarkable case under Title VII, two men and two women alleged that their supervisor subjected them to gender-based sexual harassment. Dale and Carla Chiapuzio alleged that they were sexually harassed by supervisor, Eddie Bell, whose incessant, sexually abusive remarks usually referred to the fact that Bell could do a better job of making love to Carla than Dale could. Clint Bean alleged sexual harassment because Bell subjected him and his wife, who was not an employee, to sexually abusive remarks. On one occasion, Bell offered Bean's wife $100 if she would sit on his lap. Christina Vironet alleged sexual harassment because Bell subjected her to an incessant series of sexual advances, particularly when she was pregnant.

Despite the fact that Bell was an "equal-opportunity" harasser, the court found in favor of the male and female plaintiffs. The court reached this conclusion because it concluded that each of the plaintiffs were harassed because of their gender.
Bell intended his remarks to demean the men as men by insulting their sexual prowess, and to demean the women as women by viewing them as sex objects. Through such logic, the court reached harassment of a man by another man. The court, however, drew the line at homosexual advances, observing “Bell never harassed male employees concerning sexual acts he desired to perform with them.”

The court’s reasoning draws an illogical distinction between sexual orientation and gender. Bell’s comments to the men and women did not solely relate to their gender; they also related to their sexual orientation. To the men, Bell was saying, “I am a better heterosexual than you are because I could give your wife more sexual pleasure.” To the women, Bell was saying, “I am a better heterosexual than your husband because I could give you more sexual pleasure.” The comments reflected Bell’s sexual orientation and were intended as insults to the sexual prowess of the men. It is also true that sexual prowess insults are considered to be gender-based insults in our society. But it is wrong to say that Bell’s comments were solely based on gender. The same analysis would apply if Bell had accused the men of being gay or had made sexual advances toward them. In both cases, his comments would have been based on his perception of their sexual orientation and might have insulted their integrity as men.

The court had no difficulty in concluding that Bell’s comments toward the women was based on their gender rather than sexual orientation. But why should it be gender discrimination to make sexual advances toward women but not be gender discrimination to make sexual advances toward men? If sexual advances are gender-based because they are intended to demean and objectify the victim, then it should be irrelevant whether the source of the attraction is heterosexuality or homosexuality.
The *Chiapuzio* decision reflects one of the most awkward constructions of Title VII to preserve heterosexual chastity. Given Bell’s character, it takes little imagination to speculate about the kinds of comments he would have made to an openly gay man or lesbian at the workplace. Undoubtedly, he would have found a way to insult their sexual practices with comments such as pussy and faggot to the men and comments about the lesbians just needing a “good lay.” Such comments would have been demeaning and loaded with gender stereotypes, yet the *Chiapuzio* court would have been unwilling to reach them even within the scope of its “equal opportunity” harasser doctrine. In the future, supervisors who wish to demean the sexual practices of their employees should confine their hiring to gay men and lesbians!

Evidence of sexualized comments directed toward women, however, is no guarantee of quick or easy success under Title VII. Barbara Stacks’s harassment had begun in 1986. She initially lost in the trial court and did not obtain a favorable judgment from the court of appeals until 1994. Similarly, Jean Jew endured a decade of harassment before obtaining a favorable judgment in the federal district court. Even so, her fate was uncertain until a massive public relations campaign was mounted to dissuade the University from pursuing its appeal of the decision. Thus, on the hierarchy of successful lawsuits, cases involving presumptively heterosexual women who have faced highly sexualized comments may be the most promising but even those cases can be difficult to win.

The cases involving female and even male heterosexual plaintiffs, therefore, reveal that the word “sex” already means far more than gender under Title VII. Sex discrimination can be proven with evidence of sexualized harassment even when there is not strong evidence of gender-based discrimination. But, as
we shall see further, this generalization does not usually apply to cases involving homosexual remarks and advances.

II. Loser No. I: Presumptively Gay Men

Ernest Dillon was an employee of the U.S. Postal Service. He was routinely called a “fag” at work, and told that he “sucks dicks.” He was subjected to repeated graffiti with statements such as “Dillon gives head.” He was physically assaulted at work, and received numerous injuries. After three years of enduring this treatment, he resigned upon advice from his psychiatrist and sued in federal court under Title VII for sexual harassment.

Mario Carreno had “his genitals and buttocks caressed,” was “grabbed or held from behind while simulated sexual intercourse or sodomy was performed on him by virtue of pelvic thrusts by other employees,” and was exposed to “constant, explicit, vulgar and derogatory comments regarding sexual acts at his employment.” Carreno sued in federal court under Title VII for sexual harassment. Other men have filed similar claims of sexual harassment based on incidents involving sexual touching.

These men did not prevail under sexual harassment doctrine because the courts concluded that their conduct was based on sexual orientation rather than gender. (The courts presumed they were gay men although they do not appear to have made such concessions at trial.) In each case, they were targeted for sexualized comments and actions that were not directed at women at the workplace. No one seemed concerned if women “sucked dick” or were effeminate. As men, however, those traits were unacceptable. These were not cases like Stacks or Faragher, where the employer could offer the defense that they
mistreated everyone. But, like Stacks and Faragher, they were cases where the comments clearly offended their dignity as persons.

The only defense in these cases was that the comments were homophobic rather than sexist. The line between homophobia and sexism, however, is invisible because homophobia frequently relies on sexual stereotyping about gender roles. Women who are perceived to be heterosexual frequently prevail under Title VII for what is called a “sexual stereotyping” theory even when the sexual stereotyping includes allusions about their sexual orientation. In the landmark 1989 Supreme Court case establishing this doctrine, Ann Hopkins prevailed by showing that she was sexually stereotyped as being too “macho,” and for being told that she should “wear make-up and go to a charm school.” 51 She did not fit the proper gender roles for women, including that of heterosexuality. As Professor Elvia Arriola has argued, mainstream society views “‘gayness’ [as] about crossing the strict sexual boundaries between men and women.” 52 Although Hopkins does not appear to have ever been explicitly accused of being a lesbian, other women who are considered to be heterosexual, such as Jean Jew, have faced such accusations. 53 It is rather peculiar for Title VII to protect women who are presumed to be heterosexual against sexual stereotyping when they are accused of being “macho” or “lesbian” but not to protect men, who are presumed to be homosexual, against sexual stereotyping when they are called epithets such as “Mary” and “fag.” Dillon’s and Carreno’s perceived homosexuality was unacceptable, in part, because it did not fit the proper gender roles specified by society.

Courts have suggested that one would have to add the phrase “sexual orientation” to Title VII to reach cases like Dillon’s and Carreno’s. 54 In fact, it is the courts who have added the word
“heterosexual” to Title VII already. The existing case law reads: A man can recover for being stereotyped as a “fag” and a woman can recover for being stereotyped as “macho” or “lesbian” if they are considered to be heterosexual. If Title VII would protect against gender discrimination for all employees then all employees, irrespective of their sexual orientation, would be able to complain against gender stereotyping epithets such as fag (for men) and macho (for women).

It would oversimplify the Dillon and Carreno cases, however, to conclude that men and women never can prevail under Title VII when there is harassment involving a perceived homosexual. When the harasser is a gay man or lesbian, and the person being harassed is considered to be heterosexual, the courts often find that Title VII covers such conduct. For example, Robin McCoy, a female, prevailed under Title VII because her female supervisor allegedly rubbed McCoy’s breasts, rubbed between McCoy’s legs, and forced her tongue into McCoy’s mouth while also calling McCoy “stupid poor white trash” and “stupid poor white bitch.” The sexual taunts and physical assaults to which McCoy was subjected were comparable to those faced by Dillon and Carreno. Unlike Dillon and Carreno, however, McCoy was considered to be heterosexual, so a ruling in her favor protected a plaintiff’s heterosexual chastity while penalizing a purportedly lesbian supervisor.

The problem with this trend in this case law is that it requires a court to evaluate whether the plaintiff is a heterosexual or homosexual—a problem similar to the one noted by the Ryczek court in the context of the bisexual supervisor defense. This evaluation seems to particularly harm male plaintiffs who are often presumed to be homosexual when they are the subject of explicit sexual advances; women, by contrast, are often presumed to be heterosexual in such contexts. Thus, the courts
have developed a distinction between sexual orientation and gender that they claim is based on Title VII's coverage of sexism but not homophobia. The application of this principle, however, reflects the courts' own prejudices and stereotypes about who is homosexual rather than any consistent principles.

III. Loser No. 2: Nonsexualized Women

Teresa Harris worked as a manager of Forklift Systems. Charles Hardy was the President of the company and her supervisor. Her employment began in April 1985. The following kinds of comments were made until mid-August 1987:

"You're a woman, what do you know?"
"We need a man as the rental manager."
She was a "dumb ass woman."
He suggested in front of other employees that the two of them "go to the Holiday Inn to negotiate [her] raise."
He asked Harris and other female employees to get coins from his front pants pocket.
He threw objects on the ground in front of Harris and other women, and asked them to pick the objects up.
He made sexual innuendos about Harris's and other women's clothing.

In mid-August 1987, Harris complained to Hardy about his conduct. He said he was surprised that Harris was offended, claimed he was only joking, and apologized. Nonetheless, in early September, while Harris was arranging a deal with one of Forklift's customers, he said to Harris in front of other employees: "What did you do, promise the guy . . . some [sex] Saturday night?" Harris soon quit, and filed a lawsuit for sexual harassment and constructive discharge.

After a hearing in the U.S. Supreme Court to clarify the
standards in a sexual harassment case, the Magistrate found on remand that the "workplace did not become permeated with abusive conduct that rose to the level of a Title VII violation until the middle of August 1987, when the sexual comments became explicitly unwelcome." The district court affirmed these findings and no further appeal ensued. These findings are problematic because they rely entirely on the unwelcome sexual comments made to Harris, overlooking the derogatory gender-based comments that were also made. At least two of the comments related to the purported lack of intelligence of Harris as a woman. One comment suggested that all women are stupid; another comment suggested that Hardy, as a woman, was stupid. Such comments should have been per se gender-based (although nonsexualized) harassment.

Teresa Harris was not alone in having the courts ignore the nonsexualized aspects of her complaint. She ultimately prevailed for a portion of the harassment she faced because her complaint also contained sexualized elements. Women with purely gender-based cases (without a sexual element) have not been so fortunate. The most recent example of this trend is a 1995 Fifth Circuit decision, DeAngelis v. El Paso Municipal Police Officers Association.

Sylvia DeAngelis was the first female promoted to sergeant on the police force. Within a few months of being promoted, she was subjected to repeated ridicule in the newsletter of the El Paso Municipal Police Officers Association. The newsletter reached seven hundred police officer members each month. Most of the comments referred to women in general, dismissing them as incompetent with comments like "physically, the police broads just don't got it!", while a couple of the comments referred to plaintiff personally with statements that she was a
"dingy woman." The repeated theme of the comments was that women were not suited to be police officers, but none of the comments were sexual in nature. In a jury trial in federal district court, DeAngelis was awarded $10,000 in compensatory damages and $50,000 in punitive damages.67

On appeal, the Fifth Circuit reversed.68 The three-judge panel unanimously concluded that the “column did not represent a boss’s demeaning harangue, or a sexually charged invitation, or a campaign of vulgarity perpetrated by co-workers: the column attempted clumsy, earthy humor.”69 The Fifth Circuit’s opinion was influenced by its desire to avoid First Amendment problems in concluding that an Association’s newsletter could not invoke Title VII liability for sexual harassment. But, even there, the Court was dependent on a sexualized/nonsexualized dichotomy. In a footnote, the Court commented: “We do not mean that sexual propositions, quid pro quo overtures, discriminatory employment actions against women or ‘fighting words’ involve the First Amendment.”70 In other words, had the columnist called women “bitches” or “cunts” instead of incompetent, plaintiff could probably have prevailed without First Amendment problems.

To DeAngelis and Harris, however, being called incompetent may have been far more damaging than being called sexy or a whore. DeAngelis testified that the comments undermined her credibility at work. On two specific occasions following the publication of the first article (which maligned her personally), junior officers behaved insubordinately to her.71 Further, these columns so undermined her self-confidence that she was reluctant to apply for a promotion to lieutenant. Being repeatedly labeled incompetent harmed her dignity in ways that are similar to the cases involving sexualized comments but the court of
appeals discounted that testimony, in part, because "no physical or sexual advances were made on DeAngelis." The word "sex" in Title VII was interpreted not to include nonsexualized, gender discrimination.

Fortunately, not every federal court has followed the trend typified by DeAngelis and Harris. In a 1987 decision by the Eighth Circuit, the court held that: "Intimidation and hostility toward women because they are women can obviously result from conduct other than explicit sexual advances." Accordingly, it upheld the trial court judgment for the plaintiff in a case involving harassment both of a sexualized and nonsexualized nature. Unfortunately, the Eighth Circuit's decision does not seem to reflect the more recent trends under Title VII where women in purely nonsexualized harassment cases have failed to prevail. And, as we will see in Part VI, the Equal Employment Opportunity Commission has been unable to codify the Eighth Circuit holding.

IV. Loser No. 3: African-Americans

Melvin Hicks began working as a correctional officer at a halfway house, St. Mary's Honor Center, in August 1978. In less than two years, he was promoted to shift commander although, unknown to Hicks at the time, a report was soon authored for the Department of Corrections recommending that blacks be demoted or discharged from supervisory positions to avoid racial tension within the prison system. Until 1984, when Steve Long, a white man, became superintendent, and John Powell, a white man, became chief of custody, Hicks had a perfect work record with no suspensions or reprimands. Shortly after Long and Powell took their positions, Hicks was targeted for reprimands and suspensions, and ultimately was discharged.
Hicks was treated harshly for minor rules infractions. During one incident, Hicks ordered a correctional officer to use a St. Mary's vehicle but failed to enter the vehicle's use into the log. Chief of Custody Powell recommended that Hicks be disciplined for failing to insure the vehicle was correctly logged-in; he was not recommended for discipline for authorizing the use of the vehicle. A four-person disciplinary board voted to demote Hicks as a result of that incident; Powell, who was a member of that board, voted to terminate Hicks for that infraction.79

When white shift commanders committed far more serious infractions of the rules, they received much more lenient treatment. For example, after Michael Doss, a white man, who was the acting shift commander, negligently allowed a prisoner to escape, he received only a letter of reprimand as discipline. Similarly, after Sharon Hefele, a white woman who was a shift commander, failed to lock certain doors to the main power room and annex building, she received no reprimand whatsoever.80 Moreover, Powell, who had recommended Hicks's termination for the log-in error, praised a white transportation officer, Edward Ratliff, who had instructed an inmate in violation of prison rules to climb over a wall to obtain some keys from Superintendent Long's office.81

The second incident that demonstrated the disparate treatment of Hicks was the one that ultimately led to his termination. On April 19, 1984 (only three months after the personnel changes were made), Hicks was notified of his demotion at a meeting with Powell and Long, as well as Vincent Banks, the only remaining black supervisor. Hicks was upset by the news and requested the rest of the day off. Long granted the request. Nonetheless, Powell followed Hicks to his open locker to obtain his shift commander's manual. In the court's words:
Plaintiff refused, and the two exchanged heated words. Plaintiff indicated he would "step outside" with Powell, and Powell warned plaintiff that his words could be perceived as a threat. After several tense minutes, plaintiff left.\textsuperscript{82}

Powell immediately sought disciplinary action against Hicks for these "threats." A disciplinary board met and voted to suspend Hicks for three days. Steve Long, however, disregarded their vote and recommended termination. One month later, Hicks was terminated.\textsuperscript{83}

When a parallel incident regarding a white man occurred, Powell recommended that no disciplinary action be taken. Arthur Turney, a white man who was under Hicks's supervisory authority, "became indignant and cursed plaintiff with highly profane language"\textsuperscript{84} after attending a meeting with Hicks to receive the results of his employment evaluation. In the court's words: "Powell concluded that Turney was merely venting justifiable frustration, and did not discipline Turney for the incident."\textsuperscript{85} Thus, when a white man cursed a black male supervisor, no disciplinary action was taken. But, when a black man exchanged "heated words" with a white male supervisor, he was terminated despite an internal recommendation that he only be suspended.

The atmosphere at St. Mary's Honor Center was therefore charged with harassment against black male supervisors. Black male supervisors were demoted and fired, and replaced with whites. Hicks was subjected to demotion and discharge for misconduct that was less serious than conduct for which whites received no discipline or merely a reprimand. Hicks's authority was undermined in every way possible once Powell and Long became supervisors. His attempts to reprimand others and retain his authority were not validated by management. Instead, management seemed to try to build a file as quickly as possible
that would lead to his termination. As early as the relatively minor log-in incident, Powell was recommending Hicks's discharge. The ultimate discharge occurred only because Long imposed a harsher penalty than was recommended by the disciplinary board.

To justify its conclusion that Hicks was not treated differently because of his race, the district court emphasized that two of the four persons on the disciplinary board consistently were black. One of those individuals was presumably Banks, the only remaining black supervisor after Hicks's discharge. Because there were no other black supervisors at St. Mary's, the other black member must have been a nonsupervisor. One of the two white members was apparently Powell; Long had the responsibility for making the final recommendation to the Department of Corrections.

The idea that the presence of two blacks, one of whom was a nonsupervisor, on the disciplinary board should insulate St. Mary's from a racial discrimination claim is contrary to core principles underlying Title VII and also distorts the facts underlying the case. It is clear that both Powell and Long, who were white men, treated Hicks more harshly than they treated whites. Long had the ultimate authority, which he exercised, to recommend to the Director of the Missouri Department of Corrections and Human Resources that Hicks be terminated. That decision did not result from the recommendation of the racially balanced board. Powell was always one-fourth of the votes on the disciplinary board, and consistently used that authority to seek the harshest possible penalty for Hicks. The two blacks on the board at the time of the log-in incident voted inconsistently with Powell, and thereby achieved the result that Hicks was demoted rather than terminated. Blacks, of course, can help perpetuate racism especially in a situation like the one at St.
Mary's where they might be worried about losing their own jobs. But it is not fair to describe the trial court record as demonstrating that the black employees condoned the treatment of Hicks; if anything, the record indicates that Powell and Long, white men, who had the cooperation of the Director of Corrections, engaged in a vendetta to systematically remove nearly all black supervisors.

Hicks's case was also strengthened by racially conscious documentary evidence. Unknown to Hicks at the time of his employment at St. Mary's, James Davis performed a study of the honor centers in St. Louis and Kansas City in 1980 and 1981 for the Missouri Department of Corrections. As the district court found, "In a section toward the end of the study Davis pointed out that too many blacks were in portions of power at St. Mary's, and that the potential for subversion of the superintendent's power, if the staff became racially polarized, was very real."  

Although the witnesses at trial indicated that they were unaware of the Davis study in 1984, dramatic personnel changes began occurring in 1984 that were consistent with the Davis study. The supervisory staff changed from being one white and five blacks to being four whites and two blacks. The black superintendent was demoted and transferred; his position was filled by a white. The black chief of custody was demoted and transferred; his position was filled by a white. The two black shift commanders other than Hicks were fired and replaced by whites. Hicks was formally retained, but was subjected to immediate and pervasive harassment. Although blacks were hired during this reorganization, none of them were hired for supervisory positions. Until this time, Hicks had not been suspended, written up, or otherwise disciplined except for a mistaken reprimand for being absent when he, in fact, was on a
scheduled vacation.\textsuperscript{92} His record was considered entirely satisfac-
tory.\textsuperscript{93}

The court excused these dramatic race-based personnel changes by noting that they were "not unusual" in light of the problems at St. Mary's.\textsuperscript{94} Implicitly, the court was ratifying the Davis study's conclusion that one way to respond to racial tension at the halfway house was to terminate black supervisors and replace them with whites. Such reasoning, however, should be unacceptable under Title VII's prohibition of race discrimi-
nation.

Ultimately, Hicks lost his case because the district court con-
cluded that his discharge was the result of a personality dispute rather than racism.\textsuperscript{95} This holding was upheld by the Supreme Court because it refined and tightened the burden of proof for plaintiffs in race and gender discrimination cases. In the \textit{Hicks} case, the plaintiff had alleged that he was a black man who had been fired for entirely pretextual reasons thereby raising a strong inference of race discrimination. At trial, the defendants had tried to explain their conduct by producing evidence that Hicks was fired for merit-based reasons. That proof, however, was unsuccessful, as Hicks was able to rebut the evidence with the examples cited above concerning similarly situated whites who were treated more favorably. One would therefore have expected Hicks to prevail in his claim that a nonmerit-based factor, such as racism, must explain his discharge. The trial court and the Supreme Court, however, refused to presume that racism motivated his discharge. Instead, the trial court came up with an explanation for the discharge \textit{that had not even been offered by the defendants at trial}—that Hicks had been fired due to a personality dispute rather than racism. Emphasizing that a plaintiff in a race discrimination case always maintains the burden of proving intentional discrimination, the court
found and the Supreme Court upheld that Hicks had failed to meet this burden even though he had proven that the explanations offered by the defendant were pretextual. In a dramatic shift in Title VII case law, the Supreme Court made clear that plaintiffs who allege discrimination face a virtually insurmountable assumption of incompetence. Even if they can demonstrate that the justifications offered by a defendant are pretextual, they may lose if the court chooses to substitute its own explanation such as a subjective feeling of a personality dispute.

The personality dispute defense has taken on added significance in cases after Hicks unless the plaintiff has evidence of explicit racial epithets. For example, Anita Bivens, a black woman, and Rodolfo Arzate, an Hispanic man, could not convince a judge to let them take their racial harassment cases to a jury. Bivens was not permitted to argue to the jury that pushing and shoving incidents along with loud altercations were due to her race in light of the fact that one employee did openly call her a “nigger.” 96 Arzate was not allowed to argue that other employees “mocked” his speech, which had an Hispanic accent. 97 The court concluded that plaintiff and his co-workers did not talk to each other out of “choice” rather than because of plaintiff’s race. “The fact that coworkers do not like the plaintiff, or that he does not like them, is not the basis of a cognizable Title VII racially hostile work environment claim.” 98 The court refused to connect this “dislike” and noncommunication to stereotypes about plaintiff’s Hispanic ancestry because of the absence of explicit racial epithets. 99

Most African-American plaintiffs who win racial harassment or discrimination cases do provide evidence of racial epithets. 100 James Rodgers, a black man, prevailed in his racial harassment and discharge claims against Western-South Life Insurance. 101 He offered evidence that his supervisor, William Mann, repeat-
edly called him and another black employee "nigger," had referred to blacks as "too fucking dumb to be insurance agents," and had explicitly advised his superior not to hire any more blacks. As with the gender cases involving sexualized language, the defendants tried to argue that Mann insulted all of his employees. The evidence did support the conclusion that Mann regularly called his subordinates "knobheads," "knuckleheads," "dunderheads," and "goons" which contributed to much psychological anxiety. Despite the fact that everyone seemed to suffer abuse from Mann at that workplace, the court found and the circuit court affirmed that "Mann's racist comments and taunts, though perhaps not the sole factor, contributed significantly to the stress condition that compelled Rodgers to resign from Western-Southern." 102 What the court fails to tell us is whether white employees also frequently resigned because of the stress caused by Mann's abusive personality. The racialized nature of the comments caused the court not to make that comparison. Hicks, by contrast, could not prevail although he had strong comparative evidence of different treatment, because he did not have evidence of racialized comments. Without such evidence, his lawyer did not even characterize his case as harassment.

Evidence of repeated racial epithets, however, is not a guarantee that a plaintiff will prevail. James Bolden, a black man, was subjected to comments such as: "you better be careful because we know people in the Ku Klux Klan," "honky", and "nigger." 103 Bolden lost because the court found that although he was "tormented at work" and did report some events that "he did not alert his supervisor he felt he was being harassed because of his race." 104 In another case, the district court did not find credible the assertions of Vildred Davis, a black woman, which were supported by co-workers, that her supervi-
sor "hurled racial epithets towards her, assigned her to difficult jobs without providing training, and otherwise verbally abused her in front of other employee." Both decisions were affirmed on appeal. Evidence of racial epithets therefore strengthen a race discrimination case but are certainly not a guarantee of success.

V. Winner No. 2: Whites

Wendy Wygant, a white woman, was laid off from her job as a school teacher at a time of increasing racial tensions in the Jackson School District. The Union, which represented both black and white teachers, achieved a compromise where the burden of being laid off would fall proportionately on white teachers and minority teachers as a group. Each group would experience a portion of that burden equal to its portion of the faculty. Because black teachers, however, had disproportionately less seniority than white teachers, strict seniority rules had to be modified in order to achieve this racial balance. Wygant, along with some other white teachers, who were among the bottom of the seniority scale for white teachers, but who had more seniority than some of the black teachers who were retained, successfully challenged the compromise agreement. The Supreme Court rejected this compromise despite its purpose to alleviate racial tension, provide role models for minority students, and maintain racial balance. Wendy Wygant’s competence and abilities were considered irrelevant to the Court’s resolution of the case; not once did one member of the Court even mention plaintiff’s full name in the hundreds of pages of opinions that were authored in the case.

In Hicks, the racially conscious plan did not have the purpose of maintaining racial balance; instead, it had the purpose of
overturning the gains at the supervisory level that had been made by blacks. In addition, the plan in Hicks had a disproportionate impact on “innocent” black third parties; blacks and whites were not equally affected. Finally, in Hicks the rationale of avoiding racial strife seemed much more attenuated than in Wygant. In Wygant, the school district wanted to develop and foster positive black role models; in Hicks, the Department of Corrections appeared to be perpetuating the negative stereotype that black supervisors would sympathize with minorities who might engage in racial strife in a prison context. Such negative stereotypes have no place in anti-discrimination doctrine.

Despite dramatic evidence of discrimination, Hicks lost his case because the district court concluded that Hicks had not proven that race was the true explanation for his discharge, although it agreed that Hicks had demonstrated that the reasons offered for his discharge were pretextual. As the court stated: “In essence, although plaintiff has proven the existence of a crusade to terminate him, he has not proven that the crusade was racially rather than personally motivated.”¹⁰⁹ The court of appeals reversed,¹¹⁰ but the Supreme Court reversed the court of appeals and remanded the case back to the district court.¹¹¹ For the second time, the district court ruled for the defendants, finding that Hicks had not offered sufficient evidence of race discrimination to prevail under Title VII.¹¹² Hicks never proved to the satisfaction of the court that race was the cause of his gross mistreatment at St. Mary’s.

A comparison between Hicks and reverse discrimination cases reveals that courts are exceedingly strict with determinations of causation in cases involving race discrimination claims brought by minority claimants but quite generous with determinations of causation in cases involving reverse race discrimination claims brought by white claimants. For example, in the
leading affirmative action case, *Bakke v. Board of Regents*, the courts barely paused to consider whether Allan Bakke's race was the source of his failure to be admitted by Davis Medical School. Bakke had applied to twelve medical schools over two years, and had been turned down by all of them. When he inquired as to why he was rejected, two medical schools indicated that the explanation was his age. The newest and least prestigious of these two dozen schools was the University of California at Davis. Nonetheless, Bakke was aware that his age might be a negative factor at Davis; he therefore wrote to Davis in 1971 asking how his age (33) would affect his application. The associate dean responded "that when an applicant is over thirty, his age is a serious factor which must be considered." Despite the concerns raised by this letter, Bakke applied for admission late in 1972 and received an interview in March after most of the places in the class had been filled. He was rejected for admission; his request to be waitlisted was also rejected.

Bakke sued under Title VI of the Civil Rights Act, as well as the U.S. Constitution in state court. He argued that he was not admitted because his race precluded him from competing for sixteen positions that were set aside for racial minorities. The trial court held that the special admissions program was unlawful, but refused to order Bakke's admission, holding that he had failed to carry his burden of proving that he would have been admitted but for the existence of the special program. Bakke appealed from the portion of the trial court judgment denying him admission and the University appealed from the decision that its special admissions program was unlawful. On appeal, the California Supreme Court ruled in favor of Bakke, because the University conceded that it could not demonstrate that Bakke would not have been admitted in the absence of the
special admissions program. Accepting this admission, the California Supreme Court ordered the trial court to order Bakke admitted to Medical School. The U.S. Supreme Court affirmed the judgment of the California Supreme Court.

The role that Bakke’s qualifications played in this litigation was very peculiar. Several amici suggested that the University “fabricated” Bakke’s qualifications in order to permit him to have standing in the case. The courts accepted the assumption that Bakke was qualified for admission despite the strong evidence that his age had been an adverse factor. For this white plaintiff, qualification and causation were presumed; for black plaintiff Hicks, incompetence and lack of causation were presumed even after he showed that the defendants’ explanations were pretextual.

The Supreme Court rejected the suggestion by amici that Bakke did not have standing to sue due to his fabricated qualifications. Nonetheless, six years later, when a group of parents of black school children brought suit alleging that the Internal Revenue Service helped perpetuate segregated schools, thereby depriving their children of an integrated education, by permitting segregated private schools to maintain their tax-exempt status, the Supreme Court was much more rigorous in its assessment of causation. The Supreme Court found that plaintiffs could not adequately demonstrate that the injury of attending segregated schools was “fairly traceable” to the challenged actions of the IRS. Although the Davis special admissions program supposedly caused Bakke’s harm of being excluded from fair consideration to medical school, the Court rejected the argument that the federal subsidy of segregated schools contributed to the harm of black children who are denied an integrated education. As Justice Brennan stated in dissent, “More than one commentator has noted that the causa-
tion component of the Court’s standing inquiry is no more than a poor disguise for the Court’s view of the merits of the underlying claim. The Court today does nothing to avoid that criticism. Thus, it may be true that the University of California made it easier for the Supreme Court to rule in Bakke’s favor by not contesting Bakke’s qualifications. On the other hand, the Supreme Court would probably have seen through that attempt if Bakke had been a black schoolchild trying to gain access to a white school. Moreover, the University of California probably would not have conceded Bakke’s qualifications during litigation if he were not white and male. Although Jean Jew, for example, had a strong record of sexual harassment, the University of Iowa was unwilling to concede her qualifications for promotion during litigation. As an Asian-American woman, Jean Jew did not garner the presumption of competence accorded to white men such as Bakke.

Similarly, in the recent Duquesne Light case which was decided in favor of a white plaintiff for $400,000 punitive damages (in a case where the compensatory damages were only $25,000), the courts never seriously considered whether Claus’s race was the source of his failure to be promoted. Frederick Claus had worked for Duquesne Light since 1964 and had been made director of engineering in 1985. In 1987, he was denied promotion to manager of construction and engineering and, in 1989, was rejected for promotion to manager of construction coordination and underground for the western division. In 1987, he was passed over in favor of a black man; in 1989, he was passed over in favor of a white man. The district court concluded that the black man who received the first promotion was qualified for it, but that Duquesne Light violated its own affirmative action plan when it promoted him. Four other white individuals had also applied for and been rejected for that
promotion. No one asked whether Claus was more qualified than the other whites who were also rejected for the position.\textsuperscript{126}

As for the failure to obtain the second promotion, the EEOC concluded that Claus was passed over in retaliation for having filed a complaint regarding the first promotion.\textsuperscript{127} Claus, like Bakke, was presumed to be qualified; no consideration was given to whether some of the other white candidates might be more qualified. Moreover, no one questioned why an engineer with more than twenty years of experience had not been promoted previously to a manager position. Reverse discrimination could not possibly explain the other times that Claus was not promoted, since only two of eighty-two middle and upper-middle management positions at Duquesne were held by minorities. Quite possibly, Claus was denied a promotion over the years because of some work-related problems with his performance, not his race. Or possibly, his age (55) had become an (illegal) adverse factor in the employment process. Nonetheless, in reverse discrimination cases plaintiffs are not required to prove causation with the same rigor that they are required to prove causation in cases brought by women and minorities. Once they establish that race was a factor in the selection process, the courts presume that they were more qualified than the minority who was selected.\textsuperscript{128} Melvin Hicks, by contrast, was not able to benefit from that presumption. White male plaintiffs are presumed to be competent and victims of discrimination when they are not selected; minority and female plaintiffs are presumed to be incompetent and victims of a meritocracy when they are not selected.

There are occasional counterexamples to this trend, nonetheless. A federal district court in \textit{Hopwood v. State of Texas},\textsuperscript{129} for example, recently applied the Hicks doctrine to the liability stage of a reverse discrimination case. At stage one, plaintiffs
had established that the University of Texas violated Title VI and the U.S. Constitution by using a race-based quota system for law school admissions.\(^{130}\) At stage two (the liability phase), however, the court cited *Hicks* for the proposition that the "'ultimate burden of persuasion' remains at all times with the plaintiff."\(^{131}\) Then, citing *Bakke*, the court concluded that the plaintiffs should not prevail if the defendants could "establish legitimate grounds for the decision not to admit these plaintiffs, notwithstanding the procedure followed."\(^{132}\) Applying these two doctrines, the court accepted the university's argument that the plaintiffs would not have been admitted even in the absence of the race-based admissions program. This decision was not appealed to the Fifth Circuit.

Although the district court cited *Hicks* in its opinion, it was not really following the *Hicks* doctrine. In *Hicks*, the Supreme Court concluded that a plaintiff in a race case never establishes a presumption of race discrimination even after he or she disproves the justifications offered by the defendant. In *Hopwood*, by contrast, the district court concluded that the evidence that race was a factor in the admissions process shifted the burden of proof to the defendant. The plaintiffs would presumptively prevail unless the defendant could demonstrate that the plaintiffs were unqualified. Because the defendants met this burden of proof, plaintiffs failed to prevail at the liability stage for an order of admission. Had the defendants not met this burden of proof, then the presumption in favor of the plaintiffs would have prevailed and plaintiffs would have won. Had the *Hicks* court employed such a framework, Hicks would have won after defendants failed to establish that plaintiff was unqualified. Thus, even when whites fail to obtain relief in reverse discrimination cases, they have played under an easier set of rules than have blacks.
The case that brings together the different presumptions that apply to cases being brought by white and minority plaintiffs and the role that racialized evidence can play in such cases is Jean Jew’s case. Jew’s case contained two separate allegations: that she was a victim of sexual harassment and that she was not promoted because of her gender. (She did not raise a race claim although some of the sexual epithets were racially charged.) Her failure-to-be-promoted allegation was a difficult claim under existing law, because cases challenging tenure and promotion in the educational context are usually unsuccessful. The presumption of incompetence that is usually accorded to plaintiffs in race and gender discrimination cases is particularly strong in that context. Nonetheless, Jew was able to prevail on both her harassment and promotion claims because of the strength of the evidence of sexualized comments.

The comments that formed the basis of Jew’s sexual harassment case, however, centered on her sexuality not her intelligence or abilities as a research scientist. She was called a “whore,” not a “dumb broad.” If the issue is whether harassment taints a promotion process, one would think that comments like “dumb broad” would be more powerful than comments like “whore” because they speak directly to an individual’s ability to be a research scientist. Yet, the remand decision in Harris, the Fifth Circuit’s decision in DeAngelis, and the Supreme Court’s decision in Hicks all suggest that nonsexualized and nonracialized comments are not particularly problematic at the workplace. Only sexualized and racialized comments reflect lack of respect for an individual’s ability to perform his or her work. It is time to remember that the words “sex” and “race” are unmodified in Title VII. One should be able to prevail on a claim of sex or race discrimination without evidence of sexual or racial epithets.
Ironically, when sexual harassment doctrine was first being developed, the lower courts ruled against the female plaintiffs under the misconception that sexual harassment does not constitute gender discrimination. Those courts were wrong, because, as Catharine MacKinnon has powerfully argued, “the sexual harassment of working women presents a closed system of social predation in which powerlessness builds on powerlessness.” Jean Jew was the victim of this social predation as her sexualization ultimately infected the promotion process in which men who had openly insulted her voted against her promotion. In their minds, she was a “slut” rather than a competent professional. It is therefore a positive development in Title VII jurisprudence for such women as Jean Jew to prevail. The development of sexual harassment doctrine, however, should not make us forget that sexual harassment is only one form of discrimination that women and men may face at the workplace. Gender and race discrimination can and do happen in the absence of sexualized or racialized insults.

VI. Beyond the Moral Code

As we have seen, the courts have overemphasized the sexual nature of harassment as a component of gender-based harassment for claims brought by heterosexual women. Similarly, it increasingly requires evidence of racial epithets for blacks to prevail in claims of racial discrimination. This overemphasis originated with the first harassment guidelines issues by the Equal Employment Opportunity Commission nearly fifteen years ago. Although the purpose of these guidelines was to clarify that sexual harassment constituted gender-based discrimination, contrary to the holdings of many lower courts, the guidelines failed to state clearly that harassment could be
proven without evidence of sexual comments or actions. As the EEOC has recently recognized, the focus on harassment that is sexual in nature has led some people not to realize that harassment based on race, color, religion, gender, age, and disability “is egregious” and prohibited by the various civil rights acts.\footnote{137} Accordingly, the EEOC recently decided to “put in guideline form the rule that sex harassment is not limited to harassment that is sexual in nature, but also includes harassment due to gender-based animus.”\footnote{138} Because the original EEOC guidelines focused on harassment that was sexual in nature which needed to be distinguished from appropriate sexual interactions, the Guidelines included an inquiry as to whether the sexual conduct was “welcome.” The special problem of deciding whether conduct is “welcome,” however, does not exist for nonsexualized harassment and therefore is not part of the EEOC’s recently proposed guidelines for conduct that is not sexual in nature.\footnote{139}

Unfortunately, the EEOC’s attempt to highlight nonsexualized harassment has not been successful. The proposed guidelines have been withdrawn after being subjected for much criticism that they violate employers’ First Amendment rights. Moreover, the proposed guidelines offer little guidance to courts on how to interpret statements and conduct to determine if they constitute “sex harassment” when they are not sexual in nature.\footnote{140} In many cases, like that of Teresa Harris, gender-based comments are combined with sexualized comments. The proposed guidelines give no special instruction as to how to evaluate such comments to determine if they are sufficiently severe and pervasive to constitute unlawful harassment.

The New Jersey Supreme Court, by contrast, has recognized that both gender-based and sexually-based harassment should violate Title VII. In Lehmann v. Toys ‘R’ Us,\footnote{141} the Court
stated that comments and actions of a nonsexualized nature that serve to degrade women’s value at the workplace constitute gender-based harassment and provided the following framework for evaluating such comments:

When the harassing conduct is sexual or sexist in nature, the but-for element will automatically be satisfied. . . . However, not all sexual harassment is sex-based on its face. . . . When the form of the harassment is not obviously based on the victim’s sex, the victim must make a prima facie showing that the harassment occurred because of her sex. . . . In such non-facially sex-based harassment cases a plaintiff might show that such harassment was accompanied by harassment that was obviously sex-based. Alternatively, she might show that only women suffered the non-facially sex-based harassment. All that is required is a showing that it is more likely than not that the harassment occurred because of the plaintiff’s sex. For a female plaintiff, that will be sufficient to invoke the rebuttable presumption that the harassment did in fact occur because of the plaintiff’s sex.142

The New Jersey doctrine represents an enormous advance over existing Title VII doctrine for two reasons. First, it recognizes that harassing conduct can be gender-based even if it is not “sex-based on its face.” The doctrine therefore allows plaintiffs to use circumstantial evidence to infer the gender-based aspect of harassing conduct. Under existing Title VII doctrine, cases involving such circumstantial evidence usually are required to utilize the more rigorous Burdine-Hicks doctrine.143 Second, it recognizes that the gender-based aspect of harassing conduct can be inferred from evidence that other harassment or conduct was sex-based. This insight helps clarify that harassing conduct often occurs in a situation where it is not exclusively and explicitly gender-based. The New Jersey doctrine allows a plaintiff to combine nongender-based harassment with gender-based harassment to meet the threshold of “offensive and pervasive” that is required under Title VII.144 If applied to Harris,
this framework would expand the scope of Harris's recovery. The derogatory comments to Teresa Harris about her intelligence, because accompanied by overt sexualized comments, would easily constitute sex-based harassment.

A problem with the New Jersey standard is that it does not discuss how courts should apply the "unwelcomeness" standard to cases of mixed sexual and nonsexual gender-based conduct. Courts need to clarify that the "unwelcomeness" inquiry is only relevant to sexual conduct. As applied to Harris's situation, for example, comments about her purported stupidity should have been considered per se unwelcome; Harris should have had a successful claim based on those comments before her discussion with Hardy about the unwelcomeness of the sexualized comments. Moreover, under the New Jersey guidelines, those comments about her stupidity could be used to infer that the sexual comments were intended to harm her at the time they were uttered; they were not reflective of "joking" behavior. In other words, an individual who is making entirely unacceptable comments about stupidity that must have been intended to cause harm could be understood to be making contemporaneous comments about sexuality that also must have been intended to cause harm. There is no policy reason to tolerate any derogatory and gender-based comments about one's intelligence. Sex harassment doctrine should clarify this policy.

Not addressed by the proposed EEOC guidelines or the New Jersey Supreme Court rule is how to address claims brought by individuals who are perceived to be gay men or lesbians. These individuals have not been able to take advantage of the long-standing sexualized harassment doctrine. We should retain the principle that sexualized comments are prohibited by Title VII but extend that protection to individuals who are perceived as being gay and lesbian.
Moreover, the focus of the EEOC and the New Jersey Supreme Court has been to reinvigorate gender-based, nonsexualized cases. The fact that race cases brought by racial minorities are also suffering the same problem has been largely unaddressed. The stereotype that all blacks are incompetent and deserve to be discharged remains. The EEOC has done nothing to level the playing field between white and black plaintiffs in race discrimination lawsuits. Thus, the modest steps being taken by the EEOC and New Jersey Supreme Court are unlikely to unravel the emerging moral code under Title VII.

Sexual harassment is an important problem at the workplace that Title VII should continue to redress. Title VII should reach "equal opportunity harassers" who demean both men and women at the workplace with sexualized comments, because those comments are intended to cause gender-based injury to them. To the individual woman who is called a "slut" or "whore" at the workplace, the injury is not lessened because men are also called sexually derogatory names. Since Title VII promises protection against discrimination to the "individual," an individual should be able to recover who can demonstrate that comments reflect gender stereotyping or gender-based animus.

Nonetheless, our recognition that harassment that includes conduct that is sexual in nature is egregious should not blind us to the fact that harassment that is not sexual in nature also occurs at the workplace, and is equally egregious. It is as pernicious to call a woman "stupid" as it is to call her "sexy." Both comments should be illegal when based on gender stereotypes.

Race discrimination against minorities, irrespective of whether it includes the use of racial epithets, is also pernicious and should be redressed by Title VII. Given the direction in
which Title VII case law has gone in the last decade, it is easy to forget that harassment doctrine originated with a recognition of the pernicious nature of racial harassment, and that Congress' primary motivation in passing Title VII was to rid the workplace of racism against blacks. *Hicks* reflects a growing presumption that blacks do not face harassment and are discharged at work due to incompetence. By contrast, the “reverse discrimination” cases reflect a presumption that whites who are discharged are victims of race-based affirmative action plans that cheat them out of their entitlement to employment and advancement.

Three modifications to Title VII are greatly needed to solve the problems discussed above. First, the EEOC guidelines emphasizing the importance of race and sex harassment that is not overtly racial or sexual in nature must be implemented and followed by the courts. Second, Congress must overturn *Hicks* in order to level the playing field between white male plaintiffs and female and minority plaintiffs. Racial minorities and women deserve the presumption of competence that is routinely accorded to white men. If a woman or racial minority establishes a prima facie case of discrimination and a defendant can offer no credible nondiscriminatory and legitimate explanations for its conduct then a plaintiff should prevail as a matter of law. Third, the courts must develop more skepticism toward the claims of reverse discrimination brought by white men. As they do in cases of intentional discrimination brought by women and minorities, courts should consider legitimate and nondiscriminatory explanations that are offered for their failure to promote, employ, or even discharge white men. There are many explanations other than reverse discrimination which can explain why white men do not attain certain jobs; courts must be cognizant of that reality when they consider reverse discrimina-
tion cases. They might want to consider hypothetically how they would evaluate the facts if alleged by a black man.

Some people snidely speculate that a conservative Congress may try to repeal Title VII. As I interpret the case law, however, there is no need for conservatives to call for the repeal of Title VII. By further developing existing doctrine, they can simply transform Title VII into a civil rights statute for women who are victims of sexualized harassment and white men who are purported victims of reverse discrimination. We can only hope that Title VII may one day again become a statute to protect women and minorities from all forms of discrimination at the workplace.