

# Strong Medicine: Fighting the Sexual Harassment Pandemic

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## TABLE OF CONTENTS

I.	INTRODUCTION .....	1058
II.	THE ELEMENTS OF A HOSTILE WORK ENVIRONMENT CLAIM ....	1063
	A. <i>The Advent of the Hostile Work Environment Claim</i> .....	1064
	B. <i>Same-Sex Harassment and the “Code of Civility”</i> .....	1066
	C. <i>The Subjective and Objective Tests</i> .....	1067
	D. <i>The Elements of a Hostile Work Environment Claim</i> .....	1068
	E. <i>The “Aided by the Agency” Standard and the Affirmative Defense</i> .....	1069
	1. <i>A Sensible Standard for Deterrence</i> .....	1069
	2. <i>Curtailment of the Ellerth Standard</i> .....	1072
	3. <i>The Ellerth/Vance Framework</i> .....	1075
III.	THE FAILURE OF THE LAW TO CONTROL THE PANDEMIC .....	1076
	A. <i>Flagrantly Severe or Pervasive</i> .....	1078
	1. <i>Multiple Incident Cases</i> .....	1078
	2. <i>Single Incident Cases</i> .....	1080
	B. <i>Unimpeachably Unwelcome</i> .....	1084
	C. <i>Blatantly Discriminatory</i> .....	1086
	D. <i>Intolerably Hostile Work Environment</i> .....	1089
	1. <i>More Than Severe</i> .....	1089
	2. <i>The Time Trap</i> .....	1090
	3. <i>Conflation of the Objective and Subjective Tests</i> .....	1090
	E. <i>“Tangibly” Supervisory</i> .....	1092
IV.	ENFORCEMENT ACTIONS AND PROCEEDINGS TO DETER SEXUAL HARASSMENT .....	1094
	A. <i>The Framework of Conciliation and Litigation</i> .....	1094
	B. <i>A New Standard of Liability</i> .....	1097
	C. <i>A Model: SEC Civil Enforcement Actions for Securities Fraud</i> .....	1097
	D. <i>Expanded Power to Bring Federal Court Enforcement Actions</i> .....	1100
	E. <i>Quasi-Judicial Power</i> .....	1100

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F. <i>The Requirements for an EEOC Enforcement Proceeding</i>	
<i>Alleging Hostile Work Environment</i> .....	1102
1. <i>Severe or Pervasive</i> .....	1102
2. <i>Unwelcome Words or Conduct</i> .....	1103
3. <i>The Discrimination Requirement</i> .....	1103
4. <i>Subjective Perception</i> .....	1104
5. <i>Pollution of the Work Environment</i> .....	1104
6. <i>Repudiation of Vance</i> .....	1105
V. CONCLUSION .....	1105

## I. INTRODUCTION

A pandemic of sexual harassment has stricken the country. A recent Equal Employment Opportunity Commission (EEOC) report shows that, depending on how the question is posed, between 25% and 85% of women respond that they have experienced harassment in the workplace.<sup>1</sup> Even if the lower figure is accurate, the scope of the problem is shocking. It is equally troubling that 90% of incidents go unreported.<sup>2</sup> Victims do not believe that their employers will be receptive to their complaints, and many fear censure or retaliation.<sup>3</sup> These issues are not new.<sup>4</sup> Sexual harassment has plagued American society for as long as power has provided a means to abuse the vulnerable.<sup>5</sup> A heartbreaking example

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<sup>1</sup> EQUAL EMP'T OPPORTUNITY COMM'N, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE: REPORT OF CO-CHAIRS CHAI R. FELDBLUM & VICTORIA A. LIPNIC 8 (June 2016) [hereinafter EEOC REPORT]; see also Joann S. Lublin, *When #MeToo at Work Becomes Catch-22*, WALL ST. J. (Jan. 24, 2018), <https://www.wsj.com/articles/when-metoo-becomes-catch-22-1516798800> [<https://perma.cc/D4L3-6UG2>] (reporting the results of a December 2017 survey conducted by the American Management Association showing that 51% of female managers, executives, and professionals said they were the victims of sexual harassment in the workplace).

<sup>2</sup> EEOC REPORT, *supra* note 1, at 8.

<sup>3</sup> *Id.* at v.

<sup>4</sup> See Mark Joseph Stern, *Who's to Blame for America's Sexual Harassment Nightmare? The Supreme Court, for One*, SLATE (Oct. 17, 2017), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2017/10/blame\\_the\\_supreme\\_court\\_for\\_america\\_s\\_sexual\\_harassment\\_nightmare.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2017/10/blame_the_supreme_court_for_america_s_sexual_harassment_nightmare.html) [<https://perma.cc/CL5U-Q72X>] (noting that, although sexual harassment has been illegal in the United States for fifty-three years, 75% of victims never report it); see also *Charges Alleging Sex-Based Harassment (Charges filed with EEOC) FY 2010-FY 2017*, EQUAL EMP'T OPPORTUNITY COMM'N [hereinafter EEOC Harassment Statistics] [https://www.eeoc.gov/eeoc/statistics/enforcement/sexual\\_harassment\\_new.cfm](https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm) [<https://perma.cc/3FCS-KA8C>] (reporting that for every year from 2010 to and including 2016 over 12,000 sex-based harassment charges were filed with the EEOC, and that in each of these years the EEOC found that over half of these complaints lacked reasonable cause).

<sup>5</sup> See, e.g., Margaret Gardiner, *Why Women Don't Report Sexual Harassment*, HUFFPOST: THE BLOG (July 22, 2017), [http://www.huffingtonpost.com/Margaret-gardiner/why-women-don-t-report-sex\\_b\\_11112996.html](http://www.huffingtonpost.com/Margaret-gardiner/why-women-don-t-report-sex_b_11112996.html) [<https://perma.cc/5L9U-6CLH>] (reporting that women, afraid of retaliation, regard harassment as the price for advancement in male-

is Dr. Larry Nassar's molestation of female gymnasts.<sup>6</sup> Separated from their families, these young Olympic hopefuls were defenseless.<sup>7</sup>

Nearly every day, media reports denounce yet another name that only a short time ago was the object of admiration.<sup>8</sup> The #MeToo movement has intensified the call for retribution against rogue personalities.<sup>9</sup> Harvey Weinstein's coercion of women into gratifying his lurid appetite awakened the public to the virulence of sexual harassment.<sup>10</sup> For decades he avoided accountability by threatening to destroy careers and buying silence with hefty payoffs.<sup>11</sup> And the parade of scoundrels marches on. Charges of sexual abuse levelled against Matt Lauer, the longtime star of the *Today* show, led NBC News to fire him.<sup>12</sup> Facing a

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dominated professions); Elizabeth Kristen et al., *Workplace Violence and Harassment of Low-Wage Workers*, 36 BERKELEY J. EMP. & LAB. L. 169, 174–77 (2015) (discussing the susceptibility of restaurant and agricultural workers to sexual harassment).

<sup>6</sup> See, e.g., Christine Hauser, *McKayla Maroney, Describing Sexual Abuse, Calls Larry Nassar a 'Monster of a Human Being,'* N.Y. TIMES (Jan. 18, 2018), <https://www.nytimes.com/2018/01/18/sports/mckayla-maroney-larry-nassar.html> [on file with *Ohio State Law Journal*] (reporting Maroney's accusation that Larry Nassar, former doctor for the women's Olympic gymnastics team, molested her for years, beginning when she was thirteen, and citing similar charges raised by Olympians, Aly Raisman, Gabby Douglas, and Simon Biles).

<sup>7</sup> *Id.*

<sup>8</sup> See, e.g., Jill Filipovic, *The Men Who Cost Clinton the Election*, N.Y. TIMES (Dec. 1, 2017), <http://www.nytimes.com/2017/12/01/opinion/matt-lauer-hillary-clinton.html> [on file with *Ohio State Law Journal*] (listing Matt Lauer, Charlie Rose, and Mark Halperin as journalists fired for sexually harassing women colleagues, denouncing President Trump for bragging about sexually abusive behavior, and criticizing Geraldo Rivera for minimizing the seriousness of sexual aggression against women).

<sup>9</sup> Jessica Bennett, *The #MeToo Moment: When the Blinders Come Off*, N.Y. TIMES (Nov. 30, 2017), <http://nytimes.com/2017/11/30/us/the-metoo-moment.html> [<https://perma.cc/R88S-RT25>] (reporting that Matt Lauer, Charlie Rose, Mark Halperin, Leon Wieseltier, and Garrison Keillor all stand accused of sexual harassment or assault, and that the #MeToo movement has resulted in an explosion of reports of sexual harassment). But see Anna Graham Hunter, *I Publicly Accused Dustin Hoffman of Harassment. Take It from Me, It's Not Easy to Expose Sexual Misconduct*, L.A. TIMES (Dec. 14, 2017), <http://latimes.com/opinion/op-ed/la-oe-hunter-dustin-hoffman-standards-20171214-story.html> [<https://perma.cc/Y8Y9-52XA>] (noting that some believe the #MeToo movement has become a witch hunt but adding that many victims fear that, if they report harassment, they will encounter blame).

<sup>10</sup> See, e.g., Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <http://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html> [on file with *Ohio State Law Journal*] (detailing Harvey Weinstein's decades-long pattern of harassing women in the entertainment industry).

<sup>11</sup> *Id.* (pointing out that Weinstein discouraged complaints by threatening victims with reprisals that might injure their business reputations and that he and other harassers, including Bill O'Reilly and Roger Ailes, silenced victims with hefty settlements).

<sup>12</sup> See, e.g., John Koblin, *After Firing Matt Lauer, NBC Executives Move to Control the Damage*, N.Y. TIMES (Dec. 1, 2017), <http://nytimes.com/2017/12/01/business/media/matt->

similar public relations crisis, CBS, PBS, and Bloomberg TV ousted renowned TV host, Charlie Rose, after eight women accused him of prancing naked in front of them and groping their breasts and genitals.<sup>13</sup>

Political figures, including former Congressman John Conyers,<sup>14</sup> former Senator Al Franken,<sup>15</sup> and failed senatorial candidate Roy Moore stand front and center among the lineup of offenders.<sup>16</sup> Even a prominent jurist, Judge Alex Kozinski, formerly of the Ninth Circuit Court of Appeals, was forced to resign for engaging in a pattern of sexual misconduct, including allegedly showing pornography to a law clerk and asking whether it aroused her.<sup>17</sup> But the most alarming revelations have impugned the integrity of two Presidents. Bill Clinton proved a disgrace to the office when Paula Jones sued him for using his power as the Governor of Arkansas to lure her to a Little Rock hotel room where he exposed himself.<sup>18</sup> And President Trump, during his candidacy, cast his name

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lauer-firing-nbc-news.html [on file with *Ohio State Law Journal*] (chronicling the response of NBC News to allegations that Matt Lauer sexually harassed women).

<sup>13</sup> See, e.g., Irin Carmon & Amy Brittain, *Eight Women Say Charlie Rose Sexually Harassed Them—With Nudity, Groping and Lewd Calls*, WASH. POST (Nov. 20, 2017), <http://washingtonpost.com/investigations/eight-women-say-charlie-rose-sexually-harassed-them-with-nudity-groping-and-lewd-call.html> [https://perma.cc/W3TH-VFZV] (revealing that Rose’s accusers withheld exposing his wrongdoing for fear of retaliation and of his violent temper); John Koblin & Michael M. Grynbaum, *Charlie Rose Fired by CBS and PBS After Harassment Allegations*, N.Y. TIMES (Nov. 21, 2017), <http://nytimes.com/2017/11/21/business/media/charlie-rose-fired-cbs.html> [on file with *Ohio State Law Journal*] (confirming that CBS and PBS discharged Charlie Rose because of allegations of “crude sexual advances”).

<sup>14</sup> Yamiche Alcindor, *John Conyers to Leave Congress Amid Harassment Claims*, N.Y. TIMES (Dec. 5, 2017), <http://www.nytimes.com/2017/12/05/us/politics/jon-conyers-election.html> [on file with *Ohio State Law Journal*] (reporting that Congressman Conyers resigned under intense pressure after reports of sexual harassment surfaced, including the charge of a woman who settled a harassment claim against him and said on television that he “repeatedly propositioned [a woman] for sex and asked her to touch his genitals,” and used taxpayer money to settle the sexual harassment claim of his former communications director).

<sup>15</sup> Carl Hulse, *Al Franken’s Improbable Political Rise and Sudden Fall*, N.Y. TIMES (Dec. 7, 2017), <http://www.nytimes.com/2017/12/07/us/politics/al-franken-resignation-political-career.html> [on file with *Ohio State Law Journal*] (discussing the resignation of Senator Franken resulting from accusations that he fondled and acted in sexually inappropriate ways with women).

<sup>16</sup> Samantha Cooney, *More Women Are Accusing Roy Moore of Sexual Misconduct. Here’s Everything You Need to Know About the Scandal*, TIME (Nov. 17, 2017), <http://time.com/5029172/roy-moore-accusers/> [https://perma.cc/QSQ2-E3WY] (summarizing allegations of molestation and other abuses committed against teenage girls).

<sup>17</sup> Ruth Marcus, *The Creepiest Sexual-Harassment Story We Aren’t Talking About*, WASH. POST (Dec. 15, 2017), <http://www.washingtonpost.com/opinions/the-creepiest-sexual-harassment-story-we-aren-t-talking-about.html> [https://perma.cc/RXT3-8WN5] (exposing the abusive conduct of Judge Kozinski toward his female judicial clerk, a law student, a law professor, and a former judge).

<sup>18</sup> See *infra* notes 187–202 and accompanying text (discussing *Jones v. Clinton*, 990 F. Supp. 657 (E.D. Ark. 1998)). President Clinton’s affair with Monica Lewinsky had

into disrepute when he bragged about groping women, a boast which numerous victims confirmed.<sup>19</sup>

The law is limited in its capacity to deter a pandemic that has psychological, sociological, and cultural causes.<sup>20</sup> Nevertheless, the law has a role to play, particularly in the workplace. Title VII of the 1964 Civil Rights Act prohibits employment discrimination based on sex, and the courts have long recognized sexual harassment as a form of sex discrimination.<sup>21</sup> The Act has established a framework focused on conciliation and, where efforts at settlement fail, on litigation. Regrettably, this framework has failed to achieve its mission of deterrence.<sup>22</sup>

Part I of this Article examines sexual harassment law, concentrating on the principles prohibiting an employer from subjecting a worker to a hostile work environment. This Part begins with a discussion of *Meritor Savings Bank v. Vinson*,<sup>23</sup> in which the Supreme Court established the elements of such a claim. A plaintiff who alleges sexual harassment must prove that she was subjected to unwelcome, discriminatory words or conduct of a sexual or gender-related nature so severe or pervasive that they altered the conditions of her employment.<sup>24</sup> Next, this Part analyzes *Oncale v. Sundowner Offshore Services, Inc.*,<sup>25</sup> which clarified *Meritor* by stressing that the test for establishing a hostile work environment does not impose a “civility code” in the workplace.<sup>26</sup> This

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repercussions even more serious than the Paula Jones case. *See, e.g.*, Associated Press, *Gillibrand: Bill Clinton Should've Resigned over Affair with Monica Lewinsky*, CHI. TRIB. (Nov. 16, 2017), <http://www.chicagotribune.com/news/nationworld/politics/ct-kirsten-gillibrand-bill-clinton-20171116-story.html> [<https://perma.cc/4QSN-SNLL>] (reporting Senator Gillibrand's remarks suggesting that President Clinton should have resigned his office as a result of his affair with Monica Lewinsky). Charging President Clinton with perjury and obstruction of justice arising from his affair with Lewinsky, the House nearly ended his presidency by voting to impeach him. *Id.*

<sup>19</sup> Ashley Parker et al., *Three Women Reassert Allegations of Sexual Harassment Against President Trump*, WASH. POST (Dec. 12, 2017), <http://www.washingtonpost.com/politics/three-women-reassert-allegations-of-sexual-harassment-against-president-trump.html> [<https://perma.cc/KA7K-8R35>] (noting that President Trump has dismissed the accusations and characterized reports of his misconduct as “Democrat-driven ‘fake news’”).

<sup>20</sup> *See* EEOC REPORT, *supra* note 1, at 3 (noting that the EEOC Select Task Force recognized that psychological, sociological, and cultural factors breed sexual harassment).

<sup>21</sup> *See, e.g.*, Henry L. Chambers, Jr., *A Unifying Theory of Sex Discrimination*, 34 GA. L. REV. 1591, 1625 (2000) (noting that sexual harassment is a form of unlawful sex discrimination).

<sup>22</sup> *See, e.g.*, Kerri Lynn Stone, *License to Harass: Holding Defendants Accountable for Retaining Recidivist Harassers*, 41 AKRON L. REV. 1059, 1071–73 (2008) (noting that the primary policy of Title VII is deterrence and arguing that providing a remedy to first-time victims of recidivist offenders would advance this policy).

<sup>23</sup> *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

<sup>24</sup> *Id.* at 67–68.

<sup>25</sup> *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998).

<sup>26</sup> *Id.* at 80.

Part goes on to discuss *Harris v. Forklift Systems, Inc.*,<sup>27</sup> which announced that a plaintiff must establish that her work environment was both subjectively and objectively hostile.<sup>28</sup>

*Meritor* did not decide the circumstances under which an employer would be vicariously liable for the harassment of its supervisors. *Burlington Industries, Inc. v. Ellerth*,<sup>29</sup> resolved this issue. Part I argues that *Ellerth* established a sensible framework that promoted deterrence. Finally, Part I examines *Vance v. Ball State University*,<sup>30</sup> which undermined the *Ellerth* framework by defining “supervisor” restrictively.<sup>31</sup>

Part II of this Article identifies the elements of a hostile work environment claim, and then, for each element, highlights federal court decisions that have rejected claims alleging highly offensive and even egregious misconduct. Based on these decisions, Part II argues that numerous federal court decisions have impeded the deterrent effect of sexual harassment law.

Part III observes that several reasons account for the failure of current law to curtail sexual harassment in the workplace. One of the primary reasons for this failure is the law’s focus on conciliation and litigation. Under the current model, complainants file grievances with the EEOC, which seeks to settle disputes. If settlement efforts fail, the EEOC may sue on a victim’s behalf or, more commonly, grant a victim the right to sue. Settling cases may do little to deter abuses. After entering into a settlement agreement, an employer may revert to complacency.<sup>32</sup> Deterrence is similarly a secondary focus of the current litigation framework, which functions primarily as a means to compensate victims.<sup>33</sup> To be entitled to monetary relief, a victim must have suffered injury.<sup>34</sup> The injury requirement, in turn, calls for a demanding standard of liability. As noted, the current standard requires a plaintiff to establish severe or pervasive misconduct that objectively and subjectively renders the workplace hostile.<sup>35</sup> Misconduct that is highly offensive but not severe or pervasive will escape accountability. Even worse, many lower courts have misapplied the existing standard, denying relief to employees subjected to outlandish offenses.<sup>36</sup>

To overcome these barriers to deterrence, Part III of this Article proposes that Congress supplement the current model of conciliation and litigation by granting the EEOC expanded enforcement powers. The EEOC should have

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<sup>27</sup> *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993).

<sup>28</sup> *Id.* at 22.

<sup>29</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

<sup>30</sup> *Vance v. Ball State Univ.*, 570 U.S. 421 (2013).

<sup>31</sup> *Id.* at 422.

<sup>32</sup> *See infra* Part III.A (discussing the EEOC’s current procedural framework).

<sup>33</sup> *Id.*

<sup>34</sup> *See, e.g.*, 13A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531.4 (3d ed. 2008) (commenting that under Article III of the Constitution a plaintiff, to be entitled to relief, “must show a distinct and palpable injury to himself”).

<sup>35</sup> *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986).

<sup>36</sup> *See infra* Part II.A.

plenary authority to initiate civil enforcement proceedings in both federal court on its own behalf and in quasi-judicial enforcement proceedings. Rather than compensating victims, the purpose of such proceedings would be to identify instances of workplace harassment and, where appropriate, sanction irresponsible employers with injunctions and fines. Because the EEOC, in such enforcement proceedings, would not seek relief on behalf of victims, the elements that establish injury would be superfluous. In such proceedings the EEOC should merely have to prove that discriminatory, sexual or gender-related words or conduct would be highly offensive to a reasonable person. By adopting the “highly offensive to a reasonable person” standard, Congress would maximize prevention of sexual harassment in the workplace.

This Article concludes with a request that Congress adopt these proposals. In the alternative, this Article makes the same request of state legislatures. Admittedly, implementing the proposals in this Article would not eliminate sexual harassment. The problem is too tenacious and endemic to allow for an easy fix. But the approach advocated in this Article might curtail sexual harassment in the workplace. The imposition of sanctions, along with public exposure, might chasten reluctant employers to take forceful action.

## II. THE ELEMENTS OF A HOSTILE WORK ENVIRONMENT CLAIM

No federal statute expressly prohibits sexual harassment. Courts have implied this prohibition from Title VII, which makes it unlawful to discriminate because of sex.<sup>37</sup> The courts have recognized two types of sexual harassment.<sup>38</sup> Quid pro quo harassment occurs when a supervisor promises a subordinate benefits if she submits to his sexual advances or when he threatens retaliation if she does not submit.<sup>39</sup> The more prevalent form of sexual harassment, hostile work environment, subjects a victim to intolerable work conditions.<sup>40</sup>

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<sup>37</sup> See, e.g., *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 752–53 (1998) (noting that the text of Title VII does not mention the terms quid pro quo or hostile work environment, but that Title VII implicitly prohibits such forms of sexual harassment); *Meritor*, 477 U.S. at 64 (holding that, under Title VII, sexual harassment is discrimination based on sex).

<sup>38</sup> *Meritor*, 477 U.S. at 62.

<sup>39</sup> Compare *Ellerth*, 524 U.S. at 751 (stating that quid pro quo sexual harassment occurs when threats are made and carried out), with *Vinson v. Taylor*, 753 F.2d 141, 145 (D.C. Cir. 1985) (citing *Bundy v. Jackson* 641 F.2d 934, 946 (D.C. Cir. 1981)) (stating that quid pro quo harassment is conditioning employment benefits on the submission to sexual favors), and Lynn T. Dickinson, *Quid Pro Quo Sexual Harassment: A New Standard*, 2 WM. & MARY J. WOMEN & L. 107, 107 (1995) (stating that quid pro quo harassment occurs when an employer or supervisor conditions an employee’s benefits on her submission to sexual advances).

<sup>40</sup> *Meritor*, 477 U.S. at 62.

### A. *The Advent of the Hostile Work Environment Claim*

The Supreme Court prescribed the elements of a hostile work environment claim in *Meritor Savings Bank v. Vinson*.<sup>41</sup> Sidney Taylor, a manager at a branch of Meritor Savings Bank, hired Mechelle Vinson as a teller-trainee.<sup>42</sup> Vinson's job performance led to promotions to teller, head teller, and finally assistant branch manager.<sup>43</sup> After four years on the job, she informed the bank that she was going on sick leave for an indefinite period, which stretched into two months.<sup>44</sup> The bank ultimately discharged her for excessive absence.<sup>45</sup>

Vinson commenced an action against Taylor and the bank for sexual harassment.<sup>46</sup> She alleged that, shortly after her employment at the bank began, Taylor invited her to dinner and suggested that they go to a motel and have sex.<sup>47</sup> Though she refused initially, she finally complied because she feared he might retaliate by firing her.<sup>48</sup> She estimated that over the next three years she succumbed to Taylor's sexual demands forty to fifty times.<sup>49</sup> She also testified that Taylor fondled her in the workplace, followed her into the women's room, exposed himself to her, and raped her.<sup>50</sup> These abuses allegedly stopped when she informed Taylor that she had a boyfriend.<sup>51</sup> Taylor denied all of Vinson's allegations of sexual misconduct, asserting that a business-related dispute spawned her accusations.<sup>52</sup>

The district court dismissed Vinson's claim.<sup>53</sup> The court ruled that, regardless of the truth of her charges against Taylor, Vinson had, by her own admission, had a consensual affair with him.<sup>54</sup> The D.C. Circuit reversed and remanded, believing that the district court had placed undue emphasis on

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<sup>41</sup> *Meritor*, 477 U.S. at 67; see, e.g., Sasha Anderson, Note, *That's What He Said: The Office, (Homo)Sexual Harassment, and Falling Through the Cracks of Title VII*, 47 ARIZ. ST. L. REV. 961, 965–66 (2015) (characterizing *Meritor* as a milestone in the development of sexual harassment law).

<sup>42</sup> *Meritor*, 477 U.S. at 59.

<sup>43</sup> *Id.* at 59–60.

<sup>44</sup> *Id.* at 60.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Meritor*, 477 U.S. at 60.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 61.

<sup>53</sup> *Id.*

<sup>54</sup> *Meritor*, 477 U.S. at 61. A finding of consent would not have diminished Vinson's allegation that Taylor raped her. See *id.* at 68 (explaining that voluntary sexual conduct, if nevertheless unwelcome, constitutes sexual harassment).



voluntariness when the controlling issue was whether Taylor had made Vinson's assent to his advances a condition of her employment.<sup>55</sup>

On appeal to the Supreme Court, the bank conceded that when a supervisor harasses a subordinate because of the subordinate's gender, the harassment violates Title VII's prohibition against sex discrimination.<sup>56</sup> Nevertheless, the bank denied liability, arguing that by forbidding discrimination in the "compensation, terms, conditions, or privileges" of employment, the statute proscribed activities resulting in economic rather than mere psychological harm.<sup>57</sup> The Supreme Court disagreed, construing Title VII's broad statutory language to encompass a spectrum of activities, even some without economic consequences.<sup>58</sup>

Addressing the issue of consent, the Supreme Court emphasized that unwelcome sexual advances lay at the core of a sexual harassment claim.<sup>59</sup> The Court endorsed the view of the D.C. Circuit that Vinson's fear of retaliation from Taylor may have induced her consent to his unwelcome advances.<sup>60</sup> The Court also held that a claim of sexual harassment must pass a rigorous threshold. To constitute actionable harassment, conduct must be "sufficiently severe or pervasive" to alter the conditions of the victim's work environment.<sup>61</sup>

The final issue in the case was whether the bank would be vicariously liable if Taylor sexually harassed Vinson. The district court held that the bank would not be liable for Taylor's harassment because it had no notice of the wrongdoing.<sup>62</sup> The D.C. Circuit disagreed with the lower court, holding that an

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<sup>55</sup> *Id.* at 62. In its analysis, the D.C. Circuit stated that there are two types of sexual harassment. *Id.* The first, often referred to as quid pro quo, occurs when the harasser conditions employment benefits on sexual favors, and the second occurs when the harassment creates a hostile work environment. *Id.* In *Ellerth*, the Supreme Court modified the definition of quid pro quo harassment as workplace threats that the harasser carries out. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 753–54 (1998).

<sup>56</sup> *Meritor*, 477 U.S. at 64.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* Noting that EEOC Guidelines, though not binding, are persuasive authority, the Court relied on the agency's view that economic injury is not required to establish a violation of Title VII. *Id.* at 65. The Court also cited circuit court decisions that upheld both sex and race harassment claims, though the plaintiffs alleged no economic loss. *Id.* at 65–66.

<sup>59</sup> *Id.* at 68.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 67.

<sup>62</sup> *Meritor*, 477 U.S. at 69. In *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998), the Court answered the question of employer vicarious liability for a supervisor's sexual harassment of a subordinate. See *infra* notes 110–124 and accompanying text (discussing when an employer is strictly liable and when it may establish an affirmative defense). The Court reasoned that employers delegate authority to supervisors who wield that authority over subordinates. *Ellerth*, 524 U.S. at 759–60. Aided by their agency powers, supervisors may alter their subordinates' working conditions. *Id.* at 761–62. When a supervisor, aided by his agency powers, takes a tangible job action against his subordinate, the employer, having empowered the supervisor, is strictly liable. *Id.* at 762–63. A tangible job action is a significant change in the subordinate's working conditions. *Id.* at 761–62.

employer is strictly liable for the harassment of a supervisor.<sup>63</sup> The Supreme Court, while remarking that agency principles would determine the outcome of that issue, found the factual record undeveloped on the basic question of whether Taylor had sexually harassed Vinson.<sup>64</sup> The Court therefore found the issue of the bank's vicarious liability premature for decision.<sup>65</sup>

*Meritor* established a high threshold for sexual harassment claims. Such a standard of liability is appropriate in litigation where plaintiffs must establish injury to trigger entitlement to compensation. Later Supreme Court decisions built on this standard.

### B. Same-Sex Harassment and the “Code of Civility”

In *Oncale v. Sundowners Offshore Services, Inc.* the Court addressed concerns that the law of sexual harassment should not impose liability for minor transgressions.<sup>66</sup> A member of an eight-man crew, Oncale worked as a roustabout on an oil platform operated by Sundowner.<sup>67</sup> On several occasions other members of the crew subjected Oncale to unwelcome sex-related conduct, which included physical assault and the threat of rape.<sup>68</sup> When Oncale complained that other personnel were abusing him, his supervisors took no remedial action.<sup>69</sup> To avoid violent confrontations, Oncale quit his job.<sup>70</sup>

The principle issue in *Oncale* was whether Title VII's protections against sexual harassment applied only to the male harassment of females—which was the primary focus of Title VII—or whether those protections applied to same-sex harassment.<sup>71</sup> Writing for a unanimous Court, Justice Scalia interpreted the statute expansively, concluding that Title VII protected both men and women.<sup>72</sup> He cited precedent recognizing that someone may discriminate against members

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Examples of tangible job actions are refusal to hire, demotion, discharge from employment, denial of a raise, or reassignment to a position of diminished responsibility. *Id.* at 761. If a supervisor has not taken a tangible job action, the employer may seek to establish an affirmative defense, which has two elements: “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” *Id.* at 765. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998) (adopting the liability standard and affirmative defense set forth in *Ellerth*); Curtis J. Bankers, Note, *Identifying Employers’ “Proxies” in Sexual-Harassment Litigation*, 99 IOWA L. REV. 1785, 1808 (2014) (noting that *Meritor* rejected a strict-liability standard for employers).

<sup>63</sup> *Meritor*, 477 U.S. at 69–70.

<sup>64</sup> *Id.* at 72.

<sup>65</sup> *Id.*

<sup>66</sup> *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 80 (1998).

<sup>67</sup> *Id.* at 77.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 76.

<sup>72</sup> *Oncale*, 523 U.S. at 78.

of his own race.<sup>73</sup> The same logic, he reasoned, applied to sexual harassment law.<sup>74</sup> Conceding that male against female harassment was the primary concern of Title VII's prohibition of sex discrimination, he noted that remedial statutes often redress wrongs beyond the targeted evil.<sup>75</sup> To support his view that Title VII was such a statute, Justice Scalia quoted the broad statutory language, which condemns sex discrimination categorically.<sup>76</sup>

After adopting this generous and undoubtedly correct interpretation of Title VII, Justice Scalia addressed respondents' concern that the statute, if construed too broadly, might devolve "into a general civility code for the American workplace."<sup>77</sup> To dispel this concern, Justice Scalia observed that a finding of unlawful sexual harassment requires a showing of differential treatment of someone in a protected class.<sup>78</sup> Second, he pointed out that, far from merely proving a stray remark or two, a claimant must show that the offensive conduct was sufficiently severe or pervasive to render the work environment hostile.<sup>79</sup>

### C. *The Subjective and Objective Tests*

As noted, *Meritor* held that a valid claim of sexual harassment does not require economic injury.<sup>80</sup> One might argue therefore that at the very least a plaintiff should have to prove psychological injury. *Harris v. Forklift Systems, Inc.*<sup>81</sup> resolved this issue. Teresa Harris was a manager for Forklift Systems, an equipment rental company.<sup>82</sup> Charles Hardy, the company's president, subjected Harris to a continuing pattern of harassment.<sup>83</sup> On several occasions he told Harris, in the presence of other employees, "You're a woman, what do you know," "We need a man as a rental manager," and you are a "dumb ass woman."<sup>84</sup> Hardy sometimes asked Harris to remove coins from his pants

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<sup>73</sup> *Id.* (citing *Castanada v. Partida*, 430 U.S. 482, 499 (1977)).

<sup>74</sup> *Id.* at 79.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 80.

<sup>77</sup> *Id.*; see also *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (commenting that the standards for establishing a hostile environment case "are sufficiently demanding to ensure that Title VII does not become a 'general civility code,'" and citing occasional sex-related joking, or teasing as not arising to the level of actionable harassment (quoting *Oncale*, 523 U.S. at 80)).

<sup>78</sup> *Oncale*, 523 U.S. at 80–81.

<sup>79</sup> *Id.* at 81.

<sup>80</sup> *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986).

<sup>81</sup> *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993).

<sup>82</sup> *Id.* at 19.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* These comments do not appear to reflect a motive of sexual desire, but rather indicate a discriminatory bias based on Harris's gender. See *infra* note 273 and accompanying text (noting that a hostile work environment claim may stand on non-sexually motivated gender-based remarks).

pockets.<sup>85</sup> He threw objects on the floor and asked Harris to pick them up, and he made sexual innuendos commenting on Harris's clothing.<sup>86</sup> After Harris complained to Hardy, he apologized, but he soon resumed his offensive behavior.<sup>87</sup> While Harris was working with a customer, Hardy, in front of other employees, asked Harris if she had promised to have sex with the customer.<sup>88</sup> This incident prompted Harris to quit.<sup>89</sup>

The Supreme Court granted certiorari to decide whether a victim of sexual harassment must prove psychological injury to state a claim.<sup>90</sup> Noting that a valid claim must rest on misconduct that creates a hostile work environment,<sup>91</sup> Justice O'Connor, writing for a unanimous Court, stated that "Title VII comes into play before the harassing conduct leads to a nervous breakdown."<sup>92</sup> A valid claim, however, must allege both objective and subjective alteration of the work environment.<sup>93</sup> Justice O'Connor thus explained that an actionable claim under Title VII requires that "the environment would reasonably be perceived, and is perceived" as hostile.<sup>94</sup>

#### D. *The Elements of a Hostile Work Environment Claim*

*Meritor* established the elements of a hostile work environment claim. A plaintiff must show that (1) sexual words or conduct were (2) discriminatory, (3) unwelcome, (4) severe or pervasive, and (5) altered the conditions of the work environment.<sup>95</sup> *Harris* implied that gender-related words or conduct, even if not expressing sexual desire, met the first element.<sup>96</sup> *Harris* further instructed that both the defendant and a reasonable person must perceive that the work environment has become hostile.<sup>97</sup> Taken together, these cases provide a sensible framework for what constitutes a hostile work environment that would entitle a plaintiff to monetary relief. The requirements of such a claim are not under-inclusive. They would seem to include most, if not all, plaintiffs who, because of experiencing abusive work conditions, deserve compensation. Neither is this standard over-inclusive. As *Oncale* emphasizes, this standard does not create a code of civility where a stray remark, joke, or inappropriate act, though offensive to the sensibilities of a reasonable person, would support

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<sup>85</sup> *Harris*, 510 U.S. at 19.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 20.

<sup>91</sup> *Harris*, 510 U.S. at 21.

<sup>92</sup> *Id.* at 22.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* (citing *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986)).

<sup>95</sup> See *Meritor*, 477 U.S. at 67-68.

<sup>96</sup> See *Harris*, 510 U.S. at 19.

<sup>97</sup> *Id.* at 21-22.

a federal lawsuit.<sup>98</sup> Such minor offenses do not justify the costs of protracted litigation, the expenditure of judicial resources, or the imposition of monetary relief.

### E. *The “Aided by the Agency” Standard and the Affirmative Defense*

Although *Meritor* set forth the elements of a hostile work environment claim, it left open the question of employer liability for the harassment of supervisors.<sup>99</sup> The Supreme Court answered this question in *Burlington Industries, Inc. v. Ellerth*.<sup>100</sup>

#### 1. *A Sensible Standard for Deterrence*

Ellerth was a salesperson working for Burlington.<sup>101</sup> Slowik, a midlevel supervisor with authority over Ellerth,<sup>102</sup> barraged her with harassing misconduct.<sup>103</sup> For example, while on a business trip with Ellerth, Slowik made remarks about her breasts, and when she balked at encouraging him, Slowik warned, “I could make your life very hard or very easy at Burlington.”<sup>104</sup> Months later, Slowik expressed reservations for promoting Ellerth because she was not “loose enough,” and then Slowik rubbed her knees.<sup>105</sup> Ellerth received the promotion, but when Slowik called her to convey the news, he told her that men in the business world “like women with pretty butts [and] legs.”<sup>106</sup> Two months after that incident, when Ellerth asked Slowik for permission to add a customer’s logo to a sample, he refused to respond unless she told him what she was wearing, and days later when she renewed her request, he responded, “Are you wearing shorter skirts yet, Kim, because it would make your job a whole heck of a lot easier.”<sup>107</sup>

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<sup>98</sup> *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80–81 (1998).

<sup>99</sup> *Meritor*, 477 U.S. at 72.

<sup>100</sup> *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 766 (1998); *see also* *Faragher v. City of Boca Raton*, 524 U.S. 775, 780 (1998) (announcing the same holding reached in *Ellerth*).

<sup>101</sup> *Ellerth*, 524 U.S. at 747.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 747–48.

<sup>104</sup> *Id.* at 748.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Ellerth*, 524 U.S. at 748. The Court noted that a trier of fact could find in Slowik’s remarks to Ellerth implicit threats of retaliation if she did not respond sexually to him. *Id.* at 751. A threat when carried out, the Court explained, is referred to as quid pro quo harassment. *Id.* Other instances of harassment that are sufficiently severe or pervasive establish an actionable hostile work environment. *Id.* Although the lower courts had used the distinction between these two categories of harassment to assess employer liability, the Supreme Court stated that the distinction between quid pro quo harassment and hostile work environment harassment is descriptive only, and does not lead to the legal analysis of employer responsibility for supervisor harassment of subordinate employees. *Id.*

By expressly accepting the District Court's finding that Slowik's misconduct was sufficiently severe or pervasive to create a hostile work environment, the Supreme Court provided guidance as to how far harassing activity need go to cross the threshold of unlawfulness.<sup>108</sup> As discussed below in Part III, many circuit court decisions have imposed a markedly higher threshold.<sup>109</sup>

The principal task before the Ellerth Court was to provide a standard of employer liability for harassment committed by supervisors.<sup>110</sup> The Court reasoned that employers delegate authority to supervisors who wield that power over subordinates.<sup>111</sup> Aided by their agency powers, supervisors may alter their subordinates' work conditions.<sup>112</sup> When supervisors, exercising these powers, take tangible employment actions against their subordinates, their employers are strictly liable.<sup>113</sup> A tangible employment action is a significant change in a subordinate's work conditions, which usually inflicts economic harm.<sup>114</sup> Employers are strictly liable because only supervisors have the delegated power to inflict such harm on subordinates.<sup>115</sup> Examples are refusal to hire, demotion, discharge from employment, denial of a raise, and reassignment to a position of diminished pay or responsibility.<sup>116</sup>

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<sup>108</sup> See *id.* at 754 (affirming District Court's determination that Slowik's conduct was sufficiently severe and pervasive to constitute sexual harassment).

<sup>109</sup> See *infra* Part III.A (discussing cases that have imposed unreasonably high thresholds for establishing severe or pervasive misconduct sufficient to constitute a violation of Title VII).

<sup>110</sup> *Ellerth*, 524 U.S. at 754 ("We must decide, then, whether an employer has vicarious liability when a supervisor creates a hostile work environment by making explicit threats to alter a subordinate's terms or conditions of employment, based on sex, but does not fulfill the threat.").

<sup>111</sup> See *id.* at 759–60 (indicating that the Restatement's aided-by-the-agency rule, rather than the apparent authority rule, is applicable).

<sup>112</sup> *Id.* at 761–62. To arrive at this standard, the Court recognized that a supervisor's acts of sex discrimination may not advance the interests of his employer. *Id.* at 756–57. It would therefore make no sense to say that such a supervisor, when committing the harassment, was acting within the scope of his employment. *Id.* at 757. The Court, therefore, turned to section 219(2) of the Restatement (Second) of Agency, which provides when an employer is liable for the wrongdoing of an employee even when the employee did not act within the scope of his employment. *Id.* at 758. Subsection 2 makes an employer liable for the torts of his employee when the employee "was aided in accomplishing the tort by the existence of the agency relation." *Id.* (quoting RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (AM. LAW INST. 1957)).

<sup>113</sup> *Id.* at 762–63. *But see* Heather S. Murr, *The Continuing Expansive Pressure to Hold Employers Strictly Liable for Supervisory Sexual Extortion: An Alternative Approach Based on Reasonableness*, 39 U.C. DAVIS L. REV. 529, 594–95 (2006) (arguing that employers should be strictly liable when a supervisor threatens retaliation if she does not submit to his sexual advances, and employer liability should not depend on whether the supervisor took a tangible employment action).

<sup>114</sup> *Ellerth*, 524 U.S. at 762.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 761.

If a supervisor has not taken a tangible employment action, the employer may seek to establish an affirmative defense, which has two elements: “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”<sup>117</sup>

The Court emphasized that, by including an affirmative defense, this framework promised to deter supervisors from committing sexual harassment.<sup>118</sup> The Court reasoned, “To the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII’s deterrent purpose.”<sup>119</sup>

Some champions of employee rights argue that *Ellerth* should have imposed strict liability on employers for all harassment committed by supervisors.<sup>120</sup> This criticism is misplaced. *Ellerth* established a standard for employer liability that promoted deterrence. Strict liability would lessen an employer’s incentive to adopt remedial measures, or to enforce such measures once adopted. The first

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<sup>117</sup> *Id.* at 765; see also *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998) (adopting the liability standard and affirmative defense set forth in *Ellerth*). Joined by Justice Scalia, Justice Thomas disagreed with the majority’s holding insofar as it established the affirmative defense to harassment not involving a tangible job action. *Ellerth*, 524 U.S. at 769–70 (Thomas, J., dissenting). He analogized sexual harassment cases to racial harassment cases and pointed out that in racial harassment cases, an employer is liable for the harassment of a supervisor only if the employer was negligent, that is, if the employer knew or should have known of the harassing activities and took no remedial action. *Id.* at 767–68 (Thomas, J., dissenting). But see Brian J. Baldrate, Note, *Agency Law and the Supreme Court’s Compromise on “Hostile Environment” Sexual Harassment in Burlington Industries, Inc. v. Ellerth and Faragher v. City of Boca Raton*, 31 CONN. L. REV. 1149, 1178 (1999) (criticizing *Ellerth* and *Faragher* for creating confusion, and proposing that Congress establish a single strict liability or negligence standard that would apply to all sexual harassment cases).

<sup>118</sup> *Ellerth*, 524 U.S. at 764. But see Daniel J. Harmelink, Note, *Employer Sexual Harassment Policies: The Forgotten Key to the Prevention of Supervisor Hostile Environment Harassment*, 84 IOWA L. REV. 561, 601 (1999) (proposing that, to deter sexual harassment effectively, an employer’s liability in hostile work environment cases depend entirely on whether the employer has adopted, communicated, and vigorously enforced a sexual harassment policy).

<sup>119</sup> *Ellerth*, 524 U.S. at 764. But see Evan D. White, Note, *A Hostile Environment: How the “Severe or Pervasive” Requirement and the Employer’s Affirmative Defense Trap Sexual Harassment Plaintiffs in a Catch-22*, 47 B.C. L. REV. 853, 860 (2006) (arguing that victims of sexual harassment face a dilemma because, if they report harassment to their employer immediately on its occurrence, the harassment may not meet the “severe or pervasive” requirement, but if they delay until the harassment has grown in severity or pervasiveness, they may not meet the reporting requirement of the affirmative defense).

<sup>120</sup> See, e.g., Timothy Broderick & Katrina Saleen, *A Victim’s Guide to Sexual Harassment*, SEXUAL HARASSMENT LAWYERS: BLOG <http://www.sexualharassmentlawyerspaloalto.com/online-e-book/chapter-five-employer-and-individual-responsibilities> [<https://perma.cc/TP2K-FDDT>] (noting that under California’s Fair Employment and Housing Law, employers are strictly liable for supervisor harassment, regardless of whether the supervisor took a tangible employment action against the victim).

prong of the affirmative defense encourages employers to implement, communicate, and enforce sexual harassment policies.<sup>121</sup> The second prong also supports deterrence by encouraging victimized employees to report harassment.<sup>122</sup> Unfortunately, in *Vance v. Ball State University*,<sup>123</sup> a racial harassment case, the Supreme Court undercut this framework by narrowly defining “supervisor.”<sup>124</sup>

## 2. Curtailment of the Ellerth Standard

Vance, an African American woman, worked as a catering assistant for Ball State University (BSU).<sup>125</sup> She filed suit against BSU, alleging that Sandra Davis, a white employee of BSU, had racially harassed her.<sup>126</sup> The key to Vance’s claim was that Davis was her “supervisor,” and, therefore, that BSU was vicariously liable under *Ellerth*.<sup>127</sup> The District Court and Seventh Circuit disagreed.<sup>128</sup> They both held that a “supervisor,” by definition, has the authority to take tangible employment actions against a subordinate, and, because Davis did not have that degree of authority over Vance, Davis was not her supervisor.<sup>129</sup> Holding that Davis was merely a co-employee of Vance, both courts ruled that Vance could recover from BSU only if she could prove BSU

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<sup>121</sup> *But see* Joanna L. Grossman, *Moving Forward, Looking Back: A Retrospective on Sexual Harassment Law*, 95 B.U. L. REV. 1029, 1047 (2015) (lamenting that anti-harassment workplace policies and procedures have proliferated without any inquiry into their deterrent effectiveness).

<sup>122</sup> In *Pa. State Police v. Suders*, the Supreme Court extended the *Ellerth* holding to cases of constructive discharge. 524 U.S. 129, 134 (2004). First the Court defined constructive discharge. *Id.* Such a discharge occurs when working conditions are so intolerable that an employee’s reasonable response may be to resign. *Id.* Next, the Court ruled that constructive discharge, in itself, is not necessarily a tangible job action. *Id.* at 140–41. Only when a supervisor is aided by his agency powers in instigating the resignation will construction discharge impel the imposition of strict liability against the employer. *Id.* at 144. Otherwise, the *Ellerth* affirmative defense will be available to the employer who will bear the burden of proof to establish the two prongs of that defense. *Id.* at 148–49. Because *Suders* declined to classify constructive discharge as a tangible job action which would necessitate employer strict liability, one might characterize this decision as a victory for employers. The same counterargument, however, applies here as applied in *Ellerth*. *Suders* promotes the deterrence policy of Title VII by encouraging victims to report harassment and incentivizing employers to respond with corrective measures. Intolerable working conditions do not emerge suddenly. Such conditions build up over a period of time. It is during this period that *Suders* prompts the employee and the employer to take action.

<sup>123</sup> *Vance v. Ball State Univ.*, 570 U.S. 421 (2013).

<sup>124</sup> *Id.* at 424.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.* at 424–25.

<sup>127</sup> *Id.* at 425. Before commencing the lawsuit, Vance had complained internally and then to the EEOC, as required by law. *Id.* She alleged that Davis glared at her, slammed pots and pans in her presence, and blocked her in an elevator. *Id.*

<sup>128</sup> *Id.* at 425–26.

<sup>129</sup> *Vance*, 570 U.S. at 426.



negligent.<sup>130</sup> Because BSU had responded reasonably to Vance's complaints against Davis, Vance could not prove negligence, and accordingly the District Court granted BSU summary judgment, a decision which the Seventh Circuit affirmed.<sup>131</sup>

The Supreme Court had to choose between two competing definitions of "supervisor."<sup>132</sup> The more inclusive view defined a "supervisor" as someone having the authority to exercise significant control over a subordinate's work conditions.<sup>133</sup> The more restrictive view, adopted by the Seventh Circuit, defined a "supervisor" as someone having the authority to take a tangible employment action against a subordinate.<sup>134</sup> The Supreme Court endorsed the restrictive formulation.<sup>135</sup> To justify its holding, the Court raised a practical point. Defining "supervisor" as one with the authority to take tangible employment actions established a clear cut standard, which lower courts and juries could easily apply.<sup>136</sup> The alternative definition—having the authority to direct the job activities of a co-worker—was so vague that it would frustrate judges and confuse jurors.<sup>137</sup> To illustrate the ambiguity of the alternative definition, the Court noted that, depending on the task at hand, employers sometimes alternate the authority to direct work activities from one member of a team to another.<sup>138</sup>

The Court suggested that *Ellerth* supported its view that all supervisors have, by definition, authority to take tangible employment actions against subordinates.<sup>139</sup> The Court gleaned this meaning from *Ellerth's* assertion that *only* supervisors have such power.<sup>140</sup> But the *Vance* Court's reasoning was flawed. Though it may be true that only supervisors have such authority, it does not follow that such authority is vested in *all* supervisors. In other words, supervisors with the authority to take tangible employment actions may be a subset of all supervisors.<sup>141</sup>

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<sup>130</sup> *Id.*

<sup>131</sup> *Id.* The dissent noted that the prevailing negligence standard, which applies when an employee charges a co-employee with workplace harassment, requires that the employer knew or should have known of the harassing activity but failed to take remedial action. *Id.* at 453–54 (Ginsburg, J., dissenting).

<sup>132</sup> *Id.* at 430–31 (majority opinion).

<sup>133</sup> *Id.* at 431. The EEOC adopted this position in an Enforcement Guidance. *Id.*

<sup>134</sup> *Id.* at 430–31.

<sup>135</sup> *Vance*, 570 U.S. at 431.

<sup>136</sup> *Id.* at 432.

<sup>137</sup> *Id.* Seeking guidance to define "supervisor," the Court quoted prominent dictionaries but found both definitions acceptable. *Id.* at 432–33. The Court similarly found that both definitions were used in legal contexts. *Id.* at 433–34.

<sup>138</sup> *Id.* at 446.

<sup>139</sup> *Id.* at 440.

<sup>140</sup> *Id.*

<sup>141</sup> See *Vance*, 570 U.S. at 439, 441–42 (acknowledging that one might characterize those supervisors with authority to take tangible job actions against subordinates as a subset of all supervisors).

Justice Ginsburg dissented.<sup>142</sup> She argued cogently that the majority's view undermined one of the primary policies of Title VII: to deter workplace discrimination.<sup>143</sup> If previous incidents of harassment have gone unreported, she argued, an employer might have no reason to know about the harassment, and therefore, under the negligence standard, which would apply under the majority's view, the employer might elude liability.<sup>144</sup> If, on the other hand, the law adopted the more inclusive definition of "supervisor," employers would face a greater potential of liability for harassment, and they would have a heightened incentive to implement preventative measures.<sup>145</sup>

Justice Ginsburg also controverted the majority's argument that the more restrictive definition of supervisor is clearer than the more inclusive alternative.<sup>146</sup> She argued that, under the majority's view, a manager lacking authority to hire or fire but possessing the authority to reassign or discipline other employees might or might not qualify as a supervisor.<sup>147</sup> Justice Ginsburg noted the majority's failure to deal with another murky scenario.<sup>148</sup> An employer, perhaps to evade liability, might authorize only a few managers to take tangible employment actions.<sup>149</sup> In such cases, the few with such authority might rely on lower-level employees who, having interacted with co-workers, would be empowered to recommend actions such as demotion or discharge.<sup>150</sup>

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<sup>142</sup> *Id.* at 451 (Ginsburg, J., dissenting). Justices Breyer, Sotomayor, and Kagan joined in the dissent. *Id.*

<sup>143</sup> *Id.* In support of this argument, Justice Ginsburg suggested that the Court should have deferred to the EEOC, the agency with expertise in the area of employment discrimination. *Id.* at 463. The EEOC Guidance adopted the broad definition of supervisor. *Id.* at 451; *see, e.g.*, LaDelle Davenport, Comment, *Vance v. Ball State University and the Ill-Fitted Supervisor/Co-Worker Dichotomy of Employer Liability*, 52 HOUS. L. REV. 1431, 1455 (2015) (preferring the *Vance* dissent's definition of "supervisor," and applying the label "superior" to managers with authority to direct the day-to-day activities of co-workers but without authority to take tangible employment actions against them).

<sup>144</sup> *Vance*, 570 U.S. at 466 (Ginsburg, J., dissenting). Justice Ginsburg strengthened her argument by pointing out that a plaintiff has the burden of proof to establish negligence, whereas the defendant has the burden of proof to establish the *Ellerth* affirmative defense. *Id.* at 46. *See, e.g.*, Dallan F. Flake, *Employer Liability for Non-Employee Discrimination*, 58 B.C. L. REV. 1169, 1193–94 (2017) (noting that employers are liable for the harassment of coworkers when the employer was negligent in failing to prevent the harassment).

<sup>145</sup> *Vance*, 570 U.S. at 468 (Ginsburg, J., dissenting); *see Title VII—Employer Liability for Supervisor Harassment—Vance v. Ball State University*, 127 HARV. L. REV. 398, 407 (2013) (asserting that common law principles support the dissenters' definition of supervisor).

<sup>146</sup> *Vance*, 570 U.S. at 464 (Ginsburg, J., dissenting).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *See id.* (noting the problematic implications of the majority's decision).

<sup>150</sup> *See id.* The majority responded to this criticism, suggesting that, when employers use this strategy to insulate themselves from liability, the few managers with the power to take tangible employment actions will, of necessity, rely on recommendations of lower-level employees who interact with co-employees. *Id.* at 446–47 (majority opinion). Because the employer has delegated supervisory authority to such lower level employees, they will be

Under the majority's definition, the power to recommend and influence but not to enforce tangible employment actions might or might not establish the status of "supervisor."<sup>151</sup>

Finally, Justice Ginsburg argued that *Faragher* implicitly resolved the issue by adopting the broad definition of a supervisor.<sup>152</sup> She pointed out that nothing in the record of *Faragher* suggested that Silverman, one of the harassers, had authority to take tangible employment actions against Faragher, the victim of the harassment.<sup>153</sup> Yet the Court characterized Silverman as Faragher's supervisor, and held the employer, Boca Raton, vicariously liable for Silverman's harassment.<sup>154</sup> Though intuitively appealing, this point carries little weight because it is based neither on the holding nor even on any dictum in *Faragher*. Justice Ginsburg's most salient argument, as noted above, was based on policy: the more inclusive definition of supervisor incentivizes employers to prevent harassment and encourages victims to report it.

### 3. *The Ellerth/Vance Framework*

*Ellerth* mapped out a workable framework for employer liability for sexual harassment. When employers delegate power to supervisors who exercise those powers to inflict substantial harm on subordinates, the employers have facilitated the supervisors' abuse of power. The imposition of strict liability on employers is therefore appropriate. In all other circumstances, the two-prong affirmative defense encourages employers to take preventative and corrective measures and encourages victims to report the harassment internally. It is regrettable that *Vance* removed a significant subset of those with supervisory

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deemed supervisors. *Id.*; see also Daniel Leigh, Note, *The Cat's Paw Supervisor: Vance v. Ball State University's Flexible Jurisprudence*, 109 NW. U.L. REV. 1053, 1071 (2015) (noting that the majority's definition of supervisor includes those whose authority is effectively, though informally, delegated, and observing that this circumstance would impose "cat's paw" liability on the employer).

<sup>151</sup> *Vance*, 570 U.S. at 464 (Ginsburg, J., dissenting). Justice Ginsburg also pointed out that, even were the majority correct in its assertion that its definition provides clarity, seeking mechanical precision is not, in any event, desirable. *Id.* at 465. The workplace is dynamic, and the roles played by employees are too complex to fall into simplistic categories, and thus a subtle analysis is required. *Id.* For example, under the majority's definition, Justice Ginsburg asked, would a pitching coach qualify as a supervisor of pitchers on his team, or would a law-firm associate qualify as the supervisor of a paralegal working for the firm? See *id.*; see, e.g., Andrew Freeman, Comment, *A Bright Line, but Where Exactly? Closer Look at Vance v. Ball State University and Supervisor Status Under Title VII*, 19 LEWIS & CLARK L. REV. 1153, 1171 (2015) (arguing that the *Vance* majority did not sufficiently take into account non-hierarchical organizational structures where lines of who has the authority to hire, fire, and demote are not clearly drawn).

<sup>152</sup> *Vance*, 570 U.S. at 456–57 (Ginsburg, J., dissenting).

<sup>153</sup> *Id.* at 457 (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 780–81 (1998)).

<sup>154</sup> *Id.* (citing *Faragher*, 524 U.S. at 808–09).

authority from the definition of “supervisor” and thus unduly limited the deterrent effect of the affirmative defense.<sup>155</sup>

### III. THE FAILURE OF THE LAW TO CONTROL THE PANDEMIC

The requirements for establishing hostile work environment are rigorous. The Supreme Court in *Meritor*, *Harris*, and *Oncale* fashioned this standard to limit actionable claims to those based on serious misconduct.<sup>156</sup> It is not surprising, therefore, that numerous courts have dismissed cases where plaintiffs have alleged facts that, although troubling, fail to meet the threshold for liability.<sup>157</sup> Even more disturbing, many federal courts have ignored the teaching of the triad of controlling Supreme Court decisions, applying a

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<sup>155</sup> See *supra* notes 141–145 and accompanying text.

<sup>156</sup> See *Oncale v. Sundowners Offshore Serv., Inc.*, 523 U.S. 75, 81 (1998) (instructing that conduct “tinged with offensive sexual connotations” does not support a claim, but that an actionable claim requires conduct so severe or pervasive that it creates a hostile work environment) (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)).

<sup>157</sup> See, e.g., *Blake v. MJ Optical, Inc.*, 870 F.3d 820, 822–23 (8th Cir. 2017) (affirming district court’s grant of summary judgment for defendant where plaintiff did not formally complain that the business owner’s son frequently grabbed her buttocks and commented about her breasts); *Stancombe v. New Process Steel LP*, 652 F. App’x 729, 730–31 (11th Cir. 2016) (affirming district court’s grant of summary judgment for defendants where the harasser grabbed the victim’s buttocks three times, and in a second incident thrust his pelvis into the victim’s face three times); *Ponte v. Steelcase, Inc.*, 741 F.3d 310, 313–14 (1st Cir. 2014) (affirming district court’s grant of summary judgment for defendant where male supervisor, on two separate occasions during training program, insisted on driving female subordinate to hotel, rested his hand on her shoulder, and once told her to do “the right thing by him”); *Clayton v. City of Atlantic City*, 538 F. App’x 124, 125–26 (3d Cir. 2013) (affirming the District Court’s grant of summary judgment for defendants where plaintiff’s supervisor in police department asked her out and, after she refused, grabbed her buttocks in public, made disparaging remarks to her, and retaliated against her by unfairly disciplining her and unfairly scheduling her vacations); *Alfano v. Costello*, 294 F.3d 365, 369–70 (2d Cir. 2002) (reversing a jury verdict for plaintiff where plaintiff proved at trial that a co-employee taunted her with jokes about oral sex, likening carrots, bananas, and hot dogs to penises, and planted carrots and potatoes in her mailbox at work to simulate male genitalia); *Burnett v. Tyco Corp.*, 203 F.3d 980, 981 (6th Cir. 2000) (affirming district court’s grant of summary judgment for defendants, and holding that three incidents of harassment, including placing a pack of cigarettes under plaintiff’s bra strap, saying to plaintiff that she had “lost [her] cherry,” and saying to plaintiff at Christmastime, “Dick the malls, dick the malls, I almost got aroused,” were insufficient to allege severe or pervasive behavior); *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1241–43 (11th Cir. 1999) (affirming district court’s grant of judgment as a matter of law in favor of defendant where harasser (1) rubbed his hip against the victim while touching her shoulder and smiling, (2) on two occasions made a sniffing sound while looking at the victims crotch, and (3) constantly stared at the victim and followed her around the workplace in a stalking fashion); *Park v. Pulsarlube USA, Inc.*, 209 F. Supp. 3d 1034, 1037–38 (N.D. Ill. 2016) (granting defendant’s motion for summary judgment where co-worker (1) crowded plaintiff by sitting unreasonably close to her at lunch, (2) said he liked to be close to her, (3) showed her a picture of a nude woman on his iPad, and (4) attempted to touch her breasts).

standard that condones behavior that should, by any reasonable measure, justify moral rebuke and legal liability.<sup>158</sup> Such cases undermine Title VII's policy of deterrence.<sup>159</sup>

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<sup>158</sup> See, e.g., *Graves v. Dayton Gastroenterology, Inc.*, 657 Fed. App'x 485, 486–87 (6th Cir. 2016) (affirming district court's grant of summary judgment for defendants where harasser twice sent sexually explicit texts to the victim and, after she reported the misconduct, retaliated against her by assigning her the most difficult tasks, denying her lunch breaks, and even throwing a chair at her); *Velázquez-Pérez v. Developers Diversified Realty Corp.*, 753 F.3d 265, 267–69 (1st Cir. 2014) (affirming district court ruling that conduct was not severe or pervasive where female with some authority over male subordinate tried to force her way into his hotel room during company conference, sent him multiple sexually motivated emails, threatened to have him fired after he rebuffed her romantic advances, and influenced the decision to fire him); *Stewart v. Miss. Transp. Comm'n*, 586 F.3d 321, 325–27 (5th Cir. 2009) (affirming dismissal of case where supervisor attempted to grab plaintiff in a truck, tried to kiss her on several occasions, kissed her once, and told her at a restaurant “to save the cherry because he had things he wanted to do to her with [it] later,” but excluding this evidence because employer reassigned plaintiff after she complained, though employer later reassigned harasser to be plaintiff's supervisor and he resumed harassing activities); *LeGrand v. Area Res. for Cmty. & Human Servs.*, 394 F.3d 1098, 1099–1100 (8th Cir. 2005) (affirming grant of summary judgment for defendant where harasser twice asked plaintiff to watch pornographic movies and “jerk [] [his] dick off,” and, on a third occasion forcibly kissed plaintiff, grabbed his buttocks and reached for his genitals); *Bowman v. Shawnee State Univ.*, 220 F.3d 456, 458–59 (6th Cir. 2000) (affirming grant of summary judgment to defendants where, on three separate occasions, female supervisor touched male employee sexually, on one of those occasions grabbing his buttocks); *Brooks v. City of San Mateo*, 229 F.3d 917, 921, 927 (9th Cir. 2000) (affirming grant of summary judgment for defendant where the harasser grabbed and fondled the plaintiff's bare breast); *Gupta v. Fla. Bd. of Regents*, 212 F.3d 571, 577–79 (11th Cir. 2000) (reversing jury verdict for plaintiff where a college professor subjected a newly hired colleague to a pattern of harassment, including (1) calling her repeatedly on the phone at night sometimes asking her if she was in bed and, in one instance, suggesting that they should have spent a night together, (2) putting his hand on her inner thigh and raising the hem of her dress, these incidents occurring on two separate occasions in his office, (3) inviting her to his office where he had on an undershirt, unbuckled his trouser, and pulled down his zipper ostensibly to tuck in his dress shirt, and (4) telling her that women are like meat and that men need a variety of women).

<sup>159</sup> See, e.g., *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998). In *Ellerth*, the Supreme Court instructed:

Title VII is designed to encourage the creation of antiharassment policies and effective grievance mechanisms. Were employer liability to depend in part on an employer's effort to create such procedures, it would effect Congress' intention to promote conciliation rather than litigation in the Title VII context. . . . To the extent limiting employer liability could encourage employees to report harassing conduct before it becomes severe or pervasive, it would also serve Title VII's deterrent purpose.

*Id.*

### A. *Flagrantly Severe or Pervasive*

Some lower courts have required plaintiffs to show flagrantly severe or pervasive misconduct.<sup>160</sup> This requirement mirrors the standard for the Intentional Infliction of Emotional Distress, which requires conduct that is outrageous and uncivilized.<sup>161</sup> The demanding threshold for liability in emotional distress cases may be appropriate to remove everyday complaints of minor offense from the courthouse, but rampant sexual harassment calls for a standard response to the plight of workers who do their jobs under intolerable conditions.

#### 1. *Multiple Incident Cases*

Too many courts dissect a pattern of harassment, view the events of misconduct in isolation, and then decide that the harassment was neither severe nor pervasive. The courts reason like someone who disassembles a jigsaw puzzle, looks at each piece separately, and concludes that the puzzle makes no sense.

One striking case is *LeGrand v. Area Resources for Community and Human Services*.<sup>162</sup> Area Resources for Community and Human Services (ARCHS), is a non-profit organization, devoted to revitalizing several communities in Missouri.<sup>163</sup> As a facilitator employed by ARCHS, LeGrand worked with local residents and community leaders on improvement projects.<sup>164</sup> Father Maurice Nutt was both a co-chair of ARCHS and a member of its board of directors.<sup>165</sup> LeGrand alleged that, when he visited Father Nutt to provide him with an update on community development initiatives, Father Nutt asked LeGrand to view pornographic movies and “to jerk off with him.”<sup>166</sup> LeGrand rejected Father

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<sup>160</sup> See *infra* Part III.A.1&2 (discussing cases where egregious misconduct did not incur liability).

<sup>161</sup> The Restatement (Second) of Torts provides: “One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress . . . .” RESTATEMENT (SECOND) OF TORTS, § 46(1) (AM. LAW INST. 1965). “Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” *Id.* at cmt. D; see L. Camille Hébert, *Conceptualizing Sexual Harassment in the Workplace as a Dignitary Tort*, 75 OHIO ST. L.J. 1345, 1354–55 (2014) (suggesting that in egregious hostile-work-environment cases, the “severe-or-pervasive” element would meet the “outrageous and uncivilized conduct” element of a claim for the Intentional Infliction of Emotional Distress).

<sup>162</sup> *LeGrand v. Area Res. for Cmty. & Human Servs.*, 394 F.3d 1098, 1102 (8th Cir. 2005).

<sup>163</sup> *Id.* at 1099.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 1100.

<sup>166</sup> *Id.*

Nutt's invitation.<sup>167</sup> When LeGrand reported this incident to his supervisors at ARCHS, they advised him to document it.<sup>168</sup> After LeGrand did so, they suggested that LeGrand seek counseling through ARCHS's Employee Assistance Program.<sup>169</sup> Again, LeGrand complied.<sup>170</sup> Approximately six months after the initial incident of harassment, LeGrand ran into Father Nutt at ARCHS's offices.<sup>171</sup> LeGrand stated that Father Nutt renewed his invitation to view pornographic movies and "jerk [] [Father Nutt's] dick off."<sup>172</sup> Father Nutt then kissed LeGrand on the mouth, grabbed his buttocks, and reached for his genitals.<sup>173</sup> In response, LeGrand pushed him away and cursed him.<sup>174</sup> A final incident occurred one month later when Father Nutt gripped LeGrand's thigh while they were seated at a table during an ARCHS meeting.<sup>175</sup>

LeGrand filed a sexual harassment charge with the EEOC.<sup>176</sup> An EEOC investigation revealed that Father Nutt admitted hugging and kissing LeGrand and brushing LeGrand's crotch, but he asserted that the kiss was mutual.<sup>177</sup> After the investigation, ARCHS procured Father Nutt's resignation from the board of directors.<sup>178</sup> LeGrand then commenced an action against ARCHS in federal district court, alleging that he had endured a hostile work environment.<sup>179</sup> The court granted ARCHS's motion for summary judgment on the grounds that LeGrand had not alleged misconduct sufficiently severe or pervasive to constitute a hostile work environment claim.<sup>180</sup>

The Eighth Circuit stressed that, to be actionable, sexual misconduct must poison the work environment and permeate the workplace.<sup>181</sup> By imposing this standard, the court disregarded the Supreme Court's injunction that a valid harassment claimant, rather than having to allege a polluted work environment,

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<sup>167</sup> *Id.*

<sup>168</sup> *LeGrand*, 394 F.3d at 1100.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* These incidents of harassment apparently had a profound impact on LeGrand. After filing a complaint with the EEOC, he sought counseling through ARCHS's Employee Assistance Program five times over a six-month period. *Id.* He then went on medical leave from ARCHS. *Id.* During LeGrand's leave, ARCHS, because of insufficient funding, eliminated all community facilitator positions, including LeGrand's position. *Id.* Thereafter, ARCHS offered LeGrand a Development Coordinator position, but by then he had secured other employment. *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *LeGrand*, 394 F.3d 1100.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 1100–01.

<sup>179</sup> *Id.* at 1101.

<sup>180</sup> *LeGrand*, 394 F.3d at 1101.

<sup>181</sup> *See id.* at 1101–02 (quoting *Scusa v. Nestle U.S.A. Co.*, 181 F.3d 958, 967 (8th Cir. 1999)).

had merely to show a hostile one.<sup>182</sup> Comparing LeGrand's allegations (and Father Nutt's admissions) to previously decided cases, the Eighth Circuit, though conceding that Father Nutt's conduct was "crass," "churlish," and "manifestly inappropriate," noted that the *isolated* incidents occurred over a nine month period and were neither severe nor pervasive.<sup>183</sup>

By characterizing the incidents as *isolated* rather than *recurrent*, the court played a neat rhetorical game. Rather than implying that a span of nine months mitigated the seriousness of the misconduct, the court could have observed that harassing conduct sustained over so long a period intensified its seriousness.

Though the Eighth Circuit's affirmation of summary judgment in favor of ARCHS was misguided, the court's rationale is articulable.<sup>184</sup> The law discourages the wave of harassment claims that might flood the courthouse if the standard for hostile work environment harassment devolved into a "civility code for the American workplace."<sup>185</sup> The Eighth Circuit's imposition of an unreasonably high standard for claims of hostile work environment highlights the need for a legal mechanism to punish the types of harassment alleged in *LeGrand*.

## 2. Single Incident Cases

The permissive version of the severe-or-pervasive standard has led many courts to grant employers summary judgment when a harassment claim rested on a single incident, even if that incident was "egregious" and, in some cases, even if the harassment involved physical assault.<sup>186</sup>

The most notorious of these cases is *Jones v. Clinton*.<sup>187</sup> When Bill Clinton was Governor of Arkansas, he noticed Paula Jones, a government employee working at the registration desk at a conference at the Excelsior Hotel in Little

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<sup>182</sup> See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–22 (1993) (declaring that a plaintiff alleging sexual harassment need show only that the harassing conduct altered the conditions of the victim's employment but not that the misconduct polluted the work environment).

<sup>183</sup> *LeGrand*, 394 F.3d at 1102–03.

<sup>184</sup> *Id.*

<sup>185</sup> *Oncala v. Sundowners Offshore Serv., Inc.*, 523 U.S. 75, 80 (1998).

<sup>186</sup> See, e.g., *Figueroa v. Johnson*, 648 F. App'x 130, 135 (2d Cir. 2016) (noting that to support a claim of sexual harassment a single incident must be "extraordinarily severe"); *Paul v. Northrop Grumman Ship Sys.*, 309 F. App'x 825, 826, 828 (5th Cir. 2009) (requiring that, to be actionable, a single incident of sexual harassment be "egregious," and affirming district court's grant of summary judgment for defendant where co-worker "chesting up" to victim's breasts, and when she fled, followed her, forced his way through the door ahead of her, placed his hand on her stomach and around her waist, and rubbed his pelvis against her hips and buttocks); *Brooks v. City of San Mateo*, 229 F.3d 917, 921, 922–27 (9th Cir. 2000) (affirming district court's grant of summary judgment for defendant where co-worker trapped the victim behind a console, twice forced his hand under her sweater, and twice grabbed and fondled her bare breasts).

<sup>187</sup> *Jones v. Clinton*, 990 F. Supp. 657 (E.D. Ark. 1998).



Rock.<sup>188</sup> Using a police officer, Danny Ferguson, as an intermediary, Clinton invited Jones to his hotel suite.<sup>189</sup> Jones accepted, thinking the invitation an honor.<sup>190</sup> After Jones arrived at Clinton's suite and they had exchanged pleasantries, he took her hand and drew her toward him.<sup>191</sup> When she retreated, Clinton approached her again and said, "I love your curves."<sup>192</sup> He then put his hand on her leg, slid it toward her pelvis, and tried to kiss her.<sup>193</sup> Ignoring her attempts to rebuff him, the governor exposed and fondled his erect penis.<sup>194</sup> Before she left the suite, the governor detained her briefly and warned her not to talk about the incident.<sup>195</sup> Several witnesses, including Jones's co-workers, confirmed that the incident with Clinton upset Jones, and that she cried as a result of the harassment.<sup>196</sup>

The district court granted Clinton's motion for summary judgment.<sup>197</sup> The totality of circumstances, said the judge, did not show that the harassment was so severe or pervasive to subject Jones to a hostile work environment.<sup>198</sup> The judge ticked off facts to illustrate the relatively minor scope of the impact that Clinton's sexual improprieties had on Jones. Jones admitted that she never missed a day of work as a result of the harassment, she continued at her government job for nineteen months after the incident at the Excelsior Hotel,

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<sup>188</sup> *Id.* at 663.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 663–64.

<sup>192</sup> *Id.* at 664.

<sup>193</sup> *Jones*, 990 F. Supp. at 664.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 664–65. Jones asserted that one month later Officer Ferguson approached her and told her that the governor's wife was out of town, that the Governor wanted Jones's telephone number, and that he wanted to see Jones. *Id.* at 665. During that encounter, Officer Ferguson asked Jones about her fiancé Steve, a question which frightened her because she had never mentioned Steve to Ferguson or Governor Clinton. *Id.* Jones also encountered Ferguson when she returned to work from maternity leave. *Id.* At that time, he commented that he had told the Governor how good she looked after having a baby. *Id.* Finally, she alleged that Clinton accosted her in the rotunda of the Arkansas State Capitol, draped his arm over her, held her tightly, and remarked that they made a beautiful couple. *Id.* Despite these later incidents, the court focused primarily on the harassment that occurred in the Excelsior Hotel. *Id.* at 675.

<sup>197</sup> *Id.* at 662.

<sup>198</sup> *Id.* at 675. *But see* Moira McAndrew, *How the Supreme Court's Reiteration of Sexual Harassment Standards Affirmed in Faragher and Ellerth Would Have Led to Jones' Survival in Jones v. Clinton*, 47 CLEV. ST. L. REV. 231, 243–44 (1999) (arguing that, though Jones's case hinged on a single incident, prior and subsequent Supreme Court and circuit court rulings imply that her case should have survived summary judgment).

she never filed a formal complaint, and she never consulted a psychiatrist, psychologist, or other medical professional.<sup>199</sup>

It is hardly surprising that Jones did not file a complaint against the Governor, the man who wielded unfettered authority over the conditions of her employment and could have ordered her discharge at his whim. Furthermore, the Governor told her not to talk about the incident, a warning that amounted to an implicit threat. Nor should persevering at the job or foregoing counseling count against her. As the Supreme Court aptly observed in *Harris*,<sup>200</sup> to state a valid claim of sexual harassment, the victim need not demonstrate psychological harm,<sup>201</sup> though Jones in fact alleged such harm. This decision seems blind to *Harris*' instruction that, to have a claim, a victim does not have to suffer a "nervous breakdown."<sup>202</sup>

One might surmise that in the *Jones v. Clinton* decision the President benefited from the prestige or influence of his high office. Though one cannot dismiss this possibility, in *Brooks v. City of San Mateo*, the harasser was neither a president nor even a governor.<sup>203</sup> Nevertheless, the Ninth Circuit, known for its liberal bent, subjected the victim of a single incident of harassment to the same harsh standard applied in *Jones v. Clinton*. Patricia Brook was a telephone dispatcher for the City of San Mateo.<sup>204</sup> She and her supervisor, Steven Selvaggio, were on duty at the city communications center fielding 911 calls.<sup>205</sup> Suddenly Selvaggio placed his hands on Brooks's stomach and commented on her sexiness.<sup>206</sup> She responded by pushing him away.<sup>207</sup> Later, while Brooks was answering a call, Selvaggio boxed her in behind the communications console, forced his hand under her sweater, and fondled her bare breast.<sup>208</sup> Brooks removed Selvaggio's hand and told him he had "crossed the line" to which he responded, "you don't have to worry about cheating [on your husband], I'll do everything."<sup>209</sup> Selvaggio then moved to grab Brooks' breast again, but another dispatcher entered the room at that moment.<sup>210</sup> Selvaggio

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<sup>199</sup> *Jones*, 990 F. Supp. at 675. Approximately nineteen months after the incident in the Excelsior Hotel, Jones stopped working for the State of Arkansas to move to California with her husband who had been transferred there. *Id.*

<sup>200</sup> *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993).

<sup>201</sup> *Id.* at 22 ("Title VII comes into play before the harassing conduct leads to a nervous breakdown.").

<sup>202</sup> *Id.*

<sup>203</sup> *Brooks v. City of San Mateo*, 229 F.3d 917, 921 (9th Cir. 2000).

<sup>204</sup> *Id.* at 921.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Brooks*, 229 F.3d at 921.

<sup>210</sup> *Id.*

backed off and soon left the communications center.<sup>211</sup> Brooks immediately reported the incident.<sup>212</sup>

An investigation revealed that at least two other female workers had suffered similar treatment from Selvaggio.<sup>213</sup> The city initiated termination proceedings against him which prompted his resignation.<sup>214</sup> He pleaded no contest to a sexual assault charge and spent 120 days in jail.<sup>215</sup>

Brooks commenced an action against San Mateo, its police department, and police chief for hostile work environment.<sup>216</sup> The district court granted summary judgment to the defendants.<sup>217</sup> On appeal, the Ninth Circuit emphasized that, to state a hostile-work-environment claim, a plaintiff must show “a workplace atmosphere so discriminatory and abusive that it unreasonably interferes with the job performance of those harassed.”<sup>218</sup> This pronouncement is perplexing. A decline in job performance would certainly indicate that the harassment significantly affected the victim, but even absent a decline in performance the harassment may have intimidated her and altered her work conditions. A woman’s determination to cope with adversity and maintain a high level of job performance despite abusive conduct should not count against her.

The Ninth Circuit then set forth its view of hostile work environment claims based on a single incident.<sup>219</sup> It began by noting that “[b]ecause only the employer can change the terms and conditions of employment, an isolated incident of harassment by a co-worker will rarely (if ever) give rise to a reasonable fear that sexual harassment has become a permanent feature of the employment relationship.”<sup>220</sup> The court explained this curious proposition by observing that when a harassment claim rests on a single incident “the employer will have had no advance notice and therefore cannot have sanctioned the harassment beforehand.”<sup>221</sup> Therefore, according to the Ninth Circuit, “it becomes difficult to say that a reasonable victim would feel that the terms and conditions of her employment have changed as a result of the misconduct.”<sup>222</sup>

This analysis conflates the employer’s fault for the harassment with an alteration in the conditions of the work environment. Employer condonation of, or responsibility for, harassment is not an element of a hostile-work-environment claim. Rather the plaintiff must prove that the harassing activity

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<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.* at 922.

<sup>214</sup> *Id.*

<sup>215</sup> *Brooks*, 229 F.3d at 922.

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 923.

<sup>219</sup> *Id.* at 924.

<sup>220</sup> *Id.*

<sup>221</sup> *Brooks*, 229 F.3d at 924.

<sup>222</sup> *Id.*

was sufficiently severe or pervasive to alter her work conditions.<sup>223</sup> The court's misstep in reasoning enabled it to conclude that Selvaggio's conduct, "while relevant" to Brooks' claim, was secondary to the conduct of the city.<sup>224</sup>

Perhaps the most troubling part of the court's analysis was its discussion of *Al-Dabbagh v. Greenpeace, Inc.*,<sup>225</sup> where an Illinois district court held a single incident sufficient to support a hostile-work-environment claim.<sup>226</sup> In that case, the assailant battered and choked the victim, ripped off her shirt, forced her to have sex with him, and held her captive overnight.<sup>227</sup> After her escape, she was hospitalized.<sup>228</sup> The *Brooks* court observed: "If the incident here were as severe as that in *Al-Dabbagh*, we would have to grapple with the difficult question whether a single incident can so permeate the workplace as to support a hostile work environment claim."<sup>229</sup>

If, as the Ninth Circuit suggests, a single incident of sexual battery, kidnapping, and rape may not suffice to establish a hostile work environment claim, then the law is woefully misguided, and will serve neither as a sufficient instrument for punishment nor deterrence. But even in cases less egregious than *Al-Dabbagh*, discrimination law should effectively police sexual harassment. The current approach, even when sensibly applied, countenances harassing conduct that most would find condemnable. A new approach should supplement the one in place. As shown in Part III, Congress should empower the EEOC to initiate enforcement proceedings against harassers who engage in highly offensive misconduct.

### B. *Unimpeachably Unwelcome*

Another element of a hostile work environment claim is that the objectionable words or conduct must be unwelcome.<sup>230</sup> Some courts have interpreted the "unwelcome" element to impose yet another barrier to claims alleging disturbing misconduct.<sup>231</sup> These courts have burdened victims of

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<sup>223</sup> *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22–23 (1993).

<sup>224</sup> *Brooks*, 229 F.3d at 924.

<sup>225</sup> *Al-Dabbagh v. Greenpeace, Inc.*, 873 F. Supp. 1105 (N.D. Ill. 1994).

<sup>226</sup> *Brooks*, 229 F.3d at 925 (citing *Al-Dabbagh*, 873 F. Supp. at 1111).

<sup>227</sup> *Id.* at 926 (citing *Al-Dabbagh*, 873 F. Supp. at 1108).

<sup>228</sup> *Id.* (citing *Al-Dabbagh*, 873 F. Supp. at 1108).

<sup>229</sup> *Id.*

<sup>230</sup> *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68 (1986) ("The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'" (quoting 29 C.F.R. § 1604.11(a) (1985))).

<sup>231</sup> *See, e.g., Souther v. Posen Constr. Inc.*, 523 F. App'x 352, 353–55 (6th Cir. 2013) (affirming district court's grant of summary judgment for defendants, where plaintiff, a construction worker, never complained about protracted affair with her supervisor, despite her insistence at deposition that she was coerced); *see infra* note 232 (analyzing the issue of whether sexual advances and activity were welcome).

sexual harassment with having to prove that they complained about the harassment, perhaps multiple times.<sup>232</sup>

In *Blake v. MJ Optical, Inc.*,<sup>233</sup> Bobbette Blake was a longtime bench technician for MJ Optical.<sup>234</sup> While attending Blake's husband's funeral, Marty Hagge, son of the owner of the company, a vice-president, and one of Blake's supervisors, allegedly grabbed Blake's behind.<sup>235</sup> Blake said, "What was that about?" and Hagge answered, "I thought you needed it."<sup>236</sup> In its summary of the facts, the Eighth Circuit seemed to minimize this incident, commenting, "[t]hat was the entirety of the exchange."<sup>237</sup> But Marty's pattern of inappropriate words and conduct was just getting started.<sup>238</sup> He smacked or grabbed Blake's behind "various times during the workday," though the Eighth Circuit characterized this misconduct as having occurred only "occasionally."<sup>239</sup> At least once, Blake flashed a dirty look at Marty, but her negative response did not stop him.<sup>240</sup> She also alleged that Marty remarked, "you'd better watch those things [her breasts] because they're going to poke my eyes out" and asked whether her nipples were "the size of nick[el]s or quarters."<sup>241</sup> Embarrassed, Blake purchased padded underwear, an act which certainly showed that Blake found Marty's comments unwelcome.<sup>242</sup> Blake explained that she did not report Marty's wrongdoing because "it wouldn't have done any good," a sensible belief given that Marty was the owner's son.<sup>243</sup>

The Eighth Circuit affirmed the district court's grant of summary judgment in favor of MJ Optical,<sup>244</sup> because Blake had failed to establish that Marty's offensive words and conduct were unwelcome.<sup>245</sup> A plaintiff, held the court, must prove either that she complained to the company, formally or informally,

<sup>232</sup> See *Souther*, 523 F. App'x at 355; see also *Wisniewski v. Pontiac Sch. Dist.*, 862 F. Supp. 2d 586, 597 (E.D. Mich. 2012) (holding that voluntary consent to sexual activity implies that subsequent similar sexual activity was welcome). See generally Kristy Dahl Rogers, Note, *An Irresistible Attraction: Rethinking Romantic Jealousy as a Basis for Sex-Discrimination Claims*, 64 DUKE L.J. 1453, 1494–95 (2015) (arguing that a victim's failure to report or complain about harassing conduct does not show that the conduct was welcome, but may reflect her fear of losing her job).

<sup>233</sup> *Blake v. MJ Optical, Inc.*, 870 F.3d 820 (8th Cir. 2017).

<sup>234</sup> *Id.* at 822. Over a period of forty years, Blake worked for the Hagge family, which first owned Shamrock, another eyeglass company, and later owned MJ Optical. *Id.* Marty Hagge, son of the owner, Michael Hagge, was the alleged harasser. *Id.*

<sup>235</sup> *Id.* at 823.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Blake*, 870 F.3d at 823.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* Blake also asserted an age discrimination claim, alleging, for example, that "he only kept her around to 'watch her die.'" *Id.*

<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 822.

<sup>245</sup> *Blake*, 870 F.3d at 828–30.

or that she objected directly to the harasser.<sup>246</sup> The court intimated that multiple complaints might well be necessary before a plaintiff had met this burden.<sup>247</sup>

Such an onerous standard contradicts the Supreme Court's holding in *Meritor*.<sup>248</sup> Meritor bank argued that because Mechelle Vinson had voluntarily had sex with Sidney Taylor, she welcomed his advances, and therefore forfeited her harassment claim.<sup>249</sup> The Supreme Court rejected this proposition.<sup>250</sup> A plaintiff's voluntary participation in sexual conduct does not necessarily negate her assertion that the sexual advances were unwelcome.<sup>251</sup> The Supreme Court's viewpoint makes sense because the power imbalance between the harasser and the victim may account for the victim's silence and acquiescence. The same principle applies to Blake's response to Marty's harassment. He was the son of the owner, a vice-president of the company, and one of her supervisors.<sup>252</sup> One can hardly conceive of a more imbalanced power dynamic. Ignoring Blake's assertion that reporting the harassment of someone in such a position of power would have been futile, the court relied on irrelevancies.<sup>253</sup> It noted that Blake and Marty had known each other for forty years, that their relationship was positive most of that time, and that Marty saw his conduct as an attempt "to lighten the mood."<sup>254</sup> None of these facts mitigate the abusiveness of his pattern of harassment.

### C. *Blatantly Discriminatory*

As noted, federal law does not expressly proscribe sexual harassment. Rather, the courts have recognized that sexual harassment is a form of discrimination "because of sex."<sup>255</sup> It follows that sexual harassment is unlawful only if it is discriminatory.<sup>256</sup> The federal courts have strictly applied the

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<sup>246</sup> *Id.* 828–29.

<sup>247</sup> *Id.* at 829.

<sup>248</sup> *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 58 (1986).

<sup>249</sup> *Id.* at 68.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Blake*, 870 F.3d at 822. See V. Blair Druhan, Note, *Severe or Pervasive: An Analysis of Who, What, and Where Matters When Determining Sexual Harassment*, 66 VAND. L. REV. 355, 377 (2013) (noting that one factor affecting the severity of harassing conduct, both objectively and subjectively, is the power and status of the harasser in the workplace).

<sup>253</sup> *Blake*, 870 F.3d at 829.

<sup>254</sup> *Id.*

<sup>255</sup> Title VII provides as follows:

It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a)(1) (2012).

<sup>256</sup> See, e.g., *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (affirming that Title VII bans "requiring people to work in a discriminatorily hostile or abusive environment");

discrimination element in sexual harassment cases, often refusing to infer discrimination when the facts implied a sex-based motive for offensive words or conduct.<sup>257</sup> Proving sex discrimination in sexual harassment cases has therefore been the downfall of numerous claims.<sup>258</sup>

For example, in *Graves v. Dayton Gastroenterology, Inc.*,<sup>259</sup> Graves worked as a certified nurse anesthetist for Dayton Gastroenterology.<sup>260</sup> She and David Schum, a co-worker with authority over schedules and work assignments, had a friendly relationship, occasionally exchanging text messages.<sup>261</sup> While on vacation, Graves texted Schum, telling him, “I like being on vacation. I have done nothing all week.”<sup>262</sup> Schum responded, “I [sic] happy for you, you just have fun and wild sex.”<sup>263</sup> Understandably, this text message offended Graves

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*Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 64 (1986) (“[W]hen a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘discriminate[s]’ on the basis of sex.”).

<sup>257</sup> See, e.g., *Lord v. High Voltage Software, Inc.*, 839 F.3d 556 (7th Cir. 2016). In that case, plaintiff alleged same-sex sexual harassment based on four separate occasions where Nick Reimer, a co-worker of Lord, slapped or grabbed Lord’s buttocks at work. *Id.* at 560. Affirming summary judgment for High Voltage Software, the Seventh Circuit found no triable issue of fact of discrimination because of sex. *Id.* at 562. The court stated, “Nothing suggests that Reimer was homosexual, and Reimer’s behavior was not so explicit or patently indicative of sexual arousal that a trier of fact could reasonably draw that conclusion. And neither the audio-bug joke [teasing Lord about his apparent interest in a female engineer] nor Reimer’s conduct reflect a general hostility to the presence of men in the workplace: Lord points to no facts suggesting that only male employees at High Voltage were the objects of this sort of teasing.” *Id.*; see also, e.g., *Stacombe v. New Process Steel LP*, 652 F. App’x 729, 731–33 (11th Cir. 2016) (rejecting claim of sexual harassment where the harasser grabbed the victim’s buttocks three times, and in a second incident grabbed the victim’s head and thrust his pelvis into the victim’s face, and rationalizing the dismissal of the claim because the plaintiff made no showing that (1) the harasser was homosexual, (2) the harasser had hostility toward males in the workplace, and (3) the harasser treated the two sexes differently in the workplace); *Davis v. Coastal Int’l Sec., Inc.*, 275 F.3d 1119, 1121–23 (D.C. Cir. 2002) (affirming district court’s grant of summary judgment for defendants on the ground that harassment was motivated by revenge rather than sex, although harasser grabbed victim’s crotch, made kissing gestures, and used vulgar phrases describing oral sex on several occasions). This cabined view of what might constitute sexual harassment is unjustified under Title VII. Victims were subjected to offensive treatment of a sexual nature in the workplace. No woman endured a similar treatment. That should be enough to establish differential treatment of the sexes. See *infra* notes 259–280 and accompanying text (analyzing sexual harassment cases where federal courts found no evidence of sex discrimination and granted defendants summary judgment, despite proof implying a sex-based discriminatory motive).

<sup>258</sup> See *supra* note 257 and accompanying text (discussing the unreasonable view that some circuit courts have taken when assessing whether words or conduct was sexually discriminatory).

<sup>259</sup> *Graves v. Dayton Gastroenterology, Inc.*, 657 F. App’x 485 (6th Cir. 2016).

<sup>260</sup> *Id.* at 485–86.

<sup>261</sup> *Id.* at 486–87.

<sup>262</sup> *Id.* at 487.

<sup>263</sup> *Id.*

who did not reply.<sup>264</sup> Schum, however, texted Graves one week later, saying, “You and your husband lay out a wonderful dinner, an [sic] have wild sex on the table!!!! I do think about sex all the time. I [sic] just not getting it.”<sup>265</sup> The next day, Graves reported both inappropriate text messages to Penno, her supervisor at Dayton Gastroenterology.<sup>266</sup> When Schum texted Graves an apology, Graves responded that she would speak to him only about work-related matters.<sup>267</sup> Angered, Schum retaliated by (1) refusing to answer her questions about work assignments, (2) assigning her the most difficult tasks at work, (3) denying her lunch breaks, (4) failing to provide her with updated work schedules, (5) rejecting her requests for days off, and (6) throwing a chart at her.<sup>268</sup> This campaign of revenge drove Graves to resign.<sup>269</sup>

A divided Sixth Circuit panel affirmed the district court’s grant of defendants’ motion for summary judgement.<sup>270</sup> Judge Daughtrey, writing for the majority, believed that Schum’s misconduct was not related to Graves’ gender, and therefore was not prohibited by Title VII’s proscription of discrimination because of sex.<sup>271</sup> The court listed the types of misconduct that support claims of gender-based animus.<sup>272</sup> The list included (1) differential treatment of males and females, (2) expressions of hostility toward females, (3) physical harassment, and (4) the request for sexual favors.<sup>273</sup> Neither evidence of Schum’s text messages, nor evidence of his retaliation supported Graves’ argument that she suffered discrimination because of sex.<sup>274</sup>

Judge Karen Nelson Moore filed a persuasive dissent.<sup>275</sup> She argued that a jury might infer from Schum’s texts that he wanted to have sex with Graves.<sup>276</sup> Such a motive showed differential treatment of a woman because of her gender

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<sup>264</sup> *Id.*

<sup>265</sup> *Graves*, 657 F. App’x at 487.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *Id.* Before tendering her resignation, Graves suffered anxiety, headaches, and nausea because of Schum’s abusive conduct. *Id.* She began a new job as a nurse anesthetist the month following her resignation. *Id.*

<sup>270</sup> *Id.* at 486.

<sup>271</sup> *Graves*, 657 F. App’x at 487–88.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.* at 488–89. *But see, e.g.*, *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 19–21 (1993) (finding non-sexually motivated conduct based on plaintiff’s gender sufficient to state a claim of hostile work environment); David S. Schwartz, *When Is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1723–24 (2002) (noting that non-sexually motivated conduct meets the “because of sex” requirement of Title VII and therefore may constitute sexual harassment).

<sup>274</sup> *Graves*, 657 F. App’x at 489.

<sup>275</sup> *Id.* at 490 (Nelson Moore, J., dissenting).

<sup>276</sup> *Id.* at 490–91. Judge Nelson Moore observed that by “[r]equiring defendants to reveal their motives outright would punish only the most vulgar harassers and reward those smart enough to speak in subtleties.” *Id.* at 491. One might broaden the judge’s point by noting that the majority’s standard countenances harassment that is not at all subtle.



and therefore was proof of sex discrimination.<sup>277</sup> Drawing an analogy to racial discrimination, she refuted the argument that Schum's text messages would have been equally offensive whether sent to a man or a woman.<sup>278</sup> It might be acceptable, she observed, for a white worker to repeatedly disparage a white co-worker's hair, but the same comment might be proof of racial harassment if the white worker directed the disparaging comments at a black co-worker.<sup>279</sup> Furthermore, Judge Nelson Moore argued that Schum's subsequent retaliatory conduct was arguably "rooted in sexual desire and rejection."<sup>280</sup>

#### D. *Intolerably Hostile Work Environment*

The last element of a hostile-work-environment claim is alteration of the work environment.<sup>281</sup> Some federal courts have, either expressly or implicitly, interpreted this standard to mean "pollution" of the work environment, though the Supreme Court expressly rejected such an extreme standard.<sup>282</sup>

##### 1. *More Than Severe*

Even if the offensive words or conduct are severe or pervasive, they may not be so severe or pervasive that they altered the work environment. The Eleventh Circuit embraced this curious formulation in *Stancombe v. New Process Steel LP*.<sup>283</sup> Stancombe, an employee of New Process Steel, banded steel coil products.<sup>284</sup> During Stancombe's one-month tenure of employment, Woodfin, a co-employee, subjected Stancombe to two incidents of harassment.<sup>285</sup> In the first incident, Woodfin hugged Stancombe and touched his buttocks three times.<sup>286</sup> Stancombe reported the incident to his supervisor.<sup>287</sup>

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<sup>277</sup> *Id.* at 491.

<sup>278</sup> *Id.*

<sup>279</sup> *Graves*, 657 F. App'x at 491 (Nelson Moore, J., dissenting). She offered another analogy. It would be acceptable if a Christian worker suggested that a Christian co-worker dress up for Halloween as Osama bin Laden, but the same suggestion directed to a Muslim co-employee might evidence discrimination based on religion. *Id.*

<sup>280</sup> *Id.*

<sup>281</sup> *See, e.g., Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 78 (1998) (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) ("When the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated.")).

<sup>282</sup> *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993) (remarking that, although the Taylor's gross misconduct in *Meritor* "polluted" Vinson's work environment, such "egregious examples of harassment . . . do not mark the boundary of what is actionable").

<sup>283</sup> *Stancombe v. New Process Steel LP*, 652 F. App'x 729, 735 (11th Cir. 2016).

<sup>284</sup> *Id.* at 731.

<sup>285</sup> *Id.*

<sup>286</sup> *Id.*

<sup>287</sup> *Id.* Stancombe's supervisor, Joe Young, passed the complaint along to Doug Logan, the production manager. *Id.* Logan then met with Stancombe and assured him that the

Only two days later, Woodfin approached Stancombe, grabbed his head and Woodfin thrust his pelvis three times in Stancombe's face.<sup>288</sup> Shocked, Stancombe left the plant premises and quit his job.<sup>289</sup>

Affirming the district court's grant of summary judgment for the defendants, the Eleventh Circuit made a perplexing observation.<sup>290</sup> The court explained: "While the second incident [pelvic thrusting into Stancombe's head] arguably was severe . . . Stancombe demonstrated no pattern of harassment and presented no other supporting evidence of an abusive working environment."<sup>291</sup> The court concluded therefore that "the two isolated incidents were not so severe as to amount to a discriminatory change in terms and conditions of employment."<sup>292</sup> The Eleventh Circuit required something more than severe misconduct, though it did not clarify how egregious misconduct must be to alter the work environment.

## 2. *The Time Trap*

Unlike *LeGrand*, where the Eighth Circuit discounted the effects of three incidents because they were spread over six months, the *Stancombe* court found that the two harassing incidents did not alter the work environment because both occurred within a short span of time.<sup>293</sup> The passage of time, whether long or short, is apparently a victim's enemy.

## 3. *Conflation of the Objective and Subjective Tests*

The *Stancombe* court emphasized that Woodfin's offensive conduct was not "so *objectively* offensive as to alter the 'conditions' of the victim's employment."<sup>294</sup> Although Stancombe resigned immediately after the second incident, the court concluded oddly that the harassment did not interfere with

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company took sexual harassment claims seriously. *Id.* Logan then took written statements from Stancombe and Woodfin, transferred Stancombe to a different department, and instructed Woodfin to avoid contact with Stancombe. *Id.*

<sup>288</sup> *Id.*

<sup>289</sup> *Stancombe*, 652 F. App'x at 731. He did not express his resignation directly to New Process Steel. *Id.* Rather, two days later he conveyed his resignation to the staffing agency that had secured the job for him. *Id.* Thereafter, New Process Steel conducted an investigation into Stancombe's complaint of sexual harassment. *Id.* Though no other employee validated Stancombe's allegations, Woodfin admitted that he had put his arm around Stancombe, and the company had disciplined him for a prior incident where he hit another employee on the buttocks while the employee bent over. *Id.* at 731–32. These facts suggest that Woodfin's co-employees may have been covering for him.

<sup>290</sup> *Id.* at 730–31.

<sup>291</sup> *Id.* at 736.

<sup>292</sup> *Id.*

<sup>293</sup> *Id.* at 735.

<sup>294</sup> *Id.* at 735–36 (emphasis added) (quoting *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 81 (1998)).

Stancombe's job performance.<sup>295</sup> The court's rationale was flimsy: if Stancombe had returned to work, the court explained, he would not have worked alongside Woodfin because, after the first incident, Stancombe's supervisor had transferred him to another department.<sup>296</sup> Having found that the harassment did not affect Stancombe's job performance, the court muddled the objective and subjective tests for sexual harassment claims. In *Harris v. Forklift Systems, Inc.*,<sup>297</sup> the Supreme Court enumerated factors that a court should weigh in determining whether the harassment was sufficiently severe or pervasive to establish a hostile work environment.<sup>298</sup> The court included, among these factors, "whether [the discriminatory conduct] *unreasonably* interferes with an employee's work performance."<sup>299</sup> The word "unreasonably" indicates an objective alteration of the work environment.

By assessing the effects of the harassment on Stancombe's job performance without assessing how the harassment might *reasonably* have affected his job performance, the Eleventh Circuit misapplied the *Harris* standard. Stancombe's job performance was relevant to assessing his subjective response to the harassment but it was irrelevant to assessing whether the harassment objectively altered his working conditions.<sup>300</sup> The objective test focuses on how a reasonable person would act, not on how the plaintiff reacted. A hypersensitive plaintiff might experience a decline in performance or even quit a job for objectively minor reasons.

As the Eleventh Circuit noted, one element of a sexual harassment claim is that the victim must feel subjectively that the harassment altered the conditions of her employment.<sup>301</sup> By resigning his job immediately after Woodfin thrust

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<sup>295</sup> *Stancombe*, 652 F. App'x at 735.

<sup>296</sup> *Id.*

<sup>297</sup> *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993).

<sup>298</sup> The Court explained as follows:

[W]e can say that whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interfered with an employee's work performance.

*Id.* at 23.

<sup>299</sup> *Id.* (emphasis added).

<sup>300</sup> *See, e.g.*, *Graves v. Dayton Gastroenterology, Inc.*, 657 F. App'x 485, 488 (6th Cir. 2016) ("In assessing whether Graves established a genuine dispute as to the objective prong, we must consider . . . whether [discrimination] unreasonably interfered with an employee's performance."); *LeGrand v. Area Res. for Cmty. Human Serv.*, 394 F.3d 1098, 1102 (8th Cir. 2005) (listing a decline in plaintiff's job performance as an objective factor).

<sup>301</sup> *See, e.g.*, *Harris*, 510 U.S. at 22 ("So long as the environment would reasonably be perceived, and is perceived as hostile or abusive, there is no need for it also to be psychologically injurious."); *Alfano v. Costello*, 294 F.3d 365, 374 (2d Cir. 2002) (noting that to have a claim for hostile work environment "the victim must also subjectively perceive that environment to be abusive"); *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1246 (11th Cir. 1999) (noting that, to state a claim for hostile work environment, the victim must perceive

his pelvis into Stancombe's face, Stancombe's reaction was doubtless sufficient to meet the subjective test. It also seems clear that the facts met the objective test. A reasonable person would have found Woodfin's misconduct so intolerable that he well might have quit to remove himself from the work environment.

Like the Eleventh Circuit in *Stancombe*, the Eighth Circuit in *Scusa v. Nestle U.S.A. Co., Inc.*,<sup>302</sup> conflated the subjective and objective tests.<sup>303</sup> The court posited that interference with the victim's work performance is one determinant of whether a reasonable person would have found the harassment sufficiently severe or pervasive to alter the victim's work environment.<sup>304</sup> Then, as a basis for rejecting Scusa's assertion that the work environment was hostile, the court seized on the fact that Scusa "was able to work full shifts and perform all of her duties."<sup>305</sup>

It might appear irrelevant whether the victim's work performance is treated as relevant to the objective or subjective test. However, substituting a plaintiff's subjective reaction for the objective reaction of a reasonable person might be outcome determinative. Suppose the victim of severe and pervasive harassment persevered through adversity and maintained her level of performance. If she were litigating before the Eighth or Eleventh Circuits, her grittiness would weigh against her argument that a reasonable person would have found the work environment altered. The Eighth and Eleventh Circuits might therefore erroneously reject her claim on the ground that she failed to meet the objective test.

#### E. "Tangibly" Supervisory

By holding that a supervisor must have authority to take tangible employment actions against the victim, *Vance v. Ball State University*<sup>306</sup> has shielded employers from vicarious liability. For example, in *McCafferty v. Preiss Enterprises, Inc.*<sup>307</sup> McCafferty, a fifteen-year-old, worked for a McDonald's franchise restaurant, owned by Preiss.<sup>308</sup> Peterson was a swing

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the objectionable conduct as so severe or pervasive that it altered the conditions of her employment).

<sup>302</sup> *Scusa v. Nestle U.S.A. Co., Inc.*, 181 F.3d 958 (8th Cir. 1999).

<sup>303</sup> *Id.* at 967.

<sup>304</sup> *Id.*

<sup>305</sup> *Id.* The court found other reasons to dispose of plaintiff's harassment claim. *Id.* at 965–66. It rejected her assertion that insulting words and aggressive conduct directed at her were based on her sex. *Id.* at 965. It also was unpersuaded that foul language hurled at her by co-workers was unwelcome, because she had uttered equally offensive epithets at them. *Id.* at 966.

<sup>306</sup> *Vance v. Ball State Univ.*, 570 U.S. 421, 424 (2013).

<sup>307</sup> *McCafferty v. Preiss Enters., Inc.*, 534 F. App'x 726 (10th Cir. 2013).

<sup>308</sup> *Id.* at 727–28. McCafferty falsely stated her age as sixteen on the employment application form. *Id.* at 727.

manager at the restaurant.<sup>309</sup> He had broad authority to direct the work activities of employees, including assigning duties, scheduling breaks, extending hours, sending employees home if the restaurant was overstaffed, and imposing disciplinary measures.<sup>310</sup> Although he had significant influence over decisions to promote, hire, and fire employees, he did not have unilateral authority to take any of these actions.<sup>311</sup> Sometimes, Peterson was the manager with the highest level of authority at the restaurant.<sup>312</sup>

On March 26, 2007, McCafferty agreed to cover the shift of another employee.<sup>313</sup> After arranging for McCafferty's early dismissal from school the next day, Peterson picked her up ostensibly to drive her to work, but instead he informed her that her shift was canceled.<sup>314</sup> He drove her to a friend's house where he fed her drugs and alcohol and had sex with her.<sup>315</sup> Later, he took her to his house where, for two days, he kept her high and continued to sexually abuse her.<sup>316</sup> On March 29, McCafferty's sister saw her in Peterson's car, rescued her, and contacted the police.<sup>317</sup>

McCafferty filed a complaint in federal district court, alleging that Preiss was vicariously liable for Peterson's harassment.<sup>318</sup> The district court granted Preiss summary judgment on the claim of vicarious liability, holding that under *Vance*, Peterson was not McCafferty's supervisor.<sup>319</sup> Affirming dismissal of the complaint, the Tenth Circuit ruled that, although Peterson had the authority to direct all of McCafferty's day-to-day work activities, he lacked the power to take tangible employment actions against her.<sup>320</sup>

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<sup>309</sup> *Id.* at 728.

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> *McCafferty*, 534 F. App'x at 728. It appears that the person who asked her to cover this shift might have been an impostor. *Id.*

<sup>314</sup> *Id.*

<sup>315</sup> *Id.*

<sup>316</sup> *Id.* On March 27, 2007, McCafferty's grandfather reported her missing. *Id.*

<sup>317</sup> *Id.* at 729. McCafferty was admitted to a hospital and later to the Wyoming Behavioral Institute where she received treatment for depression, drug dependence, and post-traumatic stress disorder. *Id.*

<sup>318</sup> *Id.* She also asserted numerous state law claims. *Id.*

<sup>319</sup> *McCafferty*, 534 F. App'x at 729.

<sup>320</sup> *Id.* at 731. McCafferty also argued that Preiss was liable because Peterson acted with apparent authority, but the court rejected this argument, noting that Peterson's misconduct was disconnected from the workplace and could not be tied to any appearance of authority that Preiss created. *Id.* at 732. McCafferty also sued Preiss for several state-law claims. The court dismissed her negligent hiring claim because, when Preiss hired Peterson, Preiss had no way of knowing that Peterson posed a danger to employees. *Id.* at 733. Similarly, the court rejected McCafferty's negligent supervision and retention claims because Peterson's criminality was outside the scope of his employment. *Id.* McCafferty also asserted a claim based on ratification. She argued that after her abduction and rescue Preiss continued to employ and even promoted Peterson. *Id.* at 733–34. The court saw no merit in this argument

The *McCafferty* case exposes the fault in the *Vance* decision. Although Preiss did not authorize Peterson to hire and fire employees, Preiss conferred supervisory powers on Peterson that enabled him to manipulate, abduct, and rape McCafferty. Peterson was therefore aided by his agency powers when he deceived and abused McCafferty. Yet, under *Vance*, Peterson was not McCafferty's supervisor and thus Preiss was exonerated.

#### IV. ENFORCEMENT ACTIONS AND PROCEEDINGS TO DETER SEXUAL HARASSMENT

Parts II and III of this Article showed that the law has failed to curb sexual harassment in the workplace. The current regime therefore needs restructuring. First, federal courts should not interpret the controlling Supreme Court decisions to permit abuses similar to those committed in *LeGrand v. Area Resources for Community and Human Services*<sup>321</sup> and *Brooks v. City of San Mateo*.<sup>322</sup> Such decisions distort the standard that the Supreme Court established. Second, Congress should overrule *Vance* and enact a more inclusive standard for "supervisor." These changes would improve the deterrent effect of sexual harassment law. Though necessary, however, these changes are not sufficient. Part IV explains in more depth why the existing approach has failed and then proposes a new regime that would complement the existing approach, as modified, and would provide more effective deterrence.

##### A. *The Framework of Conciliation and Litigation*

The EEOC is the federal agency empowered to administer Title VII, and Congress has prescribed a detailed procedural framework under which the EEOC functions.<sup>323</sup> A person with a discrimination grievance may file a complaint with the EEOC, or a member of the EEOC may file a charge on behalf of an aggrieved party.<sup>324</sup> The agency will investigate the charge and try to eliminate the unlawful discriminatory practice.<sup>325</sup> It will use informal methods, such as conferencing with the parties, and will try to persuade them to conciliate the grievance.<sup>326</sup> If the parties fail to settle the claim, the EEOC may commence a federal court action,<sup>327</sup> though it does so in a small minority of cases.<sup>328</sup> If it

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because Preiss had no actual knowledge of the abuses that Peterson had committed. *Id.* at 734.

<sup>321</sup> *LeGrand v. Area Res. for Cmty. & Human Servs.*, 394 F.3d 1098 (8th Cir. 2005).

<sup>322</sup> *Brooks v. City of San Mateo*, 229 F.3d 917 (9th Cir. 2000).

<sup>323</sup> See 42 U.S.C. § 2000e-5(b) (2012).

<sup>324</sup> *Id.*

<sup>325</sup> *Id.*

<sup>326</sup> *Id.*

<sup>327</sup> *Id.* § 2000e-5(f)(1).

<sup>328</sup> See *EEOC Litigation Statistics*, EQUAL EMP'T OPPORTUNITY COMM'N, [www.eeoc.gov/statistics/enforcement/litigation.cfm](http://www.eeoc.gov/statistics/enforcement/litigation.cfm) [https://perma.cc/865D-34R8]

does so, it will seek relief, such as backpay and damages, on behalf of the victim.<sup>329</sup> If, as in most cases, the EEOC elects not bring an action, it will issue a right-to-sue letter to the complainant, and authorize the commencement of a lawsuit in federal court.<sup>330</sup>

Conciliating and settling claims avoids the costs and uncertainties of litigation. Some claims are not serious enough to justify federal court actions, and a settlement may steer an employer toward meaningful prevention. But this approach has drawbacks. Once having negotiated a settlement, an employer may revert to complacency. For example, an employer, under the terms of a settlement agreement, may adopt strong anti-harassment policies, but once out of the EEOC's spotlight, it may be lax in enforcing them. Furthermore, when a company and the EEOC negotiate a settlement, the terms are kept confidential.<sup>331</sup> By evading public scrutiny, an employer avoids the risk of reputational injury. Fear of a public backlash might impel otherwise apathetic employers to take a vigorous stance against harassment.<sup>332</sup>

To deter sexual harassment in the workplace, the law needs an approach that is more aggressive than conciliation and settlement. Managers must endure the rigors of cross-examination at legal proceedings, and employers must face stiff

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(reporting that the total number of EEOC Title VII litigations, including those alleging sexual harassment, were as follows: 78 in 2013, 76 in 2014, 83 in 2015, 46 in 2016, and 107 in 2017).

<sup>329</sup> See *Litigation*, EQUAL EMP'T OPPORTUNITY COMM'N, <http://www.eeoc.gov/eeoc/litigation/> [<https://perma.cc/E8LH-A7FB>] (stating when the EEOC commences federal court actions, it seeks remedies on behalf of a complaining party).

<sup>330</sup> KJ Henderson, *Process for an EEOC Complaint*, HOUS. CHRON., <https://smallbusiness.chron.com/process-eeoc-complaint-1315.html> [<https://perma.cc/2HPJ-LDJF>]. In pursuing federal discrimination claims under Title VII, one must follow administrative procedures prescribing strict time limitations. If a recognized state or local agency has jurisdiction to evaluate an employee's charge of discrimination, the employee must file a claim with the EEOC within 300 days of the alleged wrong or within 60 days of the state or local agency's final determination of the matter, whichever is shorter. *Id.* In other states, the claimant has 180 days to file with the EEOC. Once a claim is filed, the EEOC will investigate the charge. *Id.* If the EEOC finds no probable cause that a violation occurred, it will issue a right-to-sue letter to the claimant, who then has 90 days to commence a federal court action. *Id.* If the EEOC finds probable cause, it will attempt to conciliate the dispute. *Id.* If the parties cannot reach settlement, the EEOC will issue a right-to-sue letter to the claimant, who has 90 days to commence a federal court action. The EEOC may commence and litigate actions on behalf of victims of discrimination. *Id.*; see also §§ 2000e-(d) & 2000e-(e)(1).

<sup>331</sup> See *What You Should Know: The EEOC, Conciliation and Litigation*, EQUAL EMP'T OPPORTUNITY COMM'N (Feb. 9, 2018), <http://www.eeoc.gov/eeoc/newsroom/wysk/counciliation/litigation.cfm> [<https://perma.cc/X4SL-F54A>] (commenting that settlement agreements between the EEOC and employers charged with unlawful discrimination are kept confidential); see also *EEOC Harassment Statistics*, *supra* note 4 (reporting that the EEOC settled 786 sexual harassment cases in 2014 or 11.2% of such cases filed with the EEOC, 834 such cases in 2015 or 11.4%, 698 such cases in 2016 or 9.4%, and 662 in 2017 or 8.8%).

<sup>332</sup> See *supra* notes 8–19 and accompanying text (discussing the impact of public opinion on forcing employers to take disciplinary action against harassers).

penalties for inaction and complicity in workplace abuses. The litigation prong of the current approach might seem to meet this concern, but it does not. Current law discourages victims from litigating serious claims.<sup>333</sup> The low chance of success does not justify the costs and emotional toll of protracted litigation. As shown in Part III, judges routinely grant summary judgment to employers, dismissing claims that allege compelling facts.<sup>334</sup> In some of these cases, lower courts have misapplied the standard established in *Meritor*, *Harris*, and *Oncale*. But even where courts have applied the standard correctly, they often reject claims alleging highly offensive behavior.<sup>335</sup>

One reason for the failure of the current litigation approach is that it focuses primarily on compensation rather than on deterrence. In *National R.R. Passenger Corp. v. Morgan*,<sup>336</sup> Justice Thomas acknowledged the primacy of “Title VII’s remedial purpose.”<sup>337</sup> As a remedial statute, Title VII provides a mechanism for compensating the victims of discrimination.<sup>338</sup> Awarding individualized remedies may confer a measure of justice on one plaintiff at a time, but may be an ineffective method for achieving broad-based gains against the pandemic.<sup>339</sup> Furthermore, if the standard for hostile-work-environment liability were lowered, the scales might tip to over-sensitivity. Some plaintiffs might burden courts with complaints not worthy of legal redress. A surge of such claims would force the expenditure of substantial judicial resources.

For these reasons, all the elements of a hostile-work-environment claim, enunciated in *Meritor* and *Harris*, make sense. Offensive behavior that is not sufficiently severe or pervasive to objectively alter a victim’s work conditions would signal a lack of injury.<sup>340</sup> As a general rule, absent injury, a plaintiff has no compensable claim.<sup>341</sup> Requiring a victim to feel subjectively that sexual misconduct created a hostile work environment also establishes injury, though this requirement overlaps with the “unwelcome” element because both indicate a victim’s reaction to harassment.<sup>342</sup> This redundancy notwithstanding, these

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<sup>333</sup> See *supra* Part III (analyzing cases where courts, deciding hostile-work-environment cases, have denied deserving plaintiffs relief).

<sup>334</sup> *Id.*

<sup>335</sup> *Id.*

<sup>336</sup> Nat’l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002).

<sup>337</sup> *Id.* at 121.

<sup>338</sup> EEOC Litigation Statistics, *supra* note 328 (describing the EEOC’s use of litigation).

<sup>339</sup> See, e.g., Burlington Indus., Inc. v. Ellerth, 542 U.S. 742, 764 (1998) (declaring that deterrence of sexual misconduct in the workplace is a major policy underlying Title VII).

<sup>340</sup> See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986).

<sup>341</sup> See, e.g., WRIGHT ET AL., *supra* note 34, § 3531.4 (discussing the constitutional requirement of injury before a plaintiff is entitled to compensation).

<sup>342</sup> See, e.g., Ann C. McGinley, *Reasonable Men?*, 45 CONN. L. REV. 1, 14 (2013) (arguing that “unwelcomeness” is subjective); Larsa K. Ramsini, Note, *The Unwelcome Requirement in Sexual Harassment: Choosing a Perspective and Incorporating the Effect of Supervisor-Subordinate Relations*, 55 WM. & MARY L. REV. 1961, 1969–70, 1977–78, 1997 (2014) (observing that the subjective requirement and the unwelcome requirement may be



elements of a hostile-work-environment claim are justifiable in Title VII litigation because the primary purpose of such litigation is to compensate injured parties.<sup>343</sup>

It is therefore necessary to create an approach that is not based on the compensatory model. The rest of Part III proposes such an approach, attempts to demonstrate its reasonableness, and seeks to justify its efficacy as a deterrent to sexual harassment in the workplace.

### B. *A New Standard of Liability*

Congress should empower the EEOC to commence both federal court enforcement proceedings and quasi-judicial proceedings in which it does not seek to compensate victims of sexual harassment.<sup>344</sup> The purpose of such enforcement proceedings would be, through civil sanctions, to punish employers who have facilitated harassment or who have failed to take serious remedial action. In such proceedings, the EEOC would be relieved of having to prove a victim's injury. The reduced burden on the EEOC would prevent irresponsible employers from escaping liability.

One might object to this proposal, questioning whether an agency should ever benefit from reduced requirements of proof. It might seem unprecedented or even unfair to relieve an agency of requirements that a private litigant would have to meet. Such an approach, however, would be neither unprecedented nor unfair. To find an example where such an approach is in place, one need look no further than securities law and the SEC.

### C. *A Model: SEC Civil Enforcement Actions for Securities Fraud*

Section 10(b), of the Securities Exchange Act of 1934<sup>345</sup> and its regulatory complement, Rule 10b-5,<sup>346</sup> make it unlawful “[t]o employ any device, scheme or artifice to defraud . . . in connection with the purchase or sale of any security.”<sup>347</sup> Section 10(b) authorizes both private rights of action,<sup>348</sup> and SEC

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redundant and proposing that, in cases of alleged supervisor harassment of subordinates, the law should presume the accuser found the sexual conduct unwelcome subject to disproof offered by the employer).

<sup>343</sup> See *EEOC Litigation Statistics*, *supra* note 328.

<sup>344</sup> This Article refers to both EEOC federal court enforcement actions and EEOC quasi-judicial enforcement proceedings as “enforcement proceedings.”

<sup>345</sup> Pub. L. No. 73-291, § 10(b), 48 Stat. 881, 891 (codified as amended at 15 U.S.C. 75j(b) (2012)).

<sup>346</sup> 17 C.F.R. § 240.10b-5 (2017). This Article refers to section 10(b) and Rule 10b-5 interchangeably.

<sup>347</sup> *Id.*

<sup>348</sup> See, e.g., *Aaron v. SEC*, 446 U.S. 680, 689 (1980) (“Another facet of civil enforcement [beyond an SEC civil action] is a private cause of action for money damages, [which] unlike the Commission injunctive action, is not expressly authorized by statute, but rather has been judicially implied.”); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 196 (1976)

civil enforcement proceedings in federal court.<sup>349</sup> The SEC also has wide latitude in bringing quasi-judicial enforcement proceedings.<sup>350</sup> Although deterrence is one of the purposes of a private right of action, the more fundamental purpose served by private actions brought under section 10(b) is to provide injured parties with a means to recover financial losses from those who commit securities fraud.<sup>351</sup> The purposes of SEC enforcement proceedings are more wide ranging than those of a private civil action.<sup>352</sup> The mission of the SEC is to protect the investing public, safeguard the integrity of the securities markets, and promote capital formation.<sup>353</sup> The SEC has numerous tools to

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(“Although § 10(b) does not by its terms create an express civil remedy for its violation, and there is no indication that Congress, or the Commission when adopting Rule 10b-5, contemplated such a remedy, the existence of a private cause of action for violations of the statute and the Rule is now well established.”); *Superintendent of Ins. N.Y. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 13 & n.9 (1971) (recognizing that, although the words of section 10(b) do not explicitly authorize a private right of action, the section implicitly provides that right).

<sup>349</sup>Section 21e of the Exchange Act provides:

Whenever it shall appear to the Commission that any person is engaged or is about to engage in acts or practices constituting a violation of any provision of this chapter, the rules or regulations thereunder . . . [I]t may in its discretion bring an action in the proper district court of the United States, the United States District Court for the District of Columbia, or the United States courts of any territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices, and upon a proper showing a permanent or temporary injunction or restraining order shall be granted without bond.

48 Stat. at 900, as amended 15 U.S.C. §78u(d)(1) (2015); *see, e.g., Kokesh v. SEC.*, 137 S. Ct. 1635, 1640 (2017) (“If an investigation uncovers evidence of wrongdoing, the Commission may initiate enforcement actions in federal district court.”).

<sup>350</sup>*See Dodd-Frank Wall Street Reform and Consumer Protection Act*, 15 U.S.C. §§ 77h-1, 78u-2, 80a-9, 80b-3 (2012) (expanding the quasi-judicial authority of the SEC to cover virtually any securities law violation); *see also David Zaring, Enforcement Discretion of the SEC*, 94 TEX. L. REV. 1155, 1164–65 (2016) (noting that *Dodd-Frank* empowered the SEC to hear in a quasi-judicial proceeding nearly any claim that it may bring in a federal court enforcement proceedings).

<sup>351</sup>*See, e.g., Angelastro v. Prudential-Bache Sec., Inc.*, 764 F.2d 939, 949–50 (3d Cir. 1985) (observing that recognition of a private right of action under Rule 10b-5 provides compensation to injured investors while deterring future violations); Justin Marocco, *When Will It Finally End: The Effectiveness of the Rule 10b-5 Private Action as a Fraud-Deterrence Mechanism Post-Janus*, 73 LA. L. REV. 633, 634 (2013) (arguing that the Supreme Court has gutted the deterrent effect of Rule 10b-5 by eliminating from the field of potential securities-fraud parties who did not “make” fraudulent misrepresentations).

<sup>352</sup>*See Gabelli*, 568 U.S. at 451–52 (comparing the policies underlying the private action to the policies underlying the SEC enforcement action).

<sup>353</sup>The SEC mission statement provides: “The mission of the SEC is to protect investors, maintain fair, orderly and efficient markets; and facilitate capital formation. The SEC strives to promote a market environment that is worthy of the public’s trust.” *About the SEC*, SEC. & EXCH. COMM’N (2017), <https://sec.gov/about.shtml> [<https://perma.cc/HMS8-54LV>]. As

achieve these broad policy objectives, some of which are denied to private litigants.<sup>354</sup> For example, private litigants have no claim against secondary actors,<sup>355</sup> whereas the SEC may bring suit against aiders and abettors of securities fraud.<sup>356</sup>

When the SEC commences federal court enforcement actions or quasi-judicial proceedings, it seeks to punish wrongdoers with remedies that range from injunctions, to disgorgement of unlawful gains, to monetary penalties.<sup>357</sup> Though it may devise a plan to return disgorged funds and disperse civil penalties to victims who prove their losses, it is not directly representing those victims.<sup>358</sup> Therefore, when alleging securities fraud under section 10(b), the SEC, in enforcement proceedings, is not required to prove all the elements that private litigants must prove. A private litigant, alleging securities fraud must establish six elements: (1) material misrepresentation or omission, (2) scienter,

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noted in *Gabelli v. SEC*, 568 U.S. 442, 451 (2013), “The SEC...is not like an individual victim who relies on apparent injury to learn of a wrong. Rather a central ‘mission’ of the Commission is to ‘investigat[e] potential violations of the federal securities laws,’” (quoting SEC. & EXCH. COMM’N, SEC ENFORCEMENT MANUAL 1 (2012)). “Unlike the private party who has no reason to suspect fraud, the SEC’s very purpose is to root it out . . . . The Government in these types of cases also seeks a different type of relief. The discovery rule helps to ensure that the injured receive recompense, but civil penalties go beyond compensation, [sic] are intended to punish, and label defendants wrongdoers.”)

<sup>354</sup> For example, Section 21(b) of the Exchange Act provides: “[A]ny member of the Commission or any officer designated by it is empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records which the Commission deems relevant or material to [a Commission] inquiry.” 48 Stat. at 900 (codified as amended at 15 U.S.C. § 78u(b) (2015)).

<sup>355</sup> See, e.g., *Cent. Bank of Denver, N.A., v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 177 (1994) (denying that private litigants under section 10(b) may seek redress from aiders and abettors of securities law violations).

<sup>356</sup> Exchange Act § 20(e) provides: “For purposes of any action brought by the Commission under paragraph (1) or (3) of section 78u(d) of this title, any person that knowingly or recklessly provides substantial assistance to another person in violation of a provision of this chapter, or of any rule or regulation issued under this chapter, shall be deemed to be in violation of such provision to the same extent as the person to whom such assistance is provided.” 15 U.S.C. § 78t(e) (2012); see, e.g., *Gabelli*, 568 U.S. at 445 (noting that the SEC has the authority to initiate claims for aiding and abetting a securities law violation).

<sup>357</sup> See Linda Chatman Thomsen, *An Overview of Enforcement*, INST. FOR SEC. MKT. DEV. (2005), [https://www.sec.gov/about/offices/oia/oia\\_enforce/overviewenfor.pdf](https://www.sec.gov/about/offices/oia/oia_enforce/overviewenfor.pdf) [<https://perma.cc/N3EA-R99M>] (discussing remedies available to the SEC); see also Mary Jo White, Chair, U.S. Sec. & Exch. Comm’n, Address at N.Y.U. School of Law Program on Corporate Compliance and Enforcement: A New Model for SEC Enforcement: Producing Bold and Unrelenting Results (Nov. 18, 2016), <https://www.sec.gov/news/speech/chair-white-speech-new-york-university-111816.html> [<https://perma.cc/4A8E-KKNX>] (stressing that the SEC’s enforcement program focuses on investor protection and capital formation).

<sup>358</sup> See B. Seth McNew, *Money Penalties Against Publicly Held Companies: A Proposal for Restraint*, 37 SEC. REG. L.J. 48, 54 (2009) (explaining that the SEC may provide a plan for the distribution of penalties and disgorged funds to injured investors).

(3) reasonable reliance, (4) “in connection with” the purchase or sale of a security, (5) economic loss, and (6) loss causation.<sup>359</sup> Because the SEC, in enforcement proceedings, does not directly represent injured investors, it need not prove that a victim of a fraud relied on a misrepresentation or omission, that the fraud caused financial loss, or that any victim of the fraud sustained a loss.<sup>360</sup> This retrenchment of the SEC’s burden promotes deterrence of securities fraud and thus advances the policies of federal securities law.

The approach taken in the arena of securities regulation would work well if adapted to the law of sexual harassment. As shown below, the EEOC’s enforcement powers need expansion, and the elements of a hostile-work-environment claim in expanded enforcement proceedings need reshaping.

#### *D. Expanded Power to Bring Federal Court Enforcement Actions*

As noted above, the EEOC may commence federal lawsuits on behalf of complainants, but it lacks the power to bring civil enforcement actions on its own behalf.<sup>361</sup> Congress should grant the EEOC powers analogous to those conferred on the SEC.

#### *E. Quasi-Judicial Power*

The EEOC’s quasi-judicial authority is also limited.<sup>362</sup> It may institute administrative enforcement proceedings only for complaints of federal employees.<sup>363</sup> These powers should be broadened. Congress should grant the

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<sup>359</sup> See, e.g., *Amgen, Inc. v. Conn. Ret. Plans & Tr. Funds*, 568 U.S. 455, 460–61 (2013) (setting forth the elements that a private litigant must prove to recover damages); *Stoneridge Inv. Partners v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 157 (2008) (listing the elements of a private right of action under section 10(b)); *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 341–46 (2005) (discussing the elements of economic loss and loss causation, after setting forth the six required elements of a private civil action alleging a violation of section 10(b)).

<sup>360</sup> See e.g., *SEC v. Morgan Keegan & Co.*, 678 F.3d 1233, 1244 (11th Cir. 2012) (enumerating the elements of an SEC enforcement action for a section 10(b) and Rule 10b-5 claim).

<sup>361</sup> 42 U.S.C. § 2000e-5(b) (2012).

<sup>362</sup> See 29 C.F.R. § 1614.103(a) (2012).

<sup>363</sup> See *id.* (providing that this part applies to discrimination and retaliation complaints arising under Title VII and other federal anti-discrimination laws); § 1614.108(c)(1) (providing that the right conferred in this regulation applies to “any employee of a federal agency” with a complaint of unlawful discrimination), and sub-section (g) (providing “the complainant may request a hearing by submitting a written request for a hearing directly to the EEOC”); § 1614.109 (prescribing procedures for hearings conducted by ALJs, including procedures for discovery, summary judgment motions, and the conduct of hearings); see also JOSEPH M. CREED, MARYLAND EMPLOYMENT LAW DESKBOOK at 9–12 (2016) (noting that the ALJ may, in his or her discretion limit the scope of discovery, dispose of cases summarily, ignore the formal rules of evidence, and regulate the conduct at the hearing, and that the complainant may appeal the ALJ’s decision to the EEOC, and thereafter appeal the EEOC’s decision to a federal circuit court).

EEOC quasi-judicial authority to hear all complaints of sexual harassment.<sup>364</sup> There is precedent for providing a civil rights administrative agency with broad quasi-judicial enforcement authority. One example is the New York State Human Rights Division (HRD), the administrative agency charged with enforcing New York's Human Rights Law.<sup>365</sup> The HRD may both entertain and initiate civil rights complaints, and conduct quasi-judicial administrative proceedings to determine whether a violation has occurred.<sup>366</sup>

The EEOC administrative enforcement process would begin with one or more parties making a formal or informal complaint to the EEOC. Such a complaint would trigger an EEOC investigation. Unlike the existing approach, conciliation and settlement of serious wrongdoing would not be a priority of the EEOC. If, after investigating, the EEOC found reasonable grounds to conduct a hearing, it would assign the case to an administrative law judge (ALJ).<sup>367</sup> Similar to the current procedures in place for an EEOC hearing of a federal employee's complaint, the ALJ could streamline pre-hearing procedures.<sup>368</sup> Expedited discovery and minimal motion practice would avert untoward delay.<sup>369</sup> After conducting an evidentiary hearing, if the ALJ found against the employer, the ALJ could impose a fine and, as appropriate, order declaratory or injunctive relief.<sup>370</sup> The party losing the hearing would have the right to appeal to the EEOC and then to a federal circuit court.<sup>371</sup>

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<sup>364</sup> The same approach might be applied to other unlawful forms of discriminatory harassment in the workplace.

<sup>365</sup> See N.Y. EXEC. LAW § 295(6)(b), (7) (McKinney 2010) (empowering the HRD, on its own motion, to hear civil right complaints administratively); New York State Division of Human Rights, Rules of Practice, General Regulations § 465.3(a)(1) & (3) (2018), <http://dhr.ny.gov/rules-practice> [<https://perma.cc/5S6Z-UFX3>] (stating that any person or organization, or the HRD, on its own motion, may file a complaint).

<sup>366</sup> See N.Y. EXEC. LAW §§ 295(6)(b), (7).

<sup>367</sup> See Administrative Procedure Act, 5 U.S.C. §§ 554–56 (2012) (prescribing the powers of an administrative law judge presiding over evidentiary hearings, and requiring that such hearings comport with due process); see also Daniel F. Solomon, *Summary of Administrative Law Judge Responsibilities*, 31 J. NAT'L ASS'N ADMIN. L. JUDICIARY 476, 476–77 (2011) (summarizing the powers of administrative law judges).

<sup>368</sup> See *Federal EEO Complaint Processing Procedures*, EQUAL EMP'T OPPORTUNITY COMM'N, <https://www.eeoc.gov/eeoc/publications/fedprocess.cfm> [<https://perma.cc/4VCA-BN2F>] (describing EEOC hearing procedures now in place for complaints of federal employees); see also Administrative Procedure Act, 5 U.S.C. § 556 (prescribing the discretionary powers of administrative law judges to allow discovery and other procedures such as motion practice); Solomon, *supra* note 367 and accompanying text at 476–77 (listing the discretionary powers of administrative law judges).

<sup>369</sup> See 5 U.S.C. § 556.

<sup>370</sup> See, e.g., 17 C.F.R. § 12.13(b)(1)(viii) (2015) (setting forth the powers of the Commodity Futures Trading Commission (CFTC) to impose fines and non-monetary sanctions).

<sup>371</sup> See 17 C.F.R. § 148.29 (2015) (providing that federal circuit courts hear appeals from the CFTC).

## F. *The Requirements for an EEOC Enforcement Proceeding Alleging Hostile Work Environment*

Because the EEOC, in enforcement proceedings, would not seek compensation for a victim, it would not have to prove any of the elements of an existing sexual harassment claim that touch on the issue of injury. To prove unlawful harassment, the EEOC would have to meet the following standard: that discriminatory words or conduct of a sexual or gender-related nature would be highly offensive to a reasonable person.

### 1. *Severe or Pervasive*

The EEOC should not have to prove that harassment was severe or pervasive. This standard has allowed employers of flagrant harassers to escape retribution.<sup>372</sup> In *LeGrand v. Area Resources for Community and Human Services*,<sup>373</sup> Father Nutt twice invited LeGrand to watch pornographic movies and jerk him off, and later kissed him, grabbed his buttocks and reached for his genitals.<sup>374</sup> After all this, the Eighth Circuit affirmed summary judgment for the defendant. It is unacceptable that the law of sexual harassment permits such behavior. Nor should Paula Jones have had to endure a governor exposing and fondling his penis.<sup>375</sup> And Brooks should not have had to tolerate Selvaggio's reaching under her clothing and fondling her bare breast.<sup>376</sup>

As noted, the EEOC should have to prove that the harassing words or conduct would have been highly offensive to a reasonable person. To determine whether words or conduct meet this standard, the EEOC should consider their nature, seriousness, and frequency, and the power relationship between the harasser and the victim. Courts should accord particular weight to threats, bribes, and other inducements to pressure a victim to acquiesce to sexual advances.<sup>377</sup> An objective "highly offensive" standard would not realize concerns expressed in *Oncale*<sup>378</sup> and *Faragher v. City of Boca Raton*<sup>379</sup> that the law might impose a civility code. If the proposed standard were implemented,

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<sup>372</sup> See *supra* Part III.A.2 (discussing cases in which multiple incidents of flagrant harassment resulted judgment for the defendants).

<sup>373</sup> *LeGrand v. Area Res. for Cmty. & Human Servs.*, 394 F.3d 1098, 1098 (8th Cir. 2005).

<sup>374</sup> *Id.* at 1100.

<sup>375</sup> *Jones v. Clinton*, 990 F. Supp. 657, 664 (E.D. Ark. 1998).

<sup>376</sup> *Brooks v. City of San Mateo*, 229 F.3d 917, 921 (9th Cir. 2000).

<sup>377</sup> Cf. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–22 (1993) (listing the factors that determine whether sexual misconduct is severe or pervasive).

<sup>378</sup> *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (stating that the statutory requirements for establishing sexual harassment, whether involving people of the same sex or not, prevent the law from becoming a civility code).

<sup>379</sup> *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (reiterating *Oncale*'s assurance that the law, applied correctly, is not overbroad in what sexual words and conduct it condemns).

the workplace would not devolve into a trap where every word uttered with a hint of sexuality might set off alarms. The standard proposed in this Article does not drop the bar unreasonably. It lowers the standard only far enough to condemn behavior that would be highly offensive to unbiased observers. The occasional salacious joke, insult, or provocative remark may be boorish, but most reasonable people would not find such misbehavior highly offensive.

The misbehaviors of Bill Clinton, Father Nutt, and Selvaggio would all seem sufficiently severe or pervasive to violate the current standard. But regardless of whether one believes that such misconduct was severe or pervasive, these judicial decisions frustrate the goal of deterrence. The misconduct of all three was certainly objectively highly offensive. Most people would likely agree that flagrant abuses such as those committed by Bill Clinton, Father Nutt, and Selvaggio should be extirpated from the workplace.

## 2. *Unwelcome Words or Conduct*

The EEOC should not have to prove that sexual words or conduct were unwelcome. Whether a plaintiff experienced misconduct as unwelcome is and should be a material consideration when a victim of harassment seeks compensation in a federal lawsuit. If, without coercion or fear of reprisal, a person voluntarily consented to sexual activity or conduct, she has no reasonable basis for recovery. Put another way, if the words or conduct were welcome, the plaintiff was not harmed. But in an EEOC enforcement proceeding, an individual would not seek compensation, nor would the EEOC seek compensation on her behalf. Proving injury—an element of virtually any claim for individual recovery—would be superfluous.<sup>380</sup> The goal of an EEOC proceeding would be to identify and eliminate words or conduct that violate a rigorous but not unreasonable objective standard of decency. Eliminating the “unwelcome” requirement would prevent outcomes similar to the decision in *Blake v. MJ Optical, Inc.*,<sup>381</sup> where the Eighth Circuit denied Blake’s claim because she did not object to the pattern of harassment that the owner’s son inflicted on her.<sup>382</sup>

## 3. *The Discrimination Requirement*

As long as sexual harassment falls under the umbrella of discrimination, differential treatment based on gender will be an element of a violation. Sometimes, highly offensive sexual behavior may not fit neatly into the category of sex discrimination, and therefore the requirement of differential treatment may excuse instances of highly offensive sexual behavior in the workplace.

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<sup>380</sup> See WRIGHT ET AL., *supra* note 34 (discussing the universality of the injury requirement for those seeking a judicial remedy).

<sup>381</sup> *Blake v. MJ Optical, Inc.*, 870 F.3d 820, 822 (8th Cir. 2017).

<sup>382</sup> *Id.* at 823 (detailing a protracted pattern of harassing words and conduct, including grabbing the victim’s behind on multiple occasions and joking about her breasts).

Suppose, for example, the CEO, at a company picnic, addressed the entire workforce, male and female. During his talk, the CEO exposed and fondled himself. One might persuasively argue that, because both sexes endured this behavior, it was nondiscriminatory. This episode might be characterized as “nondiscriminatory” sexual harassment, which falls outside the proscription of Title VII. Nevertheless, the EEOC should apply the discrimination element sensibly. It should reject the Sixth Circuit’s view, expressed in *Graves v. Dayton Gastroenterology, Inc.*,<sup>383</sup> where the court ruled sexually explicit texts and a subsequent pattern of retaliation, nondiscriminatory.<sup>384</sup> As Judge Nelson Moore observed, a finder of fact might reasonably have regarded the texts and retaliation as manifestations “of sexual desire and rejection.”<sup>385</sup>

#### 4. *Subjective Perception*

*Harris* requires that a plaintiff prove that she perceived the harassment as altering her work environment.<sup>386</sup> This requirement, too, has no place in an EEOC enforcement proceeding. Just as a party’s “unwelcome” reaction has no bearing on whether the harasser’s words or conduct were unacceptable from the perspective of a reasonable person in the workplace, any individual’s subjective reaction would similarly be irrelevant. The material factor in an EEOC proceeding is how a reasonable person would have perceived the harassment.

#### 5. *Pollution of the Work Environment*

Although the Supreme Court has stated that “pollution” of the work environment is not an element of a hostile work environment claim,<sup>387</sup> some courts have imposed that standard.<sup>388</sup> The EEOC, in enforcement proceedings, should not have to prove that highly offensive sexual words or conduct polluted or even altered the conditions of employment. The purpose of reframing the elements of hostile-work-environment harassment is to excise sexual harassment from the workplace. Replacing the “severe or pervasive” standard with the “highly offensive” standard would facilitate the efforts of the EEOC to reach this goal. Retaining the requirement that the harassment pollute or even alter the work environment would be retrogressive because it would allow the “severe or pervasive” element of the current sexual harassment approach to reenter the analysis through the backdoor.

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<sup>383</sup> *Graves v. Dayton Gastroenterology, Inc.*, 657 Fed. Appx. 485, 486 (6th Cir. 2016).

<sup>384</sup> *Id.* at 487–89.

<sup>385</sup> *Id.* at 491 (Nelson Moore, J., dissenting).

<sup>386</sup> *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993) (requiring both an objective and subjective component for a sexual harassment claim).

<sup>387</sup> *See id.* (remarking that, although Taylor’s gross misconduct in *Meritor* “polluted” Vinson’s work environment, such “egregious examples of harassment . . . do not mark the boundary of what is actionable”).

<sup>388</sup> *See supra* Part III.D.



## 6. Repudiation of Vance

As discussed in Part II.E.2, *Vance* minimized the deterrent effect of *Ellerth* by adopting a narrow definition of “supervisor.”<sup>389</sup> Congress should empower the EEOC to use the inclusive definition of “supervisor” in enforcement proceedings. By defining a supervisor as someone with the authority to effect the terms or conditions of a victim’s employment, rather than as someone with the authority to take tangible employment actions against the victim, Congress would permit the *Ellerth* affirmative defense to exert its full deterrent impact.

## V. CONCLUSION

Most deplore sexual harassment, yet few do anything about it. True, some employers have taken remedial action. Whether motivated by ethics or fear of liability, many employers have adopted, communicated, and enforced sexual harassment policies that conform to the guidance of the EEOC.<sup>390</sup> Some employers require their workers to complete training protocols. These policies and programs have largely failed to reduce the incidence of harassment because they have focused on the avoidance of liability rather than on cultivating sensitivity toward the plight of victims and developing a corporate culture that promotes empathy and instills in bystanders a duty to report.<sup>391</sup>

A staggering number of women, and a substantial number of men, face indignities, ridicule, and molestation.<sup>392</sup> Reluctant to report offensive conduct, they fear embarrassment, blame, retaliation, and censure.<sup>393</sup> Like witnesses to a drowning person, colleagues stand idly by and watch the beleaguered founder.

The law cannot grab the indifferent by the throat to awaken them to the depth and breadth of a crisis that plagues the American workplace. Neither a congressional statute, an administrative regulation, nor a Supreme Court decision can supplant apathy with virtue. Nevertheless, the law may serve a salutary role. *Meritor* and *Harris* established the elements of a hostile-work-environment claim. To have such a claim, a victim must prove discriminatory unwelcome words or conduct of a sexual or gender-related nature that

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<sup>389</sup> *Vance v. Ball State Univ.*, 570 U.S. 421, 424 (2013).

<sup>390</sup> *Policy Guidance Documents Related to Sexual Harassment*, EQUAL EMP’T OPPORTUNITY COMM’N (June 21, 1999), <http://www.eeoc.gov/policy/docs/currentissues.html> [<https://perma.cc/UMJ6-4Q8J>] (“An effective preventive program should include an explicit policy against sexual harassment that is clearly and regularly communicated to employees and effectively implemented.”).

<sup>391</sup> See EEOC REPORT, *supra* note 1, at 52–60 (promoting workplace “civility training” and “bystander training” that shift focus away from the legal requirements of harassment and concentrate instead on respect for co-workers and ethical and corporate cultural responsibilities to report sexual misconduct).

<sup>392</sup> See Romeo Vitelli, *When Men Face Sexual Harassment*, PSYCHOL. TODAY (May 11, 2015), <https://www.psychologytoday.com/us/blog/media-spotlight/201505/when-men-face-sexual-harassment> [<https://perma.cc/VE5H-ELZA>].

<sup>393</sup> See EEOC REPORT, *supra* note 1, at v.

subjectively and objectively rendered the work environment hostile.<sup>394</sup> This standard, though suitable for claims seeking compensation for victims, implicitly condones unacceptable behavior. To address this inadequacy in the law, Congress should authorize the EEOC to institute enforcement proceedings to sanction irresponsible employers. In such proceedings the EEOC should have to prove only that a reasonable person would have found a harasser's discriminatory misconduct highly offensive. To strengthen the deterrent effect of the *Ellerth* affirmative defense, the EEOC should apply a broad definition of "supervisor."<sup>395</sup> This definition would cover any worker with authority to direct the work activities of a co-worker.

Expanded EEOC oversight and the heightened prospect of detection and sanctions would boost the deterrent impact of Title VII. Disclosing the results of EEOC enforcement proceedings might cause defendants reputational injury. Public disapprobation would spur employers to shed complacency and take a more vigorous stance in opposing sexual harassment. The proposal in this Article would not eradicate the pandemic, but if enhanced EEOC oversight and enforcement decreased the incidence of sexual harassment by only a few percent, thousands of women and men in the workplace would receive a priceless gift.

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<sup>394</sup> See, e.g., *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–22 (1993).

<sup>395</sup> State legislatures would help curtail sexual harassment by enacting into state law the measures proposed in this Article.