

# SEXY DRESSING REVISITED: DOES TARGET DRESS PLAY A PART IN SEXUAL HARASSMENT CASES?

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## I. INTRODUCTION

In the last year, a great deal of public discussion focused on why women are apparently dressing and behaving more provocatively.<sup>1</sup> However, issues surrounding women's dress are nothing new. Feminists have been debating what constitutes appropriate female attire since the beginning of the feminist movement in the United States.<sup>2</sup> Since the early 1990s, when Naomi Wolf's book *The Beauty Myth*<sup>3</sup> was released, feminists, law professors, and popular culture critics have tried to understand women's dress in the present day. No one theory explains the current happenings with women's dress—instead, the discussion leads to tension within feminist theory: Are women exercising freedom to dress as they please or are they simply buying into their own objectification? Interestingly enough, tension also arises in the social science research: How can one account for studies suggesting that people believe women's dress is a factor in offenses (such as sexual assault), while other studies suggest that dress is not a factor in determining who is victimized? In succeeding parts of this article, I will examine women's dress in a particular context—that of sexual harassment. I will examine the case law to see if and how the dress of sexual harassment targets<sup>4</sup> plays a part in sexual harassment cases. I also will look at the social sciences and the feminist theories that frame sexual

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1. See, e.g., PAMELA PAUL, *PORNIFIED* (2005); ARIEL LEVY, *FEMALE CHAUVINIST PIGS: WOMEN AND THE RISE OF RAUNCH CULTURE* (2005); SHMULEY BOTEACH, *HATING WOMEN: AMERICA'S HOSTILE CAMPAIGN AGAINST THE FAIRER SEX* (2005); LINDA M. SCOTT, *FRESH LIPSTICK* (2005).

2. SCOTT, *supra* note 1, at 1.

3. NAOMI WOLF, *THE BEAUTY MYTH: HOW IMAGES OF BEAUTY ARE USED AGAINST WOMEN* (paperback ed. 2002).

4. Throughout this essay I refer to persons who are subjected to workplace sexual harassment interchangeably as "targets," "victims," and "plaintiffs." I use the term "target" instead of "victim" in many instances to avoid the connotations that come along with the idea of victimization. This does not mean that women who experience workplace harassment are not victims in the normal sense in which the word is used. However, the idea of "victimhood" has negative references that connote a lack of agency, which I intend to undermine with the use of the term "target." In addition, I also refer to "target dress" as a shorthand way to refer to what a sexual harassment target is wearing.

harassment as another form of sex discrimination. All of this is part of a greater effort to understand how women's dress might or might not impact the treatment of sexual harassment cases.

In doing so, I will draw on scholarship—both legal and social scientific—from a related area of criminal law: rape. Scholars have long recognized how a target's dress can influence outcomes in rape cases.<sup>5</sup> Jurors often blame the victims, believing that their provocative dress somehow plays a part in the perpetrator's decision to rape. In spite of years of criticism of these beliefs, the bias this injects into rape trials, and even with the enactment of rape shield laws,<sup>6</sup> this evidence still sneaks into rape cases.<sup>7</sup> With this in mind, one would expect a similar phenomenon to occur in sexual harassment cases. For instance, judges and jurors might believe that the target somehow invited the harassment by dressing provocatively. In sexual harassment cases, the argument that target dress is relevant is more compelling, although equally misguided, than in rape cases. Sexual harassment law requires a plaintiff to show that the harassment was "unwelcome."<sup>8</sup> As the Supreme Court stated in *Meritor Savings Bank v. Vinson*, no *per se* rule exists barring the admissibility of evidence of a victim's provocative dress and publicly expressed sexual fantasies.<sup>9</sup> *Meritor* opened the door to the admission of such evidence in the sexual harassment context.

However, the door was closed on this evidence—or, at least, nudged partly shut—by the extension of the federal rape shield law to civil cases. Against the recommendations of Chief Justice Rehnquist,<sup>10</sup> Fed. R. Evid. 412 became applicable to civil cases in 1994. Given the rule's lack of a bright-line standard for admissibility and the Court's earlier position that in some cases such evidence would be admissible, one would expect to find considerable case law canvassing the admissibility of such evidence in sexual harassment cases. Interestingly, few—if any—cases since Rule 412's extension to civil cases address this issue. One is left wondering why civil defendants are not using this line of argument, which criminal defendants have successfully exploited.<sup>11</sup>

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5. See, e.g., Chen Shen, *Study: From Attribution and Thought-Process Theory to Rape-Shield Laws: The Meanings of Victim's Appearance in Rape Trials*, 5 J. L. & FAM. STUD. 435, 447 (2003); Alinor C. Sterling, *Undressing the Victim: The Intersection of Evidentiary and Semiotic Meanings of Women's Clothing in Rape Trials*, 7 YALE J.L. & FEMINISM 87, 104-06 (1995); DUNCAN KENNEDY, *SEXY DRESSING ETC.* (1993); Gary D. Lafree, Barbara F. Reskin & Christy A. Visher, *Jurors' Responses to Victims' Behavior and Legal Issues in Sexual Assault Trials*, 32 SOC. PROBS. 389, 401 (1985) (study of jurors in rape trials noting that victim history often finds its way into rape trials in spite of rape shield laws).

6. See, e.g., FED. R. EVID. 412. Rape Shield Laws are defined as "A statute that restricts or prohibits the use, in rape or sexual-assault cases, of evidence about the past sexual conduct of the victim." BLACK'S LAW DICTIONARY 1410 (8th ed. 2004).

7. For the ways in which this happens, see Shen, *supra* note 5, at 447.

8. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986).

9. *Id.* at 69.

10. Letter of April 29, 1994 from Chief Justice William Rehnquist to John F. Gerry, contained in Communication from the Chief Justice, the Supreme Court of the United States (May 2, 1994), House doc. 103-250, 103d Congress, 2d Sess.

11. Most notably, evidence about the victim's dress was used effectively by defense attorneys in the William Kennedy Smith case. For a description of the dress evidence that was admitted in that case and an analysis of its use, see Sterling, *supra* note 5, at 113-15.

This article reflects the process by which I approached the subject of provocative dress and sexual harassment law. It begins by considering why a sexual harassment target's dress might be a subject of dispute in a sexual harassment case. This includes a discussion of its relevance to sexual harassment cases as well as the ambiguities in the rape shield law that should lead to litigation on the issue. It then considers those sexual harassment cases in which the plaintiff's dress was discussed by the court in the course of its decision. I discovered very few cases in which the sexual harassment target's dress was relevant; where it was, it rarely came into play in the case in the manner I expected—in particular, as a means for the defendant to argue that the target welcomed the sexually harassing behavior. Thus, I was left wondering why there were few cases about an issue when I expected to find many. From there, I looked for possible explanations for this “null set.” In particular, I looked to social science and feminist legal theory to explain why the provocative dress of a sexual harassment target does not seem to play a major role in defending against these cases. In doing so, I draw on research about how rapist choose their targets as well as research on perceptions of what victim behavior leads to sexual harassment. Based on this, I posit an explanation for the dearth of cases that suggests that sexual harassment does not operate as people often assume.

## II. THE LAW ON TARGET DRESS IN SEXUAL HARASSMENT CASES

### A. History: Supreme Court Precedent and Federal Rule of Evidence 412

The history of the use of dress in sexual harassment cases suggests that the admissibility of target dress would be a hotly-contested issue in such cases. Early sexual harassment case law provides the occasional example of a sexual harassment plaintiff's case harmed by evidence of her workplace attire.<sup>12</sup> This precedent suggested that how the plaintiff dressed might play a role in determining whether she was sexually harassed. Eventually, the rules of evidence were changed in a manner that made the admissibility of target dress less likely. Imposing a balancing test, the new evidentiary rule encouraged case by case determinations of admissibility. It was not adopted without controversy. As I explain below, the Supreme Court itself questioned the new evidence rule's constitutionality. This section provides a brief history of the use of target dress in sexual harassment cases, with an eye toward explaining why one would expect to see cases that debate the admissibility of sexual harassment target dress.

The admissibility of evidence of a target's dress became an important issue in the first sexual harassment case that the Supreme Court assessed, *Meritor Savings Bank v. Vinson*.<sup>13</sup> In *Meritor*, the Court first set out the elements a plaintiff must prove in order to have a viable hostile environment sexual harassment claim. The lower court had found that any relationship between Mechelle

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12. See Christina A. Bull, Comment, *The Implications of Admitting Evidence of a Sexual Harassment Plaintiff's Speech and Dress in the Aftermath of Meritor Savings Bank v. Vinson*, 41 UCLA L. REV. 117, 126–35 (1993) (describing several early cases involving dress).

13. 477 U.S. 57, 65 (1986).

Vinson and her harasser was voluntary. Therefore, it did not amount to sexual harassment. The Supreme Court disagreed, stating that the “gravamen” of a sexual harassment claim is that the harasser’s conduct be “unwelcome.”<sup>14</sup> Thus, evidence that suggested whether the plaintiff welcomed the behavior of the purported harasser became relevant to this element essential to the claim. In addition, the Court also set the standard for what level the harassment had to reach in order to be actionable. As the Court explained, “not all workplace conduct that may be described as ‘harassment’ affects a ‘term, condition, or privilege’ of employment within the meaning of Title VII.”<sup>15</sup> Instead, “[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’”<sup>16</sup>

The Court specifically addressed how the plaintiff’s dress might play a role in its newly-created unwelcomeness analysis. The lower courts disagreed about whether evidence of the plaintiff’s dress should be admissible in her sexual harassment case.<sup>17</sup> The D.C. Circuit explained that the evidence of plaintiff’s dress and personal fantasies “had no place in this litigation.”<sup>18</sup> The United States Supreme Court disagreed, explaining:

While “voluntariness” in the sense of consent is not a defense to such a claim, it does not follow that a complainant’s sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome. To the contrary, such evidence is obviously relevant. The EEOC Guidelines emphasize that the trier of fact must determine the existence of sexual harassment in light of “the record as a whole” and the “the totality of circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred.”<sup>19</sup>

Although the Court did not state that evidence of the sexual harassment target’s provocative dress was always admissible, this decision provided a basis for employers to discover and request admission of such evidence in sexual harassment cases, especially on the issue of unwelcomeness.

Eight years after *Meritor*, the admissibility of such evidence became less likely when Rule 412 was extended to civil cases. Rule 412 provides that in cases involving “sexual misconduct,” evidence offered to prove that a target engaged in other sexual behavior or sexual predisposition generally would not be admissible.<sup>20</sup> However, there is an exception for civil cases:

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14. *Id.*

15. *Id.* at 67.

16. *Id.* (quoting *Henson*, 682 F.2d at 904).

17. See *Vinson v. Taylor*, No. 78-1793, 1980 WL 100 (D.D.C. Feb. 26, 1980), *rev’d*, 753 F.2d 141, 146 n.36 (D.C. Cir. 1985), *aff’d sub nom.*, *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986). The district court did not directly address the plaintiff’s dress. However, the court of appeals surmised that the district court “may” have considered her dress in finding that the conduct was “voluntary.” 753 F.2d at 146 n.36.

18. *Vinson*, 753 F.2d at 146 n.36.

19. *Meritor*, 477 U.S. at 69 (citing 29 C.F.R. § 1604.11(b) (1985)).

20. FED. R. EVID. 412(a).

In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.<sup>21</sup>

Thus, the person wishing to have the evidence admitted—generally the defendant in a sexual harassment case—must satisfy this balancing test and convince a court that the probative value of the evidence “substantially outweighs” the potential harm to the target as well as any resulting prejudice. Such balancing tests generally lend themselves to case-specific factors. Therefore it is reasonable to expect litigation on this issue, in spite of the extension of Rule 412 to civil cases.<sup>22</sup>

Although it might not be clear from the text of the rule itself, the advisory committee's notes explain that the rule is applicable to sexual harassment cases. As the notes explain, “Rule 412 will . . . apply in a Title VII action in which the plaintiff has alleged sexual harassment.”<sup>23</sup> The advisory committee also explained that the purpose of the rule is to protect plaintiffs against “invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process.”<sup>24</sup> The rule is designed to encourage plaintiffs to come forward and pursue actions against sexual offenders.<sup>25</sup> Having one's private life on display in court would create a significant disincentive for targets of harassment to report such behavior and pursue these claims.

The advisory committee's notes go further, however, and appear to counter the *Meritor* Court's position on dress. The notes define the behavior intended to be precluded by the rule to “include activities of the mind, such as fantasies or dreams.”<sup>26</sup> In seeking to protect the target from stereotypical thinking that might result from such evidence, the notes specifically state that “unless the (b)(2) exception is satisfied, evidence such as that relating to the alleged victim's dress, speech, or lifestyle will not be admissible.”<sup>27</sup> Thus, the rule's drafters contemplated how the rule would impact sexual harassment cases: Evidence of the target's dress is normally inadmissible. In limiting the admissibility of this evidence, it appears that the advisory committee attempted to counteract or, at least, undermine the Court's decision on this point in *Meritor*.

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21. FED. R. EVID. 412(b)(2).

22. The rule also sets forth a specific procedure a defendant must follow before he or she may offer such evidence, which requires filing a written motion at least fourteen days before trial. FED. R. EVID. 412(c)(1). A party seeking to admit such evidence must include a description of the evidence and the purpose of its use in the motion. *Id.* It also provides that the court conduct a hearing in camera which allows the parties to be heard before the evidence is admitted. FED. R. EVID. 412(c)(2). Thus, the rule creates some protection for targets of sexual abuse.

23. FED. R. EVID. 412, advisory committee's note.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

The drafters also took the opportunity to comment on how the rule might affect the discovery process. Sometimes simply having to reveal private information to the opposing party can discourage women from pursuing otherwise meritorious claims. Even if the information is not admissible, damage may still result from the embarrassment of having to release such information to the defendant or the court. Thus, limiting discovery of this personal information seems sensible. The drafters of the rule agreed. The advisory committee's notes contemplate that a court will enter appropriate protective orders to limit discovery of information protected under Rule 412. Although the note acknowledges that Rule 412 does not directly apply to discovery, it explains: "[i]n order not to undermine the rationale of Rule 412 . . . courts should enter appropriate orders pursuant to Fed. R. Civ. P. 26(c) (governing protective orders) to protect the victim against unwarranted inquiries and to ensure confidentiality."<sup>28</sup> It explains that such orders should be "presumptively" entered, and any party wishing to discover such information would have to show that the "evidence sought to be discovered would be relevant under the facts and theories of the particular case, and cannot be obtained except through discovery."<sup>29</sup>

However, given the Supreme Court's position on the relevance of target dress evidence, these advisory notes might not afford much protection to targets. The drafters went on to explain that, "[i]n an action for sexual harassment . . . some evidence of the alleged victim's sexual behavior and/or predisposition in the workplace *may perhaps* be relevant."<sup>30</sup> Thus, the question remains whether evidence of workplace dress is covered by the discovery prohibition. Still, the notes' contemplation that dress would normally be inadmissible under Rule 412, absent the defendant satisfying the balancing test, should give sexual harassment targets some solace.

The discussion of Rule 412's application to sexual harassment cases is limited to the advisory committee's notes. Although the Supreme Court has used the advisory committee's notes in its decisions regarding the Federal Rules of Evidence,<sup>31</sup> it has not done so specifically with respect to Rule 412. Also, the Supreme Court and various courts of appeal suggest that, while the federal rules advisory committee's notes are viewed as "instructive"<sup>32</sup> and "of weight,"<sup>33</sup> both have been clear that the notes are neither binding nor determinative of a given issue in their interpretation of the rules.<sup>34</sup> Lower courts have looked to the

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28. *Id.*

29. *Id.*

30. *Id.* (emphasis added).

31. *See, e.g.,* *Tome v. United States*, 513 U.S. 150, 160 (1995) (using advisory committee notes to FED. R. EVID. 801); *United States v. Vonn*, 525 U.S. 55, 64 n.6 (2002) ("In the absence of a clear legislative mandate, the Advisory Committee Notes provide a reliable source of insight into the meaning of a rule, especially when, as here, the rule [FRCP 11] was enacted precisely as the Advisory Committee proposed.") (alteration added).

32. *Moody Nat'l Bank v. GE Life & Annuity Assurance Co.*, 383 F.3d 249, 253 (5th Cir. 2004).

33. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 316 (1988).

34. *See Torres*, 487 U.S. at 316; *Hokenkamp v. Van Winkle & Co., Inc.*, 402 F.3d 1129, 1132 (11th Cir. 2005) (explaining that, in interpreting FED. R. CIV. P. 4, "[a]lthough not binding, the

advisory committee's notes for guidance in assessing the discovery<sup>35</sup> and admissibility of evidence under Rule 412.<sup>36</sup>

It is unclear how much weight the Supreme Court would give the advisory committee notes interpretation, given its decision in *Meritor* that dress is sometimes relevant and its general opposition to extending Rule 412 to civil cases. As Chief Justice Rehnquist explained in voicing the Court's opposition:

Some members of the Court expressed the view that the amendment might exceed the scope of the Court's authority under the Rules Enabling Act, which forbids the enactment of rules that "abridge, enlarge or modify any substantive right." This Court recognized in *Meritor Saving [sic] Bank v. Vinson* that evidence of an alleged victim's "sexually provocative speech or dress" may be relevant in workplace harassment cases, and some Justices expressed concern that the proposed amendment might encroach on the rights of defendants.<sup>37</sup>

Some might see this as an invitation to open litigation on the issue of whether the Court exceeded its power under the Rules Enabling Act,<sup>38</sup> as well as Rule 412's potential to infringe on the rights of defendants. This checkered history, combined with the fact that the main text of the rule does not speak to its applicability in sexual harassment cases, creates some uncertainty as to the extent Rule 412 will apply to target dress in sexual harassment cases. This uncertainty should have resulted in a great deal of civil litigation about the valid use of Rule 412 in cases in which target dress is potentially an issue. Yet, as I explain below, very few cases discuss this issue. Instead, target dress is being used in a variety of ways and often is introduced by the plaintiff in sexual harassment cases.

## B. Lower Court Dress Cases

There are few lower court decisions involving Rule 412 that discuss whether evidence of a target's dress is admissible in a sexual harassment case.<sup>39</sup>

interpretations in the Advisory Committee Notes 'are nearly universally accorded great weight in interpreting federal rules.'" (quoting *Vergis v. Grand Victoria Casino & Resort*, 199 F.R.D. 216 (S.D. Ohio 2000)).

35. See, e.g., *A.W. v. I. B. Corp.*, 224 F.R.D. 20, 23 (D. Me. 2004); *Barta v. City & County of Honolulu*, 169 F.R.D. 132, 135 (D. Haw. 1996).

36. See, e.g., *Herchenroeder v. Johns Hopkins Univ. Applied Physics Lab.*, 171 F.R.D. 179, 181 (D. Md. 1997).

37. Letter from Chief Justice William H. Rehnquist to John F. Gerry, House Document 103-250, at v, 103d Congress, 2d Sess. (April 29, 1994) (citing 28 U.S.C. § 2072(b) (2000); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 69 (1986)) (internal citations omitted).

38. Through the Rules Enabling Act, Congress provided the Supreme Court with the authority to create rules governing the lower courts, including the Federal Rules of Evidence. 28 U.S.C. § 2072(a) (1990). The Act provides that the court "shall not abridge, enlarge or modify any substantive right." § 2072(b) (1990). Thus, a rule that invades substantive rights can run afoul of the Act and be invalidated.

39. See Charles C. Warner, *Motions in Limine in Employment Discrimination Litigation*, 29 U. MEM. L. REV. 823, 854 (1999) (noting that "[s]ince the amendment to Rule 412 in December, 1994, there have been relatively few reported decision in civil cases substantively illuminating the application of the rule substantively.").

It appears that when the rule is invoked, courts are generally applying it properly. There are some cases in which target dress evidence is admitted, but often it does not carry great weight on the unwelcomeness issue for the defendant. In most cases, Rule 412 is never discussed; hence it is difficult to know whether the rule was ever specifically raised in the case.

Although early case law suggested that a defendant's use of target dress in defending a case might prove a significant issue,<sup>40</sup> case law since the adoption of Rule 412 suggests otherwise.<sup>41</sup> Given the debate over the relevance of target dress to the unwelcomeness prong of a sexual harassment claim, as well as the balancing approach adopted in Rule 412(b), one would expect that defendants would at least attempt to use such evidence to prove that the harassment was not unwelcome. While there are many cases in which defendants use target behavior, including speech, in an attempt to prove the plaintiff welcomed the purportedly harassing behavior,<sup>42</sup> few reported cases involve defendant's using target dress to show the plaintiff welcomed the harassment.

This section looks at the various ways in which target dress is playing a role in sexual harassment cases. First, it discusses the few cases in which the defendant attempts to use the target's dress to show that she welcomed the harassment and Rule 412 is invoked. Second, it discusses cases in which target dress becomes an issue because the harassing incidents involve reactions to a target's dress.<sup>43</sup> In these cases, the plaintiff uses harasser comments about her dress to prove another element of the sexual harassment claim: that the harassment is sufficiently severe or pervasive to be actionable under Title VII. This set of cases includes several in which a harasser attempts to look down a target's shirt or up a target's skirt. Third, it describes cases in which a plaintiff was told to wear something different to work because her clothing was deemed inappropriate. The survey concludes with cases in which an employer suggested or required a plaintiff to wear revealing clothing. In most of these cases, the target's dress is not being used by the defendant to show that the plaintiff welcomed the harassment.

### 1. *Admissibility Decisions Under Rule 412*

There are few decisions involving Federal Rule of Evidence 412 that discuss whether evidence of a target's dress is admissible in a sexual harassment case.<sup>44</sup> However, in the few that have been decided, the courts tend not to admit the

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40. See John P. Furfaro & Maury B. Josephson, *Plaintiff's Conduct as Evidence in Sexual Harassment Cases*, 212 N.Y.L.J. 3, col. 1 (Nov. 4, 1994); Bull, *supra* note 12, at 119.

41. See, e.g., *Jaros v. Lodgenet Entm't Corp.*, 294 F.3d 960, 965 (8th Cir. 2002) (refusing to admit evidence of victim's dress under FED R. EVID. 412), *abrogated by Pa. State Police v. Suders*, 542 U.S. 129 (2004).

42. See THERESA M. BEINER, *GENDER MYTHS V. WORKING REALITIES: USING SOCIAL SCIENCE TO REFORMULATE SEXUAL HARASSMENT LAW 68-74* (2005) (cataloguing cases).

43. *Meritor*, 477 U.S. at 67.

44. See Charles C. Warner, *Motion in Limine in Employment Discrimination Litigation*, 29 U. MEM. L. REV. 823, 854 (1999) (noting that "[s]ince the amendment to Rule 412 in December, 1994, there have been relatively few reported decision in civil cases illuminating the application of the rule substantively.").



evidence, in keeping with the purposes behind the rule. Thus, it appears that when the Rule is invoked, the courts are (for the most part) applying it properly. There are some cases in which the evidence is admitted, but often it does not carry the day on the unwelcomeness issue for the defendant. In some, Rule 412 is never discussed. Thus, it is difficult to know whether the Rule was ever raised in the case.

Beginning with cases that were argued under Rule 412, the few courts that have considered the issue tend to use the rule to keep evidence of target dress out of the case. For example, in *Arno v. Club Med, Inc.*, the defendant argued on appeal that the court erroneously refused to admit evidence of the target's dress in a case involving a sexual assault.<sup>45</sup> The defendant argued that her dress was relevant to whether she cooperated with the harasser in removing her clothing.<sup>46</sup> The court reasoned that:

This argument is meritless. Under Rule 412 of the Federal Rules of Evidence, evidence offered to prove a victim's sexual predisposition is inadmissible. The scope of Rule 412 is broad. Indeed, its drafters intended it to exclude evidence that may have a sexual connotation, including "evidence such as that relating to the alleged victim's mode of dress." At trial, the Court found that the probative value of Arno's clothing was outweighed by the danger of unfair prejudice to Arno. Nevertheless, Defendants were permitted to cross-examine Arno about the clothing and how it was removed. Thus, the Court's ruling did not prejudice Defendant's ability to present their cooperation theory to the jury.<sup>47</sup>

Likewise, in *Jaros v. Lodgenet Entertainment Corp.*, the trial court excluded evidence under Rule 412, a decision with which the appellate court agreed.<sup>48</sup> The defendant attempted to introduce evidence that the plaintiff "'dressed in a manner that accentuated her figure more than was appropriate for the workplace.'"<sup>49</sup> Acknowledging both the Supreme Court's decision in *Meritor* and Rule 412's extension to civil cases, the district court reasoned:

In this case, the probative value of Jaros's attire was not strong. The only evidence excluded from trial were comments that Jaros sometimes wore tight-fitting clothing. The proffered evidence was very weak. Most of Racz's comments, moreover, had nothing to do with what Jaros was wearing, and many had less to do with Jaros's figure than Racz's own claimed sexual prowess or his speculation about Jaros's sex life. The evidence proposed by LodgeNet, if admitted at trial, would have carried the attendant danger that jurors would base their verdicts on their opinions about Jaros's morality and not the law of sexual harassment. While the aspects of Jaros's dress proffered by LodgeNet

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45. 1995 WL 380124 (N.D. Cal. June 22, 1995).

46. *Id.* at \*3.

47. *Id.* (citing FED.R. EVID. 412, advisory committee note, 1994 amend.) (internal citation omitted).

48. 171 F. Supp. 2d 992, 1003 (D.S.D. 2001), *aff'd*, 294 F.3d 960, 964 (8th Cir. 2002), *abrogated by* Pa. State Police v. Suders, 542 U.S. 129 (2004).

49. *Jaros*, 171 F. Supp. 2d at 1003 (citation omitted).

prior to trial were marginally relevant, their probative value was not substantial enough to warrant their admission under Rule 412.<sup>50</sup>

Thus, the court did not admit evidence of the plaintiff's dress, which is consistent with Rule 412.

There is the occasional case after Rule 412's extension to civil cases in which this evidence is admitted. In *Sublette v. Glidden Co.*, the court considered whether evidence of plaintiff's dress was relevant, but the plaintiff's actions were much more extreme than in those cases in which it was not admitted.<sup>51</sup> Notably, the plaintiff in *Sublette*:<sup>52</sup> (1) wore a sign "essentially saying 'Best Blow Jobs on the #8 line;'" (2) ripped her t-shirt and exposed her breast in front of others; and (3) permitted a male co-worker to "imprint his hand print in paint on the back bottom of her t-shirt, and on her buttocks."<sup>53</sup> The defendant argued that such actions were relevant to both welcomeness and whether she perceived the behavior to be offensive. In its Rule 412 analysis, the court began by noting that most cases cited by the parties permitted "evidence of conduct in the workplace to be introduced" under Rule 412.<sup>54</sup> Under these circumstances, the court allowed the evidence to be admitted (at least preliminarily at the motion *in limine* stage), with the caveat that it might change its decision if it became clear that the purported harassers knew nothing of the plaintiff's behavior or the plaintiff made it known directly that the harassment was unwelcome.<sup>55</sup>

Even in cases in which the evidence of the target's dress was admitted, its impact was minimal in persuading trial judges that the plaintiff welcomed the harassment. The cases prior to the effective date of the amendment to Rule 412 show that courts did not find this evidence very compelling. For example, in *Honea v. SGS Control Services, Inc.*, the defendant moved for summary judgment, arguing that the plaintiff's practice of occasionally not wearing a bra to work was evidence that the harassment was not unwelcome.<sup>56</sup> The court disagreed:

Aside from the fact that the text of Title VII does not require a woman to wear a bra in order to pursue a claim for sexual harassment, Honea's deposition testimony counters the defendant's implication by explaining that the reason she wore no bra was because she wore coveralls to work. Moreover, she also testified that she delivered roses to male and female workers alike.<sup>57</sup>

Under these circumstances, the court denied the defendant's summary judgment motion.

Similarly, in *Wilson v. Wayne County*, the court was not impressed with the defendant's argument that the plaintiff's wearing short shorts to work and

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50. *Id.* at 1003–04.

51. No. 97-CV-5047, 1998 WL 964189, at \*2–3 (E.D. Pa. Oct. 1, 1998).

52. While the plaintiff engaged in other provocative behavior, the allegations described above are those that involved her clothing. *See id.* at \*1–2.

53. *Id.*

54. *Id.* at \*3.

55. *Id.* at \*4.

56. 859 F. Supp. 1025, 1030 (E.D. Tex. 1994).

57. *Id.*

coming by the office in a bathing suit and shorts on her way back from a canoeing trip in some way welcomed her boss' sexual assault.<sup>58</sup> As the court explained,

[t]he fact that an eighteen-year-old girl wore shorts during the summer months in Tennessee, wore a bathing suit on a canoe trip, and engaged in non-sexual horseplay with a co-worker her own age should not be perceived by even the most optimistic fifty-three-year-old man as a willingness to have sex with him.<sup>59</sup>

Both of these cases occurred in 1994, shortly before Rule 412 became effective for civil cases. Thus, even without Rule 412, courts rarely found this evidence probative.<sup>60</sup> This holds true for cases decided after the extension of Rule 412 as well. In *EEOC v. Rotary Corp.*, the defendant moved for summary judgment arguing that the evidence showed that plaintiff welcomed the sexually harassing behavior by her "sexually provocative dress and behavior."<sup>61</sup> The court denied summary judgment, holding that this was a matter for the jury.

In contrast, target dress evidence played a particularly important role in *Woodard v. Metro I.P.T.C.*<sup>62</sup> In this case, the court used the plaintiff's attire as part of its reasoning in granting summary judgment, even though the plaintiff was subjected to fairly severe sexual harassment.<sup>63</sup> The case is problematic because it predates the Supreme Court's decision in *National Railroad Passenger Corp. v. Morgan*, which held that plaintiffs who pursue a claim under a hostile environment theory could include harassment occurring prior to the 300-day claim period under Title VII, so long as at least one act of harassment occurred within the 300-day period.<sup>64</sup> In *Woodard*, a great deal of harassing behavior was excluded under the pre-*Morgan* rule, because it occurred before the 300-day cut-off for employment discrimination claims. However, there still were significant acts of harassment within the 300-day period. The clothing-related allegations in this case included the fact that the plaintiff owned a lingerie store. She posted flyers that included a photo of her modeling the lingerie on a bulletin board at work.<sup>65</sup> She also offered to put on "private shows" at the store for her co-workers.<sup>66</sup> She wore what the court characterized as "skimpy or provocative" clothing to work.<sup>67</sup> She filed several motions *in limine* in an effort to keep this evidence out of consideration for purposes of the defendant's summary

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58. *Wilson v. Wayne County*, 868 F. Supp. 1254, 1257-60 (M.D. Tenn. 1994).

59. *Id.* at 1260. The plaintiff still lost on the issue of holding the sheriff individually liable. Title VII only applies to the employer and does not provide a mechanism for holding individual harassers liable.

60. *See also Meadows v. Guptill*, 856 F. Supp. 1362, 1367 (D. Ariz. 1993) (finding evidence of plaintiff's manner of dress and purported "touchy" behavior had little "probative force," especially given the nature of the sexual harassment allegations in the case).

61. *EEOC v. Rotary Corp.*, 297 F. Supp. 2d 643, 662 (N.D.N.Y. 2003) (citation omitted).

62. *Woodard v. Metro I.P.T.C.*, No. IP 98-646-C H/G, 2000 WL 684101 (S.D. Ind. Mar. 16, 2000).

63. *Id.*

64. 536 U.S. 101, 122 (2002).

65. *Woodard*, 2000 WL 684101, at \*3.

66. *Id.*

67. *Id.* at \*6.

judgment motion.<sup>68</sup> The court considered whether the evidence was admissible under Rule 412. The court found the evidence relevant to the subjective component of the sexual harassment claim, which was whether the plaintiff personally found the behavior harassing.<sup>69</sup> Curiously, however, the court did not discuss the evidence in terms of unwelcomeness, arguing instead that it was relevant to “evaluating whether Metro [the defendant] responded reasonably to her complaint and whether Metro should have discovered the alleged harassment and responded earlier.”<sup>70</sup>

Concluding that such evidence was admissible, the court explained that the relevance of the evidence “substantially outweighs any potential unfair prejudicial effect of such evidence on Woodard’s claims.”<sup>71</sup> The court reasoned that the underlying purpose behind Rule 412—preventing embarrassment to the plaintiff by revealing private information—would not be furthered in this case, because the plaintiff herself brought this information into the workplace.<sup>72</sup> The plaintiff wore “hot pants,” low-cut tops, and buttocks-revealing shorts to work.<sup>73</sup> When told to put on more clothes for work,<sup>74</sup> plaintiff responded, “I am wearing what I want to wear.”<sup>75</sup> The court ultimately granted the defendant’s summary judgment motion, reasoning that the harassment was not sufficiently severe or pervasive to be actionable and that the employer responded reasonably to her complaints.<sup>76</sup>

Yet, the acts of harassment in this case were fairly egregious. The plaintiff made allegations about four employees at Metro, but of those, the actions of one co-worker, Smith, were particularly severe. The plaintiff testified that Smith talked about his penis frequently, was “constantly trying to force himself” on her, tried to feel her breasts, tried “to feel between her legs,” and tried to kiss her.<sup>77</sup> It is surprising that such actions would not be subjectively severe or pervasive enough to be actionable as a matter of law, even though the plaintiff did engage in some voluntary conduct at work. Yet, the court was extremely dismissive of this case, beginning its opinion with “[t]his case presents truly meritless allegations of sexual harassment. If the case has any effect beyond these parties, it will only be to make it more difficult for women who genuinely are victims of sexual harassment on the job to prove their cases and obtain remedies.”<sup>78</sup> This case stands as a rare example of a court reaching such a decision. For the most part, courts considered evidence of dress inadmissible or not determinative in the cases before them.

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68. *Id.*

69. *Id.* at \*6–7.

70. *Id.* at \*7.

71. *Id.*

72. *Id.*

73. *Id.* at \*9.

74. *Id.*

75. *Id.* (citation omitted).

76. *Id.* at \*11.

77. *Id.* at \*5.

78. *Id.* at \*1.

As a general matter, evidence of the sexual harassment target's dress is not playing a major role in determining whether the plaintiff welcomed the harassment. While some courts admit such evidence, even when it is admitted, it does not prove to be very effective for the defendant. While the history of target dress in sexual harassment cases suggests that there would be a lot of litigation on this issue, the cases are relatively rare. Instead, target dress is coming into play in other ways.

## 2. *Comments on Dress as Part of the Harassing Behavior*

Another way that target dress is used in sexual harassment cases is by the plaintiff herself. In order to prove a claim of sexual harassment, a plaintiff must show that the behavior involved was “sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive work environment.’”<sup>79</sup> Plaintiffs use evidence concerning comments about their dress as part of the incidents that comprise the harassment. While perhaps one of the largest misperceptions about sexual harassment law is that an individual can be accused of sexual harassment simply by complimenting a co-worker on his or her attire—the case law and legal standards suggest otherwise. While many targets of sexual harassment allege comments about their dress as part of the sexually harassing incidents, such comments generally are not the only conduct or behavior involved in the case, and many of the comments are made in a manner that would not be viewed as complimentary.

Rather than simply being about an individual “looking nice today,” sexually-harassing comments objectify or sexualize the target.<sup>80</sup> For example, in *Landrey v. City of Glenwood Springs*, the harasser told the plaintiff that “‘there’s nothing uglier than a fat woman in stretch pants.’”<sup>81</sup> In *Ammon v. Baron Automotive Group*, the plaintiff was told by one of her harassers that “‘I’d love to lick those pants off you,’” that she had “‘nice legs,’” and that she “‘should wear a dress more often.’”<sup>82</sup> While one of her co-workers “associated plaintiff’s attire with a street walker or a school teacher,”<sup>83</sup> the court did little with these comments in the context of deciding the case. Thus, they did not appear to help the defendant’s case.<sup>84</sup> Similarly, in *Brassfield v. Jack McLendon Furniture*, the plaintiff’s manager told her that he would like to see her in a wet t-shirt, asked her if she was wearing underwear, and said that he liked her “dress because

79. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986) (quoting *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982), and *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971)).

80. See, e.g., *Brassfield v. Jack McLendon Furniture*, 953 F. Supp. 1438, 1446–47 (M.D. Ala. 1996); *Magnuson v. Peak Technical Servs., Inc.*, 808 F. Supp. 500 (E.D. Va. 1992); *Hutchison v. Amateur Elec. Supply, Inc.*, 42 F.3d 1037, 1042 (7th Cir. 1994); *Aldridge v. Kansas*, No. 96-2382-JWL, 1997 WL 614323 (D. Kan. Sept. 10, 1997).

81. 03CV01299EWNBNB, 2006 WL 726634, at \*1 (D. Colo. Mar. 22, 2006) (citation omitted).

82. 270 F. Supp. 2d 1293, 1300 n.3, 1301 (D. Kan. 2003) (citation omitted).

83. *Id.* at 1301. This is a curious juxtaposition, as school teachers are generally not thought to dress like street walkers.

84. The *Landrey* plaintiff lost on summary judgment, with the court holding that the harassment was not sufficiently severe or pervasive to be actionable. *Landrey*, 2006 WL 726634, at \*11. Summary judgment was denied in *Ammon*, 270 F. Supp. 2d at 1307–08.

when she bent over he could see her ‘tits.’”<sup>85</sup> In *Magnuson v. Peak Technical Services, Inc.*, the harasser told the plaintiff she “looked so good” that he had to “go back into the restroom” to relieve himself sexually.<sup>86</sup> Her co-workers also discussed her anatomy.<sup>87</sup> In both *Brassfield* and *Magnuson*, the court denied the defendant’s motion for summary judgment. In *Nievaard v. City of Ann Arbor*, comments were made daily about the plaintiff’s clothes and appearance.<sup>88</sup> She was told she was “sexy,” that if she “pulled down her shirt a little more the workers could have a ‘view all day,’” and that her shirts were “‘too tight.’”<sup>89</sup>

In addition, there are cases in which harassers comment on how targets look in their work uniforms or attempt to pay what appears to be a compliment.<sup>90</sup> However, these are rarely the only acts of harassment. For example, in *Cush-Crawford v. Adchem Corp.*, the plaintiff’s supervisor told her how beautiful she looked.<sup>91</sup> This was not the only act of harassment, but instead was one among many incidents, including “numerous unwelcome and upsetting suggestive comments and advances” that the plaintiff’s supervisor directed at her.<sup>92</sup> In this case, the court upheld a jury’s verdict in the plaintiff’s favor.<sup>93</sup> Similarly, in *Stefanoni v. Board of Chosen Freeholders of the County of Burlington*, the plaintiff alleged seven incidents of harassment, including five compliments on her hair and perfume over a twenty-two month period.<sup>94</sup> These comments, together with two incidents of physical touching, were insufficient to raise an issue of fact on the severe or pervasive element.<sup>95</sup> In another case, a hotel employee alleged that a supervisor harassed her by commenting about how “attractive” she was, that she was “sexy in her uniform,” and that “she turned him on.”<sup>96</sup> There were also allegations of unwanted physical contact.<sup>97</sup> The court granted summary judgment for the defendant on plaintiff’s sexual harassment claim, noting that there is a “high bar for what constitutes sufficiently severe or pervasive harassment for the purposes of a claim of a hostile work environment.”<sup>98</sup> Thus, comments about the target’s attire are

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85. 953 F. Supp. at 1446–47 (citation omitted).

86. 808 F. Supp. 500, 505 (E.D. Va. 1992) (citation omitted).

87. *Id.* at 506.

88. 124 Fed. App’x 948, 949 (6th Cir. 2005) (unpublished).

89. *Id.* at 952. She was also told that she would fit in better at work if she dressed “less femininely.” *Id.* at 954. The court relegated this comment to a “concern about the appropriateness of her attire” and held that it was insufficient to establish a hostile environment. *Id.*

90. *See, e.g.,* *Holmes v. Razo*, No. 94 C 50405, 1995 WL 444407 (N.D. Ill. July 18, 1995).

91. 94 F. Supp. 2d 294, 298 (E.D.N.Y. 2000).

92. *Id.*

93. *Id.* at 300.

94. 65 Fed. App’x 783, 784 (3d Cir. 2003) (unpublished).

95. *See id.* at 785–86 (granting defendant’s motion for summary judgment). *See also* *O’Dell v. Trans World Entm’t Corp.*, 153 F. Supp. 2d 378 (S.D.N.Y. 2001) (granting summary judgment for defendant where purported harasser, among other things, complimented plaintiff about her appearance).

96. *Baker v. Starwood Hotel & Resort Worldwide, Inc.*, No. 98-2076, 1999 WL 397405, at \*2 (E.D. La. June 15, 1999).

97. *Id.*

98. *Id.* at \*3.

sometimes used by the plaintiff as part of the sexually-harassing incidents that comprise her claim, although this does not mean that the plaintiff will reach the “severe or pervasive” standard necessary to support a claim.

Consistent with this standard, when a compliment is the only act of harassment, courts generally do not find it sufficiently severe or pervasive enough to be actionable. In *Conley v. City of Lincoln City*, the city manager told the plaintiff, the chief of police, that “she looked ‘attractive’ and ‘nice’ in her police uniform.”<sup>99</sup> The court held the comment insufficient to create a hostile environment.<sup>100</sup> Although the plaintiff tried to link this remark to a request by the city manager that she attend a seminar with him, the court did not believe that the manager had an “ulterior motive” for the request, explaining instead that the plaintiff’s reaction was not “reasonable.”<sup>101</sup>

Another set of cases in which the plaintiff used dress allegations to support her claim involve situations in which the harasser tried to look down the plaintiff’s top or up her dress or skirt.<sup>102</sup> While no employer has apparently defended these allegations by arguing that the plaintiff’s dress somehow invited such behavior, one could imagine that certain tops are easier to look down than others. However, thus far, defendants and courts have not focused on how the plaintiff’s attire might have led to her harassment. Instead, this evidence is used by the plaintiff to prove (although not always successfully) that the severity or pervasiveness of the harassment reached a level that was actionable.

### 3. *Inappropriate Attire Cases*

Another line of cases involving target dress exists in which the plaintiff’s superior asks her to dress differently because her attire is considered somehow “inappropriate” for the workplace. Plaintiffs have argued that such guidance from management about their attire constitutes sexual harassment. Not surprisingly, courts have rejected such claims. For example, in *Courtney v. Landair Transport, Inc.*, the plaintiff’s manager told her that her attire was not appropriate for work because she was “showing too much cleavage.”<sup>103</sup> While this was one of several allegations of harassment, the court quickly disposed of this aspect, stating:

Plaintiff claims that management discriminated against her because a terminal manager cautioned her as to her inappropriate attire in the workplace. A manager’s warning, without more, that plaintiff’s clothing is inappropriate in

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99. *Conley v. City of Lincoln City*, No. 02-216-AS, 2004 WL 948427, at \*4 n.2 (D. Or. Apr. 20, 2004).

100. *See id.* at \*12 (holding that defendant’s actions did not amount to sexual harassment). The plaintiff had other claims in her case as well.

101. *Id.* at \*12.

102. *See, e.g.,* *Shepherd v. Comptroller of Pub. Accounts*, 168 F.3d 871, 872 (5th Cir. 1999) (harasser simulated looking up plaintiff’s dress and tried to look down her clothing); *Ammon v. Baron Auto. Group*, 270 F. Supp. 2d 1293, 1308–09 (D. Kan. 2003) (harasser looked up one plaintiff’s skirt and attempted to look down another plaintiff’s blouse).

103. 227 F.3d 559, 561 (6th Cir. 2000) (brought under Ohio’s anti-discrimination laws, which are interpreted the same as Title VII).

the workplace is not sexual harassment. Plaintiff fails to show that the terminal manager's comments were anything more than a legitimate concern regarding appropriate dress in the workplace.<sup>104</sup>

In *Schmitz v. ING Securities, Futures & Options, Inc.*, part of the plaintiff's sexual harassment allegations included that her purported harasser had called her into his office and "accused her of disrupting office productivity by dressing so provocatively that any 'hot-blooded male' in the office could be aroused."<sup>105</sup> Her harasser, the CFO of the company, never expressed any interest in her or touched her.<sup>106</sup> However, once she complained about his comments to the director of Human Resources, her workload increased and the CFO became "openly hostile and ceased speaking to her."<sup>107</sup> She was eventually terminated for inadequate job performance.<sup>108</sup> In assessing her claim of sexual harassment, the court reasoned that the CFO commented on her appearance "with the expressed aim of bettering her professional image and her career prospects."<sup>109</sup> While he may have failed to "treat a female employee with sensitivity, tact, and delicacy," his comments did not constitute sexual harassment.<sup>110</sup> This was supported by two of plaintiff's female superiors, who stated that they too had informally commented to the plaintiff that "some of her outfits were not appropriate for the business environment."<sup>111</sup>

In *Bahri v. Home Depot USA, Inc.*, one of the plaintiff's sexual harassment allegations included that comments were made about her dress, hair, and shoes.<sup>112</sup> Employees complained that the plaintiff, Nelson, dressed "like she was 'going to a cocktail party.'"<sup>113</sup> Eventually, Nelson's supervisor told her that her shoes violated company policy, that her co-workers were complaining about her attire, and requested that she not dress "too fancy" for the home-improvement store environment in which she worked.<sup>114</sup> The court concluded that these comments did not amount to actionable sexual harassment. The court reasoned:

The evidence concerning Brownlie's comments about Nelson's style of dress indicate that Nelson and Brownlie simply disagreed over whether her clothing looked "professional" or "too fancy." Such a disagreement, even when between members of the opposite sex, is not overtly sexual in nature.<sup>115</sup>

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104. *Id.* at 564.

105. 191 F.3d 456 (7th Cir. 1999) (unpublished table opinion), available at 1999 WL 528024, at \*\*1.

106. *Id.*

107. *Id.* at \*\*2.

108. *Id.*

109. *Id.* at \*\*3.

110. *Id.*

111. *Id.* at \*\*4.

112. 242 F. Supp. 2d 922, 950 (D. Or. 2002).

113. *Id.*

114. *Id.* at 950.

115. *Id.* at 951. There also was evidence of a profane sex-based term being used with reference to the plaintiff, but the employer was not aware of this until after her termination. *Id.*



As a general matter then, an employer's counseling of an employee to dress more professionally or less provocatively has not been found actionable as sexual harassment.<sup>116</sup>

#### 4. *Plaintiff Asked to Dress Provocatively*

There are also cases in which the plaintiff's employer requires her to dress provocatively as part of her job and as a result the plaintiff is harassed. While there are entire law review articles written about the restaurant Hooters and its wait staff's attire,<sup>117</sup> very few cases against them have been resolved on the merits, and the few that have do not directly involve the plaintiff's dress.<sup>118</sup> Employers generally lost early cases involving allegations that female workers were required to dress provocatively. The case often cited on this issue is *EEOC v. Sage Realty Corp.*<sup>119</sup> In *Sage Realty*, the plaintiff worked as a building lobby attendant.<sup>120</sup> Her employer required her to wear a uniform on the job.<sup>121</sup> One uniform consisted of an octagonal piece of cloth that resembled an American flag that was worn like a poncho.<sup>122</sup> On the five-foot-eight plaintiff, the uniform revealed "[h]er thighs and portions of her buttocks."<sup>123</sup> Even after attempts at alterations, the uniform was still revealing.<sup>124</sup> The plaintiff wore the uniform for two days and "received a number of sexual propositions and endured lewd comments and gestures. Humiliated by what occurred, [the plaintiff] was unable to perform her duties properly."<sup>125</sup> Eventually, the plaintiff was fired because she refused to wear the uniform.<sup>126</sup> The court reasoned that the employer required

116. *But see* Kelly v. Lopiccio, 5 Fed. App'x 57 (2d Cir. 2001) (unpublished) (upholding jury verdict for plaintiff in § 1983 sexual harassment case in which there were allegations that employer counseled plaintiff about wearing undergarments that violated employer guidelines; however, there were other allegations of harassment from other employees).

117. *See generally, e.g.,* Jeannie Sclafani Rhee, *Redressing for Success: The Liability of Hooters Restaurant for Customer Harassment of Waitresses*, 20 HARV. WOMEN'S L.J. 163 (1997); Kelly Ann Cahill, *Hooters: Should there be an Assumption of Risk Defense to Some Hostile Work Environment Sexual Harassment Cases?*, 48 VAND L. REV. 1107 (1995).

118. *See, e.g.,* Ciesielski v. Hooters Mgmt. Corp., No. 03 C 1175, 2005WL 608245 (N.D. Ill. Mar. 15, 2005) (jury verdict against Hooters in sexual harassment case where employees were harassers upheld; no discussion of waitress attire); *EEOC v. Gaffney*, No. Civ.A.3:01CV0619-P, 2001 WL 1338368 (N.D. Tex. Oct. 16, 2001) (motion to dismiss sexual harassment complaint denied); *Steinhoff v. Uprive Rest. Joint Venture*, 117 F. Supp. 2d 598 (E.D. Ky. 2000) (jury verdict in plaintiff's favor; no discussion of waitress attire); *Hooters of America, Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999) (action to compel arbitration); *Latuga v. Hooters, Inc.*, No. 93 C 7709, 94 C 6338, 1996 WL 164427 (N.D. Ill. Mar. 29, 1996) (class certification in a sex discrimination based on hiring practices). Some Hooters sexual harassment cases have settled. *See* Andrew Blum, *Hooters Suit Lawyer Faces Ethics Complaint But the Attorney Hints that Her Ex-Clients Were Intimidated by the Restaurant's Side*, 16 NAT'L L.J. 13, col. 1 (Nov. 15, 1993); *'Hooters' Accord Reached*, 16 NAT'L L.J. A8, col. 2 (May 30, 1994).

119. 507 F. Supp. 599 (S.D.N.Y. 1981).

120. *Id.* at 602.

121. *Id.*

122. *Id.* at 604.

123. *Id.*

124. *Id.* at 605.

125. *Id.*

126. *Id.* at 607.

the plaintiff to wear the uniform because she was a woman and that the uniform caused her to endure repeated harassment.<sup>127</sup> The court believed that wearing the uniform was a condition of the plaintiff's employment and that the employer either knew or could reasonably have expected her to be subjected to sexual harassment because of it.<sup>128</sup> While acknowledging that an employer may "impose reasonable grooming and dress requirements on its employees," this does "not mean that 'an employer has the unfettered discretion . . . [t]o require its employees to wear any uniform the employer chooses, including uniforms which may be characterized as revealing and sexually provocative.'"<sup>129</sup>

Hooters aside, most commentators agree that employers cannot require employees to wear uniforms that subject them to sexual harassment.<sup>130</sup> The *Sage Realty* case is from 1981 and is rather dated. It is also somewhat inconsistent with the theory that attire alone does not result in women being harassed, which is more thoroughly discussed below. Thus, it is not clear what the courts would do with a case in which a woman voluntarily agreed to wear a revealing uniform.

##### 5. *Sum-Up: How Target Dress Is Actually Addressed in Sexual Harassment Cases*

Overall, the most prevalent cases involving sexual harassment target dress appear to be the cases in which the plaintiff raises comments about her attire as part of her sexual harassment allegations. While there are some cases addressing admissibility under Rule 412, most often the court does not admit the evidence, and even when it does, the evidence does not carry much weight. The lack of cases in which defendants use target dress in defending cases is in itself puzzling. It could be that most defendants refrain from making such arguments because of Rule 412. Yet, there seems to be some room for defendants to maneuver, given the balancing test, questions about Supreme Court precedent, and the Court's own questioning of the validity of the rule. One might expect, some twelve years after the effective date of Rule 412, to see a split in the circuits on this issue.

Another explanation for the lack of cases may be that targets of harassment are not generally provocatively dressed. Thus, there would be little opportunity for defendants to use these arguments. If sexual harassment is about power, not about sexuality or finding someone attractive, then dress comes into play when it affects how a harasser targets a victim. The underlying social science that has developed around this issue, as well as around the issue of rape, provides information that may help explain the lack of cases.

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127. *Id.*

128. *Id.* at 608.

129. *Id.* at 608–09 (quoting *EEOC v. Sage Realty Corp.*, 87 F.R.D. 365, 371 (S.D.N.Y. 1980)).

130. See, e.g., Karl E. Klare, *Power/Dressing: Regulation of Employee Appearance*, 26 NEW ENG. L. REV. 1395, 1416–17 (1992).

### III. SOCIAL SCIENCE AND DRESS

Social science has much to offer in determining the meaning of women's dress and how it might affect sexual harassment cases. A variety of academic disciplines have analyzed women's dress, looking at what it means to both the person wearing the clothing and perceivers of that person as well as its broader social implications. This section discusses several aspects of social science that may help explain why defendants are not using evidence concerning the provocative nature of the plaintiff's dress to show that the target welcomed the harassment. In doing so, it lays the foundation for the argument, made more explicitly in the next section, that the reason defendants are not seeking to admit evidence of plaintiff's provocative dress in sexual harassment cases as frequently as might be supposed is because provocatively-dressed women may not be the likely targets of sexual harassment.

The section begins by discussing how perceptions of victim dress play a role in perceptions of rape and sexual harassment. In this context it investigates how a woman's dress affects perceptions of that woman in a manner that might have relevance for sexual harassment law. For example, are provocatively dressed women harassed more often, and, more importantly, do people think this is the case? Do people believe that provocatively dressed women invite harassment? It then looks at what is known about how rapists and, to a lesser extent, sexual harassers, choose their victims in an effort to determine whether common perceptions of the role dress plays in victimization is accurate. From there it looks at characteristics of both rape and sexual harassment victims to see if, based on who these women are, sexual harassers may be choosing their victims in a manner similar to rapists. It also addresses research about sexual harassers to determine if they share some common characteristics with rapists, which may make some of the research concerning rape applicable to sexual harassment. Finally, it looks for social science explanations for why dress makes a difference in perceptions of who is likely to be harassed. Throughout this section, I rely on social science of rape in situations in which there is little research on sexual harassment. I explain why this is justified at the points in my argument where it becomes relevant.

Underlying rape shield laws is the belief that people, and in particular jurors, mistakenly believe that a women's dress has an impact on whether she will be victimized. This belief is borne out by research on perceptions of women's dress. As one source elucidates:

Although women with provocative appearances are perceived as sexually attractive and more desirable, they are judged as less intelligent, sincere, trustful, reliable, and less moral than women with non-provocative appearances. . . . Further, . . . "appearance influences judgments of a sender's competence (ability or expertise), even when the task at hand is unrelated to appearance."<sup>131</sup>

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131. Shen, *supra* note 5, at 439.

Clearly, dress influences how people perceive and interact with one another. Yet, assessments of women's attitudes or beliefs based on their dress are not necessarily accurate. For example, while people believe that certain items of clothing signify more liberal sexual attitudes, one study suggests that in reality, few items of clothing actually correlate with such liberal attitudes.<sup>132</sup> Thus, generally-held perceptions of sexualized dressing may well be out of sync with any one individual's attitudes and behaviors.

Perhaps most notably, a survey of psychiatrists reported that a three-to-one majority of those responding "said that attire that the male perceives as inviting direct sex attention does, indeed, tend to increase sex crime risk."<sup>133</sup> The styles of clothing that psychiatrists thought carried this potential risk included short skirts, see-through dresses, short shorts, and bikinis.<sup>134</sup> As they concluded, "[t]he survey replies show that U.S. psychiatrists in large numbers believe that revealing attire is one of the causative or precipitating factors in sex crimes against young females."<sup>135</sup> Thus, highly-educated and learned adults believe that how a woman dresses has an impact on whether or not she will be a victim of a sex crime.

The same general findings hold true for dress and sexual harassment. A study involving 200 college students sought to determine whether target dress and gender of a perceiver played a part in determining who was likely to be sexually harassed.<sup>136</sup> "The model when wearing provocative clothing was rated significantly higher on likelihood of provoking sexual harassment . . . than when wearing nonprovocative clothing."<sup>137</sup> Interestingly, women rated the model dressed provocatively highest on the likelihood of provoking sexual harassment.<sup>138</sup> However, men and women did not differ in their assessment of the model wearing nonprovocative clothing.<sup>139</sup> This suggests that women are more inclined to believe that provocative dress has an impact on who is harassed. While this study shows women are more inclined to link provocative dress with sexual harassment, it is important to note that both men and women perceive this link. The question remains whether this perception is accurate.

While people perceive dress to have an impact on who is assaulted, studies of rapists suggest that victim attire is not a significant factor. Instead, rapists look for signs of passiveness and submissiveness, which, studies suggest, are

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132. See Eugene W. Mathes & Sherry B. Kempher, *Clothing as a Nonverbal Communicator of Sexual Attitudes and Behavior*, 43 PERCEPTUAL & MOTOR SKILLS 495 (1976) (only cut-offs and tops exposing midriffs correlated with attitudes toward premarital sex).

133. Donna Vali & Nicholas D. Rizzo, *Apparel as One Factor in Sex Crimes Against Young Females: Professional Opinions of U.S. Psychiatrists*, 35 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 167, 174 (1991).

134. *Id.* at 172.

135. *Id.* at 178.

136. Kim K.P. Johnson & Jane E. Workman, *Clothing and Attributions Concerning Sexual Harassment*, 21 HOME ECON. RES. J. 160, 165 (1992).

137. *Id.* at 167.

138. *Id.*

139. *Id.* at 167-68.

more likely to coincide with more body-concealing clothing.<sup>140</sup> In a study to test whether males could determine whether women were high or low in passiveness and submissiveness, Richards and her colleagues found that men, using only nonverbal appearance cues, could accurately assess which women were passive and submissive versus those who were dominant and assertive.<sup>141</sup> Clothing was one of the key cues: “Those females high in passivity and submissiveness (i.e., those at greatest risk for victimization) wore noticeably more body-concealing clothing (i.e., high necklines, long pants and sleeves, multiple layers).”<sup>142</sup> This suggests that men equate body-concealing clothing with passive and submissive qualities, which are qualities that rapists look for in victims. Thus, those who wore provocative clothes would not be viewed as passive or submissive, and would be less likely to be victims of assault.

Along these lines, research suggests that rape victims are “significantly lower” in “dominance, assertiveness, and social presence.”<sup>143</sup> While members of the public believe that victims of assault attract such attacks by dressing provocatively,<sup>144</sup> attractiveness does not correlate with submissive characteristics in victims.<sup>145</sup> Instead, research “specifically revealed a negative relationship between perceptions of attractiveness and traits which could be construed as contributing to a nonverbal appearance of vulnerability.”<sup>146</sup> Thus:

Male evaluators perceived attractive females as lower in submissiveness, uncertainty, simpleness, carelessness and passivity than their less attractive peers. This suggests that conventional definitions of physical attractiveness do not represent visual attributes which enhance a woman’s potential for victimization.<sup>147</sup>

This seems at odds with studies concerning provocative dress, although no studies have looked directly at provocative dress and submissiveness. Of course, attractiveness and provocative dress are not the same thing. As Glick and his colleagues point out, it can be difficult to alter one’s physical attractiveness, “but women can easily emphasize or deemphasize their sexuality through clothing and demeanor.”<sup>148</sup> Thus, dressing sexy or provocatively is a choice that may or may not lead to a woman being perceived as attractive. Still, women who dress provocatively may be exhibiting a degree of confidence that does not suggest submissiveness. These women would be less likely to be victims of sexual

140. Shen, *supra* note 5, at 441.

141. Lynne Richards, *A Theoretical Analysis of Nonverbal Communication and Victim Selection for Sexual Assaults*, 9 CLOTHING & TEXTILES RES. J. 55, 59–60 (Summer 1991) (discussing Lynne Richards et al., *Perceptions of Submissiveness: Implications for Victimization*, 125 J. PSYCH. 407 (1991)).

142. *Id.*

143. *Id.* at 59.

144. One study showed that “only four percent of reported rapes involve precipitous behavior by the victim.” Sterling, *supra* note 5, at 119.

145. Richards, *supra* note 141, at 59.

146. *Id.* (citing A. Miller, *Role of Physical Attractiveness in Impression Formation*, 19 PSYCHONOMIC SCI. 241 (1970)).

147. *Id.*

148. Peter Glick et al., *Evaluations of Sexy Women in Low- and High-Status Jobs*, 29 PSYCH. WOMEN Q. 389, 389 (2005).

assault or harassment, because potential abusers would not perceive them as passive or submissive.

No studies were readily available that explained how sexual harassers target their victims. However, there is information about who is more likely to be targeted for sexual harassment. Interestingly, it parallels what is known about rape victims: “Young and single women tend to be the targets of sexual harassment.”<sup>149</sup> However, sexual harassment can happen to any women, and, studies show, once other factors are considered (such as workplace characteristics and the form the sexual harassment takes), the impact of age and marital status on who is harassed lessens considerably.<sup>150</sup> Youth and being single are factors related to power. As one researcher observed, “[d]ifferences in age, marital status, and education reinforce gender differences in power and status in society.”<sup>151</sup> Thus, because sexual harassment is about power, differences in these power-related statuses are likely to correlate with who is sexually harassed.

This parallels research on rape victims. While, like sexual harassment, any woman can be a rape victim, “studies have shown that the rape victim is more likely to be a single, white or black young female, from a lower social working class. Further ‘women who are most vulnerable to rape exhibit lower levels of psychosocial effectiveness’ and tend to have passive or submissive personalities prior to the assaults.”<sup>152</sup>

Thus, it appears that victims of rape and victims of sexual harassment share some common characteristics. Yet, much of the research discussed above involves how rapists choose their victims—not how sexual harassers choose their targets. Thus, it may not be directly applicable to sexual harassment. However, research also suggests that perpetrators of more serious sexual harassment are on a continuum with rapists.<sup>153</sup> Research on rapists might be likewise helpful in determining how sexual harassers choose their targets. Sexual harassers, like rapists, may pick victims who are vulnerable and submissive. Research on men who are likely to sexually harass suggests that this leap is logical.

Psychologist John Pryor was one of the first to study characteristics of men who sexually harass. He developed a scale to determine the propensity of men to sexually harass.<sup>154</sup> His sexual harassment research is based, in part, on the research of those who study rape. As he explains, “[m]any researchers believe rape and severe forms of sexual harassment are conceptually similar forms of

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149. James E. Gruber, *An Epidemiology of Sexual Harassment: Evidence from North America and Europe*, in *SEXUAL HARASSMENT: THEORY, RESEARCH, AND TREATMENT* 84, 92 (William O’Donohue ed., 1997).

150. *Id.*

151. *Id.* at 90.

152. Shen, *supra* note 5, at 437 (quoting Richards, *supra* note 141, at 58) (footnotes omitted).

153. See, e.g., John B. Pryor, *Sexual Harassment Proclivities in Men*, 17 *SEX ROLES* 269 (1987); John B. Pryor & Lynnette M. Stoller, *Sexual Cognition Processes in Men High in the Likelihood to Sexually Harass*, 20 *PERSONALITY & SOC. PSYCH. BULL.* 163 (1994). Rapists have a “pronounced psychological need[] for dominance and aggression.” Richards, *supra* note 141, at 61.

154. Pryor, *supra* note 153, at 272–73.

behavior.”<sup>155</sup> Researchers see rape as on a continuum of “male-aggressive/female-passive” interactions that involve differing levels of coercion and sexual intimacy.<sup>156</sup> This led Pryor to opine that rapists and sexual harassers might have some characteristics in common. As a result, he set out to study characteristics of sexual harassers to see if this was true.

Pryor examined those who would be inclined to engage in sexual exploitation, essentially what amounts to quid pro quo harassment. Pryor used various other scales, including those that measured certain attitudes about sex roles and beliefs, attitudes towards feminism, likelihood to rape, and one that measured empathy.<sup>157</sup> What he found was a strong relationship between the likelihood-to-sexually-harass scale (LSH) and adversary sexual beliefs and rape-myth acceptance.<sup>158</sup> Weaker relationships were found for sex-role stereotyping and acceptance of interpersonal violence.<sup>159</sup> Tellingly, “[t]he single best predictor of LSH was Malamuth’s (1981) LR [likelihood-to-rape] scale. This result . . . supports [another researcher’s] contention that rape and severe forms of sexual harassment represent different degrees of coercive sexual conduct.”<sup>160</sup> Interestingly, men who scored higher on the LSH scale also had a harder time understanding the perspective of others.<sup>161</sup> As Pryor explained, “[t]he profile of a person who is likely to initiate severe sexually harassing behavior that emerges from the initial study is one that emphasizes sexual and social male dominance.”<sup>162</sup>

This scale has proven useful after further study. As Pryor and Stoller point out, “the LSH scale measures a readiness to use social power for sexually exploitative purposes. This suggests that social dominance and male sexuality may be closely aligned concepts in the minds of high-LSH men.”<sup>163</sup> In a subsequent study, they found that dominance was the best predictor of LSH in men. As they explained, “[t]his finding seems to buttress the argument that dominance and sexuality are integrally related for high-LSH men.”<sup>164</sup> Thus, it seems appropriate to opine that sexual harassers might choose their targets in a manner similar to that of rapists. These two groups of perpetrators share common characteristics. Further, sexual harassment by high LSH men appears to be triggered by power imbalances—the kind of imbalances that might well be triggered by target submissiveness.

155. *Id.* at 272.

156. *Id.*

157. *Id.* at 277–78.

158. *Id.* at 275. As examples, Pryor explained that adversarial sexual beliefs include: “In a dating relationship a woman is largely out to take advantage of a man . . . . [R]ape myth acceptance [includes such beliefs that] ‘[m]any women have an unconscious wish to be raped, and may unconsciously set up a situation in which they are likely to be attacked.’” *Id.* at 275–76.

159. *Id.* at 276.

160. *Id.*

161. *Id.*

162. *Id.* at 277.

163. Pryor & Stoller, *supra* note 153, at 164.

164. *Id.* at 166.

This conclusion is inconsistent with the common belief that how a woman dresses has an impact on whether she will be sexually harassed or sexually assaulted. Why then, do many people, including psychiatrists, assume that dress plays some part in who is a victim of sexual assaults? In particular, why do women believe this? Social scientists believe this is the result of the “just world hypothesis.” As Melvin Lerner explained,

for their own security, if for no other reason, people want to believe they live in a just world where people get what they deserve. One way of accomplishing this is by . . . persuading himself that the victim deserved to suffer, after all. The assumption here is that attaching responsibility to behavior provides us with the greater security—we can do something to avoid such a fate.<sup>165</sup>

Thus, in the context of sexual harassment, this explains why women, more than men, are inclined to believe that provocative dress has an impact on who is sexually harassed. Women attribute the harassment to something the victim has done, such as wearing provocative clothing, as a way to understand how it could happen to someone else and not to them. Thus, blaming the victim, for example, by believing she provoked the behavior by her dress, makes other women believe that dressing differently (i.e., more “appropriately”) will prevent it from happening to them.<sup>166</sup>

This is closely related to another theory known as “harm avoidance.” Women blame victims as a way to exercise control over their lives and to continue to believe that bad things, including sexual harassment and sexual assaults, will not happen to them.<sup>167</sup> Thus, by viewing provocative dress as a factor in sexual harassment, women believe that they can avoid sexual harassment simply by not dressing provocatively. Both of these theories provide explanations as to why women, in particular, may think that harassment or sexual assault is provoked by victim dress.

Thus, how people commonly perceive the role of a target’s dress in sexual harassment appears to be out of sync with how sexual harassers may choose their targets. This leads to a possible explanation as to why defendants are not using target dress to prove unwelcomeness.

#### IV. IMPLICATIONS OF DRESS FOR SEXUAL HARASSMENT LAW

The social science described above suggests some potential explanations as to why defendants do not regularly raise the issue of target dress to rebut unwelcomeness in sexual harassment cases. Given the purported recent increase

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165. Melvin J. Lerner, *Desire for Justice and Reactions to Victims*, in ALTRUISM AND HELPING BEHAVIOR: SOME SOCIAL PSYCHOLOGICAL STUDIES OF SOME ANTECEDENTS AND CONSEQUENCES 205 (J. Macaulay & L. Berkowitz, eds., 1970), *quoted in* Theresa L. Lennon, Sharron J. Lennon & Kim K.P. Johnson, *Is Clothing Probative of Attitude or Intent? Implications for Rape and Sexual Harassment Cases*, 11 LAW & INEQ. 391, 410–11 (1993).

166. Lennon, Lennon & Johnson, *supra* note 165, at 411.

167. Johnson & Workman, *supra* note 136, at 164, 170.



in provocative dress by women<sup>168</sup> and the lack of a solid legal standard against its admission, one would expect to see defendants using arguments and evidence about target dress to prove welcomeness—or at least, to *dis*-prove *un*-welcomeness. Yet, this practice appears uncommon. How does one account for this? Earlier in this article I suggested several potential explanations. First, it could be that defendants are not raising it because they believe either that they will not be successful in having the evidence admitted under Rule 412 or that the factfinder will be in some way offended by such attempts. Essentially, the tactic might backfire on the defendant. Second, it is possible that women who wear provocative clothing to work do not mind the attention that they receive from it and therefore are not bringing sexual harassment claims. Third, it is possible that victim dress does not have an impact on who is sexually harassed. Legal feminists have long argued that sexual harassment is about power. With this in mind, the work of social scientists suggests that potential harassers might choose their targets using criteria other than dress.

Legal and social science scholars have proposed a number of theories suggesting why and how sexual harassment occurs. The foremost legal scholar on this issue, Catharine MacKinnon, posited early on that sexual harassment is about power differences between men and women. Sexual harassment is a tool used to perpetuate hierarchy, the principal way in which men maintain their dominance in American society.<sup>169</sup> As several psychology researchers described the theory,

[a]ccording to this model, male dominance is maintained by cultural patterns of male-female interaction as well as by economic and political superordinancy. Society rewards males for aggressive and domineering sexual behaviors and females for passivity and acquiescence. . . . [T]he function of sexual harassment is to manage ongoing male-female interactions according to accepted sex status norms, and to maintain male dominance occupationally and therefore economically, by intimidating, discouraging, or precipitating removal of women from work.<sup>170</sup>

This theory fits well with what is known about men who sexually harass. These men are influenced by dominance—power—in their relationships with women. Thus, this provides an explanation of why women who are provocatively

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168. See Dennis Hall, *Delight in Disorder: A Reading of Diaphany and Liquefaction in Contemporary Women's Clothing*, 34 *POPULAR CULTURE* 65, 66 (2001). Hall sees four fashion tactics that are being used by women to reveal more skin: (1) presenting underwear as clothing; (2) choosing clothing that is cut to be highly revealing, i.e., plunging necklines, slit skirts, bare tummies, short shorts; (3) diaphany (see-through garments); and (4) what he terms liquefaction (the use of opaque fabrics that fit so tightly that they cling like skin). A rather ironic instance of this recently arose within the United States Office of the Special Counsel (OSC), which is the office that protects federal workers and whistle-blowers. The OSC recently put out an office newsletter of "Business Casual" do's and don'ts that included not wearing short skirts and tight pants, advising women that, "before choosing a skirt to wear," they should "sit down in it facing a mirror." Elizabeth Williamson, *A Published Dress Code is Dressed Down in Furor*, *WASH. POST*, Sept. 7, 2006, at A25.

169. CATHARINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 107 (1979).

170. Sandra S. Tangri et al., *Sexual Harassment at Work: Three Explanatory Models*, 38 *J. SOC. ISSUES* 33, 40 (Winter 1982) (citation omitted).

dressed might not be bringing sexual harassment cases: They are not good potential targets for harassers. If, as studies of rapists suggest, harassers look for more passive or submissive women, women who are provocatively dressed may appear more confident and are therefore less likely to be considered appropriate targets by potential harassers. Indeed, the cases involving requests that women dress more professionally or tone down their sexy attire suggest that people are generally uncomfortable with women who dress provocatively in the workplace. The power dynamic involved in telling women to dress less provocatively (essentially trying to control their attire) is also interesting. It suggests that there is power in dressing provocatively, and that employers are uncomfortable by such assertions of this power by women.<sup>171</sup>

I am aware that I am extrapolating at least in part from research on rapists for this argument. This is one area that requires further study by social scientists to determine whether sexual harassers are picking their targets much like rapists pick their victims—based on indications of passivity and submissiveness. At this point, this theory is somewhat speculative—rapists and sexual harassers share some common characteristics, and victims of rape and sexual harassment also share several common characteristics. To the extent that there is incomplete research on sexual harassers, this essay serves as a call to social scientists who study sexual harassment to do further scholarship on how sexual harassers choose their targets.

There is another problem with this potential explanation. Just because a woman is dressed provocatively does not mean that she is necessarily confident and therefore less likely to be submissive. It could well be that her lack of confidence is what induces her to dress provocatively, in an attempt to draw what she considers to be positive attention to herself. Perhaps there is a class of cases that never make it to court because the women involved do not find the attention their attire garners harassing. Indeed, they may enjoy the attention. Further, to the extent that the attention is considered complimentary (i.e., it is not derogatory or otherwise demeaning), it may not be objectionable by these women.

Other sexual harassment theorists posit that sexual harassment is a result of an interaction between people and workplace characteristics and situations.<sup>172</sup> Workplace environments in which sexualized images, comments, and behavior toward women are tolerated are more likely to be those in which women are sexually harassed.<sup>173</sup> This theory, however, is not inconsistent with the power/dominance model. In workplaces with such atmospheres, women are placed in less powerful positions: They are essentially deemed sex objects. It is little wonder that sexual harassment thrives in such environments, given the little organizational power afforded to women.

This also might explain the one set of cases where provocatively dressed women are commonly harassed: the Hooters cases. Studies show that men high

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171. Further examination of this issue is beyond the scope of this article.

172. BEINER, *supra* note 42, at 126.

173. *See id.* at 126–30.

in LSH are aware of situational constraints on their behavior.<sup>174</sup> Thus, in an environment like Hooters, where the Hooters Girl's "predominant function is to provide vicarious sexual recreation, to titillate, entice, and arouse male customers' fantasies,"<sup>175</sup> men who are likely to sexually harass will consider the Hooters' business plan to permit (perhaps even encourage) such harassment. Thus, while provocative dress might signal confidence in an office setting, at Hooters, workplace norms encourage men who are so inclined to harass.

What about the women who complain about men making comments about their attire as part of their sexual harassment allegations? It is not clear whether these women were dressed in a provocative manner or not. Certainly, in some cases they were not. For example, in *Conley v. City of Lincoln City*, the plaintiff was in her police uniform.<sup>176</sup> In addition, employers in these cases (aside for rare exceptions such as the lingerie case<sup>177</sup>) did not argue that something about the plaintiff's attire "caused" the plaintiff to be harassed. Yet, clearly inappropriate comments—including those that are sexually demeaning—about workplace dress offend women. They are a weapon in the arsenal of harassing behaviors that affect women's employment. Some of these comments clearly would undermine a woman's workplace authority, because the comments are demeaning and thereby undermine the plaintiff's power and authority in the workplace. Even in the case involving the police chief, commenting, although apparently in a complimentary fashion, about her attire could cast her as something to look at rather than someone who leads the police force. One could imagine how these comments might have affected her ability to lead and why she included them in her complaint. Thus, comments about dress are used to undermine the workplace authority of women and should be included in the appropriate case as part of a plaintiff's sexual harassment allegations.

## V. CONCLUSION

When I began research for this article, I expected to find many cases involving allegations that the plaintiff "welcomed" the sexual harassment by her workplace attire. I was surprised to find that this was a rare case. Defendants were not using the woman's dress to weasel out of claims, but instead, the woman's dress most commonly was present in allegations by plaintiffs. Plaintiffs frequently raised comments about their dress as part of their sexual harassment allegations. This would seem to open the door to defendants, who might use evidence of target dress to argue that the plaintiff welcomed the harassment. Yet, that was not the case. I have tried to account for the lack of case law and, in the process, have gone back to the root cause of sexual harassment: power. Sexual harassment is about power; therefore, a target who is dressed provocatively is not the ideal target for the would-be harasser, who appears motivated at least in part by his ability to dominate his victim. Provocative dress

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174. See *id.* at 130 (discussing studies).

175. *HI Ltd. P'ship v. Winghouse of Fla., Inc.*, 347 F. Supp. 2d 1256, 1258 (M.D. Fla. 2004).

176. No. 02-216-AS, 2004 WL 948427, at \*4 n.2 (D. Ore. Apr. 20, 2004).

177. *Woodard v. Metro I.P.T.C.*, No. IP 98-646-C H/G, 2000 WL 684101 (S.D. Ind. Mar. 16, 2000).

does not necessarily signify submissiveness but instead may be an indication of confidence and assertiveness. It is clear, however, that comments about dress directed at plaintiffs are a component of sexual harassment allegations. Comments about dress are used to undermine working women's authority and should be considered seriously by courts assessing sexual harassment claims.