

4-23-2019

LEGAL CHANGES NEEDED TO STRENGTHEN THE #METOO MOVEMENT

Sarah David Heydemann

Sharyn Tejani

Follow this and additional works at: <https://scholarship.richmond.edu/pilr>

Part of the [Public Law and Legal Theory Commons](#)

Recommended Citation

Sarah D. Heydemann & Sharyn Tejani, *LEGAL CHANGES NEEDED TO STRENGTHEN THE #METOO MOVEMENT*, 22 RICH. PUB. INT. L. REV. 237 (2019).

Available at: <https://scholarship.richmond.edu/pilr/vol22/iss2/8>

This Article is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in Richmond Public Interest Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

LEGAL CHANGES NEEDED TO STRENGTHEN THE #METOO MOVEMENT

*Sarah David Heydemann & Sharyn Tejani**

*Sharyn Tejani is the Director of the TIME'S UP Legal Defense Fund, which is housed and administered by the National Women's Law Center Fund, LLC. Sarah David Heydemann is a Legal Fellow at the National Women's Law Center in its Workplace Justice Team. The authors would like to thank the individuals who have come forward to the TIME'S UP Legal Defense Fund. The authors would also like to thank Emily Martin and Maya Raghu for their invaluable insight; Nicole Fault and Lauren Hoffman for their research and editing; Mariafernanda Zacarias for her assistance in the presentation that accompanied this article; and the Workplace Justice team at the National Women's Law Center for all of the work it does creating safer and more respectful workplaces.

ABSTRACT

The rise of the #MeToo Movement highlights the inadequacies of Title VII, the federal law that protects against employment discrimination, including sex harassment. Title VII, in its current form, does not adequately address the needs of workers, especially low-wage workers, who already face considerable obstacles to reporting their harassment. While states have made significant strides in this area, the work of advocates for change and for survivors, like the TIME'S UP Legal Defense Fund and the National Women's Law Center, is necessary so that the federal government follows suit to ensure Title VII works for all workers. In this article, we posit that changes need to be made to the time restrictions for filing Title VII claims, the severe or pervasive standard needs to be recalibrated to acknowledge the significant harassment workers face, the damages cap in Title VII should be adjusted for inflation to truly compensate survivors and discourage future misconduct by employers, mandatory nondisclosure agreements should be curtailed to stop silencing survivors, and the retaliation framework needs to place a greater burden on the employer. Until such a time as these changes are made and sexual harassment in the workplace becomes a thing of the past, the TIME'S UP Legal Defense Fund will continue to provide advocacy services to low-wage workers in order to help them achieve workplaces that are safe and respectful.

INTRODUCTION

“Jennifer” worked at a fast food restaurant. A cook at her job regularly tried to kiss and grope her. She asked him to stop, but the cook kept texting her inappropriate messages, asking her to send him pictures while he was in the shower. When Jennifer reported the sexual harassment to her employer, she was told to “shut up” and to “drop it.” The owner then called her a liar, and told her to stop talking about the harassment, because the “restaurant is how he feeds his family.” The owner then cut her hours and hired a different woman to replace her.

We know Jennifer’s story because she, like thousands of other women, reached out to the TIME’S UP Legal Defense Fund. The TIME’S UP Legal Defense Fund helps individuals who experience sexual harassment and related retaliation at work or in their careers connect with legal and public relations assistance¹ In select cases, the Fund also helps to defray legal and

¹ *About TIME'S UP Legal Defense Fund*, NAT'L WOMEN'S L. CTR.,

public relations costs for people challenging the harassment they have experienced.²

The TIME'S UP Legal Defense Fund is the first fund of any kind focused solely on helping with workplace sexual harassment cases.³ The initiative was spearheaded by individuals in the entertainment industry, attorneys Tina Tchen, Roberta Kaplan, and Fatima Goss Graves, and public relations professional Hilary Rosen.⁴ Women in Hollywood came together around their own experience of harassment and assault and were moved by the outpouring of support and solidarity against sexual harassment from women across sectors. In particular a letter written by and on behalf of 700,000 farm worker women to the women of Hollywood⁵ helped inspire them to help create a fund to help survivors of sexual harassment and retaliation in all industries—especially low-income women and people of color.⁶ They worked together to achieve a historic first: to design a structure that would be both inclusive and effective. Through the Fund, workers gain “[a]ccess to prompt and comprehensive legal and communications help [which] will empower individuals and help fuel long-term systemic change.”⁷ The Fund is housed and administered by the National Women's Law Center Fund. The National Women's Law Center is long-time leader in the fight for policies and laws that improve the lives of women and girls.

The TIME'S UP Legal Defense Fund helps people in two separate but interconnected ways. First, we connect individuals who have faced workplace sexual harassment and assault with attorneys in their geographic area through our intake process.⁸ These attorneys agree to do a first consultation with people coming through our network for free. There are more than 800 attorneys in the network who have committed to providing these pro bono consultations and working with the Fund.⁹ During that initial consultation,

<https://nwlc.org/times-up-legal-defense-fund/about-times-up-legal-defense-fund/> (last visited Nov. 13, 2018) [hereinafter *About TIME'S UP*].

² Funding is only available in select cases based on criteria and availability of funds. *Id.*

³ *See id.*

⁴ *Id.*

⁵ Letter from Alianza Nacional de Campesinas to Hollywood Actors (Nov. 10, 2018), in TIME Staff, *700,000 Female Farmworkers Say They Stand With Hollywood Actors Against Sexual Assault*, TIME (Nov. 10, 2017), <http://time.com/5018813/farmworkers-solidarity-hollywood-sexual-assault/>.

⁶ *About TIME'S UP*, *supra* note 1.

⁷ *Id.*

⁸ *Where to Get Help*, TIME'S UP NOW, <https://www.timesupnow.com/home#facts-anchor> (last visited Nov. 13, 2018).

⁹ *TIME'S UP Legal Defense Fund - Stats & Numbers*, NAT'L WOMEN'S L. CTR. (Oct. 9, 2018), <https://nwlc.org/resources/times-up-legal-defense-fund-stats-numbers/> [hereinafter *TIME'S UP Legal Defense Fund Stats & Numbers*].

the attorney lays out the legal options for an individual seeking help. Second, we help fund investigations and cases of workplace harassment and related retaliation.¹⁰ Attorneys can apply to us for funding either when they have agreed to take the case or if they are considering it.¹¹ We fund both affirmative discrimination cases and cases involving defamation or the threat of defamation for speaking out.¹² We help pay for both attorney's fees and costs of the litigation.¹³ Finally, we offer assistance with media and storytelling if that is part of what will help the individual.¹⁴

Since its inception in January 2018, the Fund has responded to over 4,000 requests for help from working people seeking assistance with sex discrimination, including and especially workplace sexual harassment and related retaliation.¹⁵ The Fund has received intakes from every state and from every industry. Approximately two-thirds of the individuals reaching out to us identify as low-income.¹⁶ Approximately one-third are women of color and nine percent identify as LGBTQ individuals.¹⁷ In March 2018, the Fund began to accept funding applications for cases.¹⁸ Since then, we have committed to funding over 100 cases totaling over six and a half million dollars.¹⁹

Because of our work with the fund, we see numerous places where the federal anti-discrimination law, Title VII of the Civil Rights Act of 1964 ("Title VII"), fails to meet the needs of workers or the reality of their lives.²⁰ Generally, Title VII prohibits discrimination against employees and applicants on the basis of sex, race, color, national origin, and religion.²¹ It is also illegal to retaliate against an individual who opposes practices made illegal under the statute or participates in an investigation under the stat-

¹⁰ *TIME'S UP Legal Defense Fund*, NAT'L WOMEN'S L. CTR., <https://nwlc.org/times-up-legal-defense-fund/> (last visited Nov. 18, 2018).

¹¹ NAT'L WOMEN'S LAW CTR., APPLICATION FOR FINANCIAL SUPPORT FOR LEGAL REPRESENTATION 1 (2018), <https://nwlc-ciw49tixgw51bab.stackpathdns.com/wp-content/uploads/2018/03/TULDF-Attorney-Funding-Application.docx>.

¹² *TIME'S UP Legal Defense Fund Stats & Numbers*, *supra* note 9.

¹³ NAT'L WOMEN'S LAW CTR., *supra* note 11, at 1.

¹⁴ *TIME'S UP Legal Defense Fund Stats & Numbers*, *supra* note 9.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Frequently Asked Questions*, NAT'L WOMEN'S L. CTR., <http://www.nwlc.org/times-up-legal-defense-fund/frequently-asked-questions-about-the-times-up-legal-defense-fund-and-the-legal-network-for-gender-equity/> (last visited Nov. 14, 2018).

¹⁹ *TIME'S UP Legal Defense Fund Stats & Numbers*, *supra* note 9.

²⁰ See Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 905 (2008) (discussing the shortcomings of Title VII protections in practice).

²¹ 42 U.S.C. §2000e-2(a) (2018).

ute.²² Moreover, Title VII only applies to employers with fifteen or more employees.²³

Although not discussed in detail in this article, one of the primary changes necessary in Title VII is an increase in coverage. Some courts have already ruled that the statute covers discrimination based on sexual orientation and gender identity; the rest of the circuits should follow this lead.²⁴ The statute also needs to cover independent contractors as contracting is a growing area of the workforce that has very few employment protections. Workers who are independent contractors may have nowhere to turn if they are sexually harassed or otherwise discriminated against at work, even though they may look like and do the same work as “regular” employees.²⁵ Some states have amended their laws to allow for coverage of independent contractors,²⁶ and the federal government should do the same. Finally, Title VII only applies to employers with fifteen or more employees. Millions of workers are employed by small businesses and cannot use Title VII’s protections. Again, some states provide more protection,²⁷ and this should be the norm. For other workers, however, if they sue their employers for sexual harassment, their only recourse is state law tort actions which may have a higher legal standard.

This article outlines many of the obstacles, aside from lack of coverage, that individuals face when attempting to bring a workplace sexual assault or sexual harassment claim. First, Part I of this article examines the strict time limits surrounding potential sexual harassment claims and why they are unrealistic for many employees. Part II outlines the current severe or pervasive standard for sexual harassment charges that claimants must satisfy. It discusses what the standard requires, how it has been applied to permit egregious workplace conduct, the impact that this has on potential claimants, and state efforts to obtain true justice under the standard. Next, Part III explains Title VII’s cap on the damages a plaintiff can receive and the barriers

²² *Laws Enforced by EEOC*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/law/statutes/index.cfm> (last visited Nov. 18, 2018).

²³ *Questions and Answers*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, https://www.eeoc.gov/eeoc/publications/qa_domestic_violence.cfm (last visited Nov. 18, 2018).

²⁴ *See, e.g.*, *Zarda v. Altitude Express*, 833 F.3d 100, 112–13 (2d Cir. 2018); *EEOC v. R.G.*, 884 F.3d 560, 571 (6th Cir. 2018).

²⁵ MAYA RAGHU & JOANNA SURIANI, NAT’L WOMEN’S LAW CTR., #METOOWHATNEXT: STRENGTHENING WORKPLACE SEXUAL HARASSMENT PROTECTIONS AND ACCOUNTABILITY 2 (2017), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2017/12/MeToo-Strengthening-Workplace-Sexual-Harassment-Protections.pdf>.

²⁶ *Id.* at 2–4.

²⁷ *Id.* at 2.

these caps pose to adequate recovery. Non-disclosure agreements and the intentional silencing of victims are discussed in Part IV. Finally, Part V addresses the retaliation that many employees face when they do choose to come forward.

I. STRICT TIME LIMITS

“Angela” worked for over twenty years at the same restaurant and was constantly harassed. The owner would grab her breasts and make disgusting remarks. She quit after one of her children begged her not to go back because she saw the toll it was taking on her. She went from earning \$500 a week to earning nothing. She was out of work for two years. She reached out to the TIME’S UP Legal Defense Fund because she was inspired by the #MeToo Movement and wanted to speak up.

Unfortunately for Angela her ability to seek legal redress is very limited. Under federal law, Angela had to file a charge with the Equal Employment Opportunity Commission (EEOC) within either 180 or 300 days of her harassment.²⁸ Whether a potential plaintiff has 180 or 300 days to file a charge depends whether there are state laws that also cover the same type of harassment; if there are, the longer time limit (300 days) applies.²⁹ For harassment charges, all that is necessary is that one act of harassment be within the 180 or 300 days; for other types of Title VII claims, however, different rules apply.³⁰ As the EEOC’s own website says, “[f]iguring out how much time you have to file a charge is complicated.”³¹

After the charge is filled with the EEOC, the administrative process starts. It takes, on average, about ten months for the EEOC to investigate a charge,³² although some investigations can take significantly longer. Once that process is over, and if the EEOC decides not to take the case, the worker has ninety days to file a lawsuit or the courthouse doors close.³³

The strict time limits mean that it is exceptionally more difficult for workers to meet the procedural requirements for filing a charge with the EEOC. First, as the outpouring of support for Dr. Christine Blasey Ford

²⁸ 42 U.S.C. §2000e-5(e)(1) (2018).

²⁹ *Id.*

³⁰ *Id.*; Nat’l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 117 (2002).

³¹ *Time Limits for Filing A Charge*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/employees/timeliness.cfm> (last visited Sept. 13, 2018).

³² *What You Can Expect After You File a Charge*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/employees/timeliness.cfm> (last visited Sept. 13, 2018).

³³ *Filing a Lawsuit*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/employees/lawsuit.cfm> (last visited Nov. 23, 2018).

showed, people frequently do not report sexual harassment or assault at the time that it happens.³⁴ There are numerous reasons why workers delay in coming forward to report sexual harassment including the time it can take for a person to process the trauma and be able to speak about it and report it, shame, fear of suffering a pay cut or other employment action as a consequence of speaking out, fear of being seen as oversensitive or a troublemaker, lack of information, fear of seeming irrational, fear of losing relationships with co-workers, and fear of admitting that they have been placed in a vulnerable position.³⁵

In addition to all of the psychological reasons that cause workers to delay coming forward, finding lawyers, especially for low-wage workers, is a daunting task especially if the worker only has ninety days to do so. The worker has to find the name of a lawyer, find a time to call, and in all likelihood has to leave a message and play phone tag with the lawyer until the meeting. This is all while working one or two or three jobs – jobs that probably do not allow unlimited breaks or access to a private phone line. Add to that other scheduling difficulties such as transportation and child care, and simply finding a lawyer may be too much of a burden for a worker. If the worker does manage to connect to a lawyer, the lawyer may not be interested in a case brought by a low-wage worker because the damages under Title VII may not be high enough to make the case worthwhile. And, of course, lawyers need to be paid. Even with resources like TIME'S UP Legal Defense Fund, which can give a person a list of lawyers in the area who are

³⁴ See, e.g., Daryl Hannah (@dhlovelife), TWITTER (Sept. 21, 2018), <https://twitter.com/dhlovelife/status/1043177356142305280> (“I did, it didn’t matter, I was dismissed, disparaged, and I still get blamed. #WhyIDidntReport”); Lili Reinhart (@lilireinhart), TWITTER (Sept. 21, 2018), <https://twitter.com/lilireinhart/status/1043285620087373824> (“Because I didn’t want to lose my job or make people think I was a drama queen. #WhyIDidntReport”). See generally #WhyIDidntReport, TWITTER, <https://twitter.com/search?q=%23whyididntreport&src=typd> (compiling the many different reasons why people decided not to report their sexual assaults).

³⁵ See AMANDA ROSSIE ET AL., NAT’L WOMEN’S LAW CTR., OUT OF THE SHADOWS: AN ANALYSIS OF SEXUAL HARASSMENT CHARGES FILED BY WORKING WOMEN 2 (2018), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2018/08/SexualHarassmentReport.pdf>; L. Camille Hebert, *Why Don’t “Reasonable Women” Complain About Sexual Harassment?*, 82 IND. L.J. 711, 731 (2007) (discussing the many reasons why women do not report); Justine E. Tinkler, *Resisting the Enforcement of Sexual Harassment Law*, 37 LAW & SOC. INQUIRY 1, 4 (2012) (discussing the reasons why women do not actually define workplace sexual harassment as workplace sexual harassment); Louise F. Fitzgerald et al., *Why Didn’t She Just Report Him? The Psychological and Legal Implications of Women’s Responses to Sexual Harassment*, 51 J. SOC. ISSUES 117, 118 (1995).

willing to at least do an initial meeting with the worker and help fund certain cases,³⁶ too many people simply cannot make this deadline.

A worker who misses the 180 or 300 day deadline to file with the EEOC or the ninety day deadline to file suit, may find the courthouse doors permanently closed to them because courts are very unlikely to toll these limits.³⁷ For example, in a recent Virginia sexual harassment case, the court refused to toll the filing deadline even though the plaintiff suffered from post-traumatic stress disorder from abuse she had faced as a child.³⁸ In that case, the plaintiff, a school administrator, claimed a member of the school board repeatedly sexually harassed her including by telling her she would never become a superintendent unless she had sex with him.³⁹ She refused and was rejected for the position of superintendent twice.⁴⁰ She filed her charge the year after her second rejection – at most sixty-five days after her second rejection.⁴¹ The court rejected her claim as untimely, relying on the standard that tolling of the time period could only occur for “exceptional circumstances” and that if the plaintiff claimed that her PTSD was the reason, the she had to show that her condition prevented her from understanding and maintaining her affairs generally.⁴² The court then turned the plaintiff’s own claim against her, stating that she could not possible meet the standard necessary for tolling the time period because she claimed she was capable of being the superintendent of a school.⁴³

³⁶ *Legal Help*, NAT’L WOMEN’S L. CTR., <https://nwlc.org/legal-assistance/> (last visited Nov. 24, 2018).

³⁷ *Amtrak v. Morgan*, 536 U.S. 101, 113 (2002) (stating that equitable doctrines such as tolling or estoppel should be applied sparingly in Title VII claims); *Crane v. Shulkin*, 293 F. Supp. 3d 352, 359 (W.D.N.Y. 2018) (stating that “[t]hese timing requirements, though not jurisdictional, ‘are not to be disregarded by courts out of a vague sympathy for particular litigants.’”); *Horseley v. U.S. Dep’t of State*, 170 F. Supp. 3d 256, 264–65 (D.D.C. 2016) (“It is well established that the plaintiff-employee ‘who fails to comply to the letter, with administrative deadlines ordinarily will be denied a judicial audience.’”).

³⁸ *Elitharp-Martin v. Pulaski Cty. Sch. Bd.*, 62 F. Supp. 3d 515, 520–21 (W.D. Va. 2014); see also *Carter v. Barker*, No. 99-1433, 2000 U.S. App. LEXIS 17600, at *33 (4th Cir. July 21, 2000) (charge untimely where harasser-supervisor who had sexually assaulted the worker asked the worker not to file charge and worker did not until after the 180 days because the harasser’s statement “took the form of requests and not threats.”).

³⁹ *Elitharp-Martin*, 62 F. Supp. 3d at 517.

⁴⁰ *Id.* at 517–18.

⁴¹ See *id.*

⁴² *Id.* at 520–21.

⁴³ *Id.* at 521.

II. THE LEGAL STANDARD: SEVERE OR PERVASIVE

Title VII has been interpreted by the Supreme Court to contain a severe or pervasive standard for workplace sexual harassment claims. This means that in order for a court to find that behavior is unlawful, a plaintiff must demonstrate that the harassment they experienced is severe or pervasive enough that it “create[s] a work environment that a reasonable person would consider intimidating, hostile, or abusive.”⁴⁴ Courts, though, have inconsistently applied this standard, often allowing egregious conduct to go unchecked. However, some cities like New York City and states like California, are enacting new policies to change or clarify the standard in order to ensure victims of sexual harassment have access to legal redress.

A. What is Required?

Amending the court-created “severe or pervasive” standard is among the essential improvements to federal anti-discrimination law necessary to ensure that those who experience sex harassment at work are able to prevail in court. Title VII itself does not use the words “severe or pervasive.”⁴⁵ Rather, the standard was first widely adopted twenty-two years after the passage of the Civil Rights Act in a landmark 1986 Supreme Court decision, *Meritor Savings Bank v. Vinson* which held that, alongside *quid pro quo*⁴⁶ sex harassment, “hostile work environment” sexual harassment is a form of sex discrimination actionable under Title VII.⁴⁷ In other words, to be actionable, sexually harassing behavior must be “sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’”⁴⁸

The Plaintiff in *Meritor*, Mechelle Vinson, was an African-American woman who lived and worked in Washington, D.C.. She suffered shocking sexual harassment at the hands of her supervisor over a four-year time period, including 40 to 50 instances of rape,⁴⁹ accompanied by groping, de-

⁴⁴ *Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/laws/types/harassment.cfm> (last visited March 24, 2019).

⁴⁵ 42 U.S.C. §2000e-2(a) (2018).

⁴⁶ 29 C.F.R. § 1604.11(a)(2) (defining *quid pro quo* sex harassment as “submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual.”).

⁴⁷ *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986).

⁴⁸ *Id.* at 67 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982) (stating that “[w]hether sexual harassment at the workplace is sufficiently severe and persistent to affect seriously the psychological well being of employees is a question to be determined with regard to the totality of the circumstances.”)).

⁴⁹ *See id.* at 59-60. In *Meritor*, the Court uses both the words “intercourse” and

mands for sexual favors, and instances in which the supervisor followed her into the bathroom and exposed himself.⁵⁰ In Justice Rehnquist's decision, he called the behavior of Ms. Vinson's supervisor, "plainly sufficient" to reach the definition of hostile work environment sexual harassment.⁵¹ However, not all instances of hostile work environment sexual harassment are as clear-cut.

For example, in 1993, the Court further refined the standard in *Harris v. Forklift Sys., Inc.*⁵² The Plaintiff, Theresa Harris, worked as a manager at an equipment rental company for approximately two years. She sued after the president of the company, Charles Hardy, insulted her gender and targeted her with unwanted sexual innuendo.⁵³ The lower court dismissed her case, concluding that although her harassment was offensive, it was not so severe as to seriously psychologically affect Harris's well-being. Harris appealed, and the Sixth Circuit affirmed the decision of the lower court. The Supreme Court granted certiorari to resolve a circuit split over whether a plaintiff must have suffered harm that seriously affected their psychological well-being to prevail in their claim.⁵⁴ Writing for a unanimous court, Justice O'Connor clarified that harassment may satisfy the severe or pervasive standard without seriously affecting the victim's psychological well-being.⁵⁵ In doing so, the Court affirmed severe or pervasive as the standard for hostile work environment sexual harassment and clarified the test for

"rape" in the decision, preferring to distinguish instances of "voluntary" intercourse from forcible rape. *See id.* at 60. However, it is clear from the case that her supervisor forced sexual contact with Ms. Vinson, including instances in which interactions may not have been "forcible." Ms. Vinson complied with her supervisor's advances because she feared losing her job and suffering other forms of retaliation. *Id.* As such, I will not distinguish between instances of unwelcome sexual intercourse and have chosen to only use the word "rape" to describe such events. As defined by Merriam-Webster, rape is, "usually sexual intercourse carried out forcibly or under threat of injury against a person's will or with a person who is... incapable of valid consent because of... deception." Definition of Rape, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/rape> (last visited Nov. 16, 2018).

⁵⁰ *Meritor*, 477 U.S. at 60.

⁵¹ *Id.* at 67.

⁵² *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–22 (1993).

⁵³ *Id.* at 19. In addition to other unwelcome behavior, "Hardy told Harris on several occasions, in the presence of other employees, 'You're a woman, what do you know' and 'We need a man as the rental manager'; at least once, he told her she was 'a dumb ass woman.' Again, in front of others, he suggested that the two of them 'go to the Holiday Inn to negotiate [Harris'] raise.' Hardy occasionally asked Harris and other female employees to get coins from his front pants pocket. He threw objects on the ground in front of Harris and other women and asked them to pick the objects up. He made sexual innuendos about Harris' and other women's clothing."

⁵⁴ *Id.* at 20.

⁵⁵ *Id.* at 21–22.

assessing whether harassing conduct has reached a severe or pervasive level. To be actionable, the harassing conduct must create an “objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive.”⁵⁶ Further, the victim must “subjectively perceive the environment to be abusive” in order to alter the conditions of an individual’s workplace and reach a Title VII violation.⁵⁷ The Court additionally outlined a set of factors to assess whether or not behavior is actionable when considering “all the circumstances,” including: “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.”⁵⁸ On the issue of whether Harris had suffered sexual harassment, the Court reversed the Sixth Circuit and remanded the case for further proceedings consistent with the clarified standard.⁵⁹

As the justices acknowledged, “[t]his is not, and by its nature cannot be, a mathematically precise test.”⁶⁰ Even Justice Scalia, in his concurrence, acknowledged the vague nature of the test outlined in *Harris* but conceded that he “[knew] of no alternative course” and joined the opinion.⁶¹ Indeed, in subsequent Supreme Court cases following *Meritor* and *Harris* the Court attempted to further define various elements of actionable hostile work environment sexual harassment claims. In *Oncale v. Sundowner Offshore Servs., Inc.*, the Court clarified that Title VII sex harassment includes instances of same-sex sexual harassment and sexual harassment need not have “sexual content or connotations” or be “motivated by sexual desire” in order to be illegal sex discrimination.⁶² Rather, a plaintiff may be subject to unlawful harassment where the harassment involves “such sex-specific and derogatory terms . . . as to make it clear that the harasser is motivated by general hostility to the presence of [the plaintiff’s sex] in the workplace.”⁶³ In clarifying the reach of Title VII sexual harassment, however, the Court continued to caution that Title VII was not a “general civility code” and specified that the statute “does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same

⁵⁶ *Id.* at 21.

⁵⁷ *Id.* at 21–22.

⁵⁸ *Id.* at 23.

⁵⁹ *Id.*

⁶⁰ *Id.* at 22.

⁶¹ *Id.* at 24 (Scalia, J., concurring).

⁶² *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998).

⁶³ *Id.*

sex and of the opposite sex...it forbids only behavior so objectively offensive as to alter the ‘conditions’ of the victim's employment.”⁶⁴

Again, just two months after *Oncale*, the Court in *Faragher v. City of Boca Raton* doubled down on cautioning that the severe or pervasive standard must be “sufficiently demanding” as to not transform Title VII into a “general civility code.”⁶⁵ In that case Justice Souter, writing for the majority, outlined the difference between illegal sex harassment and “the sporadic use of abusive language, gender related jokes and occasional teasing,” stating that the Court had made clear that “conduct must be extreme to amount to a change in the terms and conditions of employment.”⁶⁶ And in *Clark Cty. Sch. Dist. v. Breeden*, the Court declined to find sex harassment had occurred after the plaintiff was exposed to one sexually harassing comment.⁶⁷ The Court reiterated that “simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the ‘terms and conditions of employment.’”⁶⁸

In the 1998 *Oncale* decision, the Court tried to assure the public in dicta that “common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing...and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.”⁶⁹ This sentiment has proved to be shortsighted when considered against the backdrop of the last thirty-odd years of case law interpreting and applying the severe or pervasive standard. Since the advent of the standard, courts have routinely failed to hold that fact patterns evidencing egregious sexual harassment meet the severe or pervasive standard for illegality under Title VII.⁷⁰ The case law seems especially out of place in today's climate of the #MeToo Movement. In the last year, a new reckoning has focused attention on the deeply entrenched nature of sexual harassment in the work lives of millions and the grave

⁶⁴ *Id.* at 81.

⁶⁵ *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998).

⁶⁶ *Id.*

⁶⁷ *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 271 (2001).

⁶⁸ *Id.* (quoting *Faragher*, 524 U.S. at 788).

⁶⁹ *Oncale*, 523 U.S. at 82. Some lower courts interpreted this statement that the conduct was to be interpreted as a “reasonable person in the plaintiff's position” as a new reasonableness standard more specific than simply a “reasonable person” standard. D.C. BAR, CURRENT STATUS OF SEXUAL HARASSMENT CLAIM SAND CASES 14 (2018), <https://www.americanbar.org/content/dam/aba/administrative/crsj/committee/dccbar-current-status-of-sexual-harassment-claims-and-cases.authcheckdam.pdf>.

⁷⁰ See *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1246–47 (11th Cir. 1999); SANDRA F. SPERINO & SUJA A. THOMAS, UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW 34–40 (2017).

damage it causes, both to the lives of individuals and to the fabric our society as a whole.

B. How Have Courts Applied the Severe or Pervasive Standard?

Courts across the country lack a reliable metric for uniformly analyzing which conduct rises to level of “severe or pervasive.” As the Supreme Court has acknowledged there is no mathematically precise test or assessment to determine which standard meets the bar.⁷¹ While some behavior, like that suffered by Ms. Vinson in *Meritor*, illustrates a clear picture of what is both severe as well as pervasive (although only severe or pervasive is necessary), other fact patterns leave courts struggling to assess behavior.

Considering this confusion, courts have adopted some troubling conventions. While most people assume, based on common sense, that certain conduct may be illegal harassment, courts have held otherwise. One case, *Brooks v. City of San Mateo*, outlined what came to be known as the “single grope” rule, in which the Ninth Circuit held that a single incident where one employee groped another by touching her stomach and forcing his hand underneath her bra to grope her breast was not hostile work environment sexual harassment.⁷² The Ninth Circuit came to this conclusion in part, by reasoning that this was an “isolated incident.”⁷³ In light of the #MeToo Movement the California legislature in 2018 passed a bill explicitly denouncing this standard and clarifying that a single instance of harassment may create a triable issue. But for the last eighteen years, Ninth Circuit plaintiffs who suffered a “single instance” of groping faced an uphill battle set by bad precedent when seeking justice in the courts. And for Ninth Circuit plaintiffs outside of California, the *Brooks* case still presents a challenge to overcome.

A trend central to the problem with the severe or pervasive standard is the way in which precedent operates to raise the bar for behavior to be considered sufficiently severe or pervasive. Over time, as progressively worse behavior escapes liability, it becomes increasingly difficult for plaintiffs to prevail. While precedent can be helpful, and even necessary for the legal system to operate, courts have repeatedly found outstandingly bad behavior

⁷¹ *Harris*, 510 U.S. at 22.

⁷² *Brooks v. City of San Mateo*, 229 F.3d 917, 921, 930 (9th Cir. 2000), *abrogated by statute*, S.B. 1300, 2018 Sess. (Cal. 2018). It is notable that despite this being described as an isolated incident in the opinion, the opinion also states that two other women had been subjected to similar treatment from the same employee, although they did not report the misconduct at the time. *Id.* at 922.

⁷³ *Id.* at 927.

to not reach the severe or pervasive standard, citing their own previous cases as justification.

For example, in the Fifth Circuit case *Barnett v. Boeing Co.*, Sonja Barnett worked as a Procurement Agent at Boeing.⁷⁴ Between 2004–2005, Barnett’s supervisor “leered at Barnett, touched her in sexually inappropriate and unwelcome ways, and allegedly actively intimidated her after she complained of his actions by loitering outside the building where Barnett’s office was located.”⁷⁵ The Fifth Circuit held that this behavior was not severe or pervasive enough to be hostile work environment harassment because it did not “destroy her ability to succeed in the workplace environment.”⁷⁶ In coming to its decision, the court compared the harassing behavior Ms. Barnett suffered to harassment inflicted upon women in prior cases where the court held that the harassing behavior was not severe or pervasive.⁷⁷

In one of the Fifth Circuit’s prior cases, Debra Jean Shepherd suffered harassing behavior over a period of two years perpetrated by a coworker. The behavior included: attempting to look down the plaintiff’s clothing; sexually suggestive comments including, “your elbows are the same color as your nipples” and “you have big thighs;” the harasser patting his lap and remarking, “here’s your seat” while the plaintiff was looking for a seat in a meeting; and unwanted touching, including touching the plaintiff’s arm and rubbing one of his hands from her shoulder to wrist.⁷⁸ In another Fifth Circuit case that the court used to support the rejection of Ms. Barnett’s claim, Ladonna Hockman was harassed by Oscar Rogers, who ran a commercial printing press out of the same building where she worked.⁷⁹ The case detailed that in about a year and a half time-span, “Rogers...(1) once made a remark to Hockman about another employee's body, (2) he once slapped her on the behind with a newspaper, (3) he “grabbed or brushed” against Hockman's breasts and behind, (4) he once held her cheeks and tried to kiss her, (5) he asked Hockman to come to the office early so that they could be alone, and (6) he once stood in the door of the bathroom while she was washing her hands.”⁸⁰ The court found this conduct not to be severe or per-

⁷⁴ *Barnett v. Boeing Co.*, 306 F. App'x 875, 876 (5th Cir. 2009).

⁷⁵ *Id.* at 879.

⁷⁶ *Id.* at 880.

⁷⁷ *Hockman v. Westward Commc'ns, L.L.C.*, 407 F.3d 317, 321–22 (5th Cir. 2004); *Shepherd v. Comptroller of Pub. Accounts*, 168 F.3d 871, 874 (5th Cir. 1999).

⁷⁸ *Shepherd*, 168 F.3d at 872.

⁷⁹ *Hockman*, 407 F.3d at 321.

⁸⁰ *Id.* at 328.

vasive.⁸¹ In this way, Sonja Barnett was denied justice in the courts based in part of the fact that the court also declined to decide in favor of Debra Jean Shepherd and Ladonna Hockman.

As another example, in *Mitchell v. Pope*, the Eleventh Circuit affirmed a grant of summary judgment against Donya Mitchell, who was employed for four years as a Deputy Sheriff under the supervision of Major Michael Overbey.⁸² During those four years, she details sixteen separate incidents of harassment.⁸³ In dismissing her claims, the court stated that the harassment she suffered was “not that frequent,” and Overbey “attempted to touch or did touch her...[o]nly three times.”⁸⁴ In coming to its conclusion, the court compared the harassment that Mitchell suffered to previously decided Eleventh Circuit cases, *Gupta v. Florida Bd. of Regents* and *Mendoza v. Borden, Inc.*, in which the court decided the behavior was not severe or pervasive.

In *Gupta*, the Eleventh Circuit reversed a jury verdict finding that a male department coordinator, Rupert Rhodd, harassed a female associate profes-

⁸¹ *Id.*

⁸² *Mitchell v. Pope*, 189 F. App'x 911, 914 (11th Cir. 2006).

⁸³ Conduct by her supervisor included that he:

(1) tried to kiss her after the 1999 Sheriff's Department Christmas party and called her a “frigid bitch” when she refused, (2) showed up at places Plaintiff was “staying out” in December 1999 and told her “you must be working out” and “you sure do look fine.” (3) appeared several times in her driveway in January 2000, once drunk, when he told Plaintiff's son that he loved Plaintiff. (4) suggested she wear certain jeans and commented “your ass sure does look fine.” (5) told her “you can just walk into the room and I'd get an erection.” (6) stood on his tiptoes to look down her shirt. (7) rubbed up against her, whispered in her ear, and put his arm across her chest. (8) chased her around the...office. (9) once picked her up over his head in the...office. (10) asked her over the Sheriff's Department telephones if she was dressed or naked. (11) opened the door to the women's bathroom and turned the lights off and on when Plaintiff was inside. (12) simulated “humping” another female employee with that employee's consent, (13) made sexually derogatory remarks and gestures about a female magistrate judge, and (14) referred to Sheriff Pope as a “big eared pencil dick motherfucker.” [15] In March 2000, Plaintiff and Supervisor attended a conference in Alabama. Supervisor told Plaintiff that the hotel had made a mistake and that they would have to share a room. Overbey slept on the floor. [16] The next night, after Overbey got his own room, he tried to convince Plaintiff to go to the hotel hot tub with him and other conventioners. He called her a “frigid bitch” when she refused; when she confronted him the next morning and threatened to tell the Sheriff if Overbey did not leave the conference, Overbey cried, promised he would be “good,” and left. [Additionally,] in June 2002, before she was scheduled to work security at a private golf tournament given by a strip club owner, Overbey told her and other officers about another golf tournament hosted by this owner where strippers acted as caddies. Overbey said that the owner directed the strippers to place golf balls into their vaginas and to squirt them onto the green.

Id. at 914 n. 3.

⁸⁴ *Id.* at 914

sor, Srabana Gupta, over a six or seven-month period.⁸⁵ Gupta is a citizen of India and had applied for a tenure track position at the university.⁸⁶ Rhodd was the chairman of the search committee for the position, met her at the airport when she arrived, and helped her settle into her apartment.⁸⁷ The alleged harassment included Rhodd making flirtatious comments, such as “You are looking very beautiful” and “I can look at you and I can tell you are innocent and don’t have much [sexual] experience;” calling Gupta frequently at night and asking her questions including, “Are you in bed yet?” and “Are you talking to your boyfriend?;” placing his hand on her inner thigh; touching her ring and bracelet; and lifting up the hem of her dress and asking, “What kind of material is this?”⁸⁸ Once when he was expecting her in his office, she walked in and found “him sitting in his chair with no dress shirt on, but wearing an undershirt. When she entered his office, he grabbed his dress shirt, ‘unbuckled his belt and pulled down his zipper and start[ed] tucking his shirt in.’”⁸⁹ The court in *Gupta* used the Eleventh Circuit analysis laid out in *Mendoza* to analyze the case and concluded that finding for Gupta would, “lower the bar of Title VII to punish mere bothersome and uncomfortable conduct” that would “trivialize true instances of sexual harassment.”⁹⁰ The court reversed the jury, concluding that there was insufficient evidence to support the jury finding. And in *Mendoza*, the court said that the Plaintiff, Red Mendoza, did not experience hostile work environment sexual harassment when over a period of eleven months, her supervisor “constantly watched her,” looked her up and down and followed her around. In two instances, while looking her up and down, he looked at her groin area and made a sniffing sound; in another instance he did not look at her but made a similar sniffing sound, and he once rubbed his right hip up against her left hip, touched her shoulders at the same time and when she gave him a startled look, smiled at her.⁹¹ When Mendoza finally confronted her supervisor about his behavior, she told him, “I came here to work, period,” and he responded, “Yeah, I’m getting fired up too.”⁹²

Between *Mendoza* in 1999, *Gupta* in 2000, and *Mitchell* in 2006, it is particularly striking to see progressively more extreme behavior being thrown out as not sufficiently severe or pervasive. Fact patterns such as the-

⁸⁵ *Gupta v. Florida Bd. of Regents*, 212 F.3d 571, 578–79 (11th Cir. 2000).

⁸⁶ *Id.* at 577.

⁸⁷ *Id.* at 578.

⁸⁸ *Id.* at 578–79.

⁸⁹ *Id.* at 585.

⁹⁰ *Id.* at 584 (quoting *Mendoza*, 195 F.3d at 1246).

⁹¹ *Mendoza*, 195 F.3d at 1243.

⁹² *Id.*

se are, unfortunately, not the exception - they are closer to the norm. Appalling sexual harassment regularly fails to meet the standard.⁹³

⁹³ See, e.g., *Rickard v. Swedish Match N. Am., Inc.*, 773 F.3d 181, 183 (8th Cir. 2014) (affirming a grant of summary judgment and finding conduct not sufficiently severe or pervasive to satisfy the hostile work environment standard where on the same day, Plaintiff's supervisor "grabbed and squeezed [Plaintiff's] nipple and stated 'this is a form of sexual harassment'" and on another occasion, "took a towel from [Plaintiff], 'rubbed it on his own crotch,' and gave 'it back to [Plaintiff].'"); *Guthrie v. Waffle House, Inc.*, 460 F. App'x 803, 805 (11th Cir. 2012) (holding that a few dozen instances of harassment over an eleven-month period, including a co-worker grabbing plaintiff's butt two to five times, "talking dirty" to plaintiff, saying five times that he wanted to have sex with her and "lick" her "all over," asking her on a date ten to twenty times, and saying that she "could just pee in his mouth," along with plaintiff's supervisor telling her that he "wanted to have her," speaking openly about sex, kissing plaintiff on the cheek and saying that plaintiff could "shit in [his] mouth" over the course of a month did not constitute severe or pervasive harassment.); *Anderson v. Family Dollar Stores*, 579 F.3d 858, 864 (8th Cir. 2009) (holding that two months of the manager's rubbing of Anderson's shoulders or back at times during her training session, calling Anderson "baby doll" during a telephone conversation, accusing her of not wanting to be "one of my girls," and his suggestion that she should be in bed with him and a Mai Tai in Florida, were not sufficiently severe or pervasive); *Singleton v. Dep't of Corr. Educ.*, 115 F. App'x 119, 120 (4th Cir. 2004) (affirming summary judgment for the employer and holding that harassment over a period of approximately one year was not sufficiently severe or pervasive, including when it, "occurred approximately four times a week," contained comments such that Plaintiff "should be spanked every day;" insistent compliments; one instance where the harasser stared at Plaintiff's breasts; one occasion where, "he measured the length of her skirt to judge its compliance with the prison's dress code and told her that it looked 'real good;' constantly told her how attractive he found her; made references to his physical fitness...; asked [Plaintiff] if he made her nervous (she answered 'yes'); and repeatedly remarked to [her] that if he had a wife as attractive as [the Plaintiff], he would not permit her to work in a prison facility around so many inmates." Additional harassment included that the harasser "improperly requested access to [Plaintiff's] leave records" and installed "a security camera...in her office in a way that permitted him to observe her as she worked, supposedly for safety reasons, but which did not permit him to observe the prison library or any interactions with inmates that she might have had while she was not sitting at her desk."); *Patt v. Family Health Sys., Inc.*, 280 F.3d 749, 754 (7th Cir. 2002) (holding that Plaintiff's complaints of eight gender-related comments during the course of her seven-year employment, including, "the only valuable thing to a woman is that she has breasts and a vagina," was insufficient to demonstrate hostile work environment because "these comments were too isolated or sporadic to constitute severe or pervasive harassment."); *Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355, 1365-66 (10th Cir. 1997) (holding five "sexually-oriented, offensive" statements over sixteen months insufficient to show hostile environment, even though one of the harasser's statements occurred while he put his arm around Plaintiff, looked down her dress and said, "well, you got to get it when you can."); *Black v. Zaring Homes, Inc.*, 104 F.3d 822, 823-24 (6th Cir. 1997) (reversing the jury verdict, including a \$250,000 damages award, and finding conduct insufficiently severe or pervasive because it appeared to have been nothing more than "merely offensive." Conduct over a four-month period involved repeated sexual jokes; one occasion of looking Plaintiff up and down, smiling and stating, there is "nothing I like more in the morning than sticky buns;" suggesting land area be named as "Titsville" or "Twin Peaks;" asking Plaintiff, "Say, weren't you there [at a biker bar] Saturday night dancing on the tables?;" stating, "Just get the broad

C. Why is it a Problem?

As it now stands, the severe or pervasive standard is broken. Rather than acting as a reasonable test of liability, it has been interpreted over the years such that victims of workplace sexual harassment are largely unable to achieve justice through the laws created to protect them.⁹⁴

to sign it;" telling Plaintiff she was "paid great money for a woman;" laughing when Plaintiff mentioned the name of Dr. Paul Busam, apparently pronounced as "bosom."); *Hopkins v. Baltimore Gas & Elec. Co.*, 77 F.3d 745, 747 (4th Cir. 1996) (concluding that although same-sex sexual harassment was actionable, the behavior Hopkins experienced was not severe or pervasive enough to be actionable because it was "sexually neutral or at most ambiguous" and "temporally diffuse" with "gaps between incidents as great as a year." Over a seven year period, the supervisor frequently entered the men's bathroom when Plaintiff was there alone, including one time when he pretended to lock the door and said, "Ah, alone at last," while walking towards Plaintiff; writing "SWAK., kiss, kiss" and drawing hearts on internal mail Plaintiff received from his fiancé; asking him if he had gone on any dates over the weekend and whether he had sex with anyone; on one occasion pivoting an illuminated magnifying glass over Plaintiff's crotch, looking through it while pushing the lens down and asking, "Where is it?;" bumping into Plaintiff and saying, "You only do that so you can touch me;" regularly commenting on Plaintiff's appearance; while in a confined darkroom space together asking Plaintiff, "Was it as good for you as it was for me?" and then attempting to force himself into a revolving door with Plaintiff.); *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430 (7th Cir. 1995) (holding insufficiently severe or pervasive to support a hostile-environment claim nine instances of offensive behavior over seven months including repeated references to Plaintiff as a "tilly" and a "pretty girl;" one comment that the office was hot because she had entered it; and one instance referring to masturbation. The Court reasoned that the behavior was merely, "distasteful to a sensitive woman."); *Weiss v. Coca-Cola Bottling Co.*, 990 F.2d 333, 337 (7th Cir. 1993) (holding Plaintiff's claims—that her supervisor repeatedly asked about her personal life; told her how beautiful she was; asked her on dates; called her a dumb blonde; put his hand on her shoulder at least six times; placed "I love you" signs in her work area; and tried to kiss her once at a bar and twice at work over a three-month period—were not sufficient for actionable sexual harassment because "these incidents were also relatively isolated and no more serious" than in *Scott v. Sears, Roebuck & Co.*, 798 F.2d 210, 211–14 (7th Cir. 1986), in which the Plaintiff worked in an auto mechanic shop and was repeatedly propositioned; slapped on her butt on at least one occasion; and consistently received the response, "What will I get for it?" when asking her supervisor for assistance, among other incidents.); *Saxton v. American Tel. & Tel. Co.*, 10 F.3d 526, 528, 534 (7th Cir. 1993) (finding insufficient harassment to constitute a hostile work environment where over approximately a one-month period, Defendant supervisor placed his hand on Plaintiff's leg above the knee and rubbed her upper thigh; forced a kiss on Plaintiff; and "lurched" at her in an attempt to grab her because his behavior was "relatively limited" and "did not rise to the level of pervasive harassment....").

⁹⁴ See SPERINO & THOMAS, *supra* note 70, at 34–40, 130, 160; *Justice for Victims: Re-Examining California's Legal Standards for Sexual Harassment: Informational Hearing Before the Cal. S. Comm. on Judiciary & S. Select Comm. on Women, Families, & the Workplace* (Jan. 11, 2018), https://www1.nyc.gov/assets/cchr/downloads/pdf/Testimony_Commissioner_Malalis-CA_Senate_Judiciary_Committee.pdf (testimony of Carmelyn P. Malalis, Chair & Commissioner of the NYC Commission on Human Rights).

Further, setting the bar unduly high creates the wrong deterrent, or very little deterrent to sexual harassment for employers. Rather than aspiring to a workplace where there is no sexual harassment, employers must only legally maintain a workplace where there is neither a severe nor a pervasive level of sexual harassment. This perverse incentive has “resulted in courts ‘assigning a significantly lower importance to the right to work in an atmosphere free from discrimination’ than other terms and conditions of work.”⁹⁵

D. How Are States And Cities Addressing the Problem?

Given these serious concerns, advocates across the country are grappling with the most appropriate way to address judicial interpretations of “severe or pervasive” to ensure that the law provides redress to those who have experienced hostile work environment sexual harassment. Two strains of thought have risen to the fore. The first is to do away with the “severe or pervasive” standard language and start fresh. The second is to redefine the meaning of the standard, adding guardrails to the “severe or pervasive” language to indicate expressly how the standard should and should not be interpreted.

Two recent legislative approaches from New York City and California provide useful examples. New York City has chosen to adopt new, less restrictive language. Namely, in New York City, a plaintiff can prove a violation of the New York City Human Rights Law if s/he can show that they were treated *less well* than other employees because of their gender.⁹⁶ California decided to keep the “severe or pervasive” language intact, but further defined how its courts should interpret the standard by expressly adopting and affirming certain decisions and abrogating others.⁹⁷

1. The New York City Approach

In 2005, New York City passed the Local Civil Rights Restoration Act of 2005⁹⁸ stating, “[i]t is the sense of the Council that New York City’s Human Rights Law has been construed too narrowly to ensure protection of

⁹⁵ *Williams v. N.Y.C. Hous. Auth.*, 872 N.Y.S.2d 27, 36 (App. Div. 2009).

⁹⁶ N.Y.C. LOCAL L. NO. 35, §2(c) (2005); N.Y.C. COMM’N ON HUMAN RIGHTS, COMBATING SEXUAL HARASSMENT IN THE WORKPLACE: TRENDS AND RECOMMENDATIONS BASED ON 2017 PUBLIC HEARING TESTIMONY 3 (2018), https://www1.nyc.gov/assets/cchr/downloads/pdf/SexHarass_Report.pdf.

⁹⁷ S.B. 1300, 2018 Sess. (Cal. 2018).

⁹⁸ N.Y.C. LOC. L. NO. 85 (2005).

the civil rights of all persons covered by the law.”⁹⁹ The law’s explicit purpose was to assert that the provisions of the New York City Human Rights Law (NYCHRL) were to be “construed independently from similar or identical provisions of New York state or federal statutes.”¹⁰⁰ The federal and state laws were to serve as a floor below which the city laws should not fall.¹⁰¹ In *Williams v. N.Y.C. Hous. Auth.*, a case of first impression before a New York State Appellate Division Court, Judge Rolando T. Acosta dictated a new standard by which courts should analyze NYCHRL liability.¹⁰² Rather than use the “severe or pervasive standard” the court adopted the following test: “the primary issue for a trier of fact in harassment cases, as in other terms-and-conditions cases, is whether the plaintiff has proven by a preponderance of the evidence that she has been treated less well than other employees because of her gender.”¹⁰³

In coming to its conclusion, the court openly acknowledged that the “severe or pervasive” standard had “sanctioned a significant spectrum of conduct demeaning to women” by “permitting a wide range of conduct to be found beneath the ‘severe or pervasive bar’” and thereby allowing discrimination “to play some significant role in the workplace” and “reduc[ing] the incentive for employers to create workplaces that have zero tolerance for conduct demeaning to a worker because of protected class status.”¹⁰⁴ The *Williams* standard “maximizes the law’s deterrent effect” given that “liability is normally determined simply by the existence of differential treatment (i.e., unwanted gender-based conduct).”¹⁰⁵ However, the court did clarify that while severity and pervasiveness could not be a measure for liability, they are applicable when considering the scope of damages.¹⁰⁶

Moreover, the *Williams* standard has since been adopted by New York state courts and upheld by the Second Circuit Court of Appeals in *Mihalik v. Credit Agricole Cheuvreux N. Am., Inc.*¹⁰⁷ In *Mihalik*, the Second Circuit vacated the district court’s grant of summary judgment for the defendant

⁹⁹ *Id.*

¹⁰⁰ *Id.*; N.Y.C. Human Rights Law, N.Y. ADMIN. CODE §§ 8-101-107 (2005).

¹⁰¹ N.Y.C. LOC. L. NO. 85 (2005).

¹⁰² *Williams*, 872 N.Y.S.2d at 39.

¹⁰³ *Id.* (emphasis added). The court also acknowledged that this new standard was not to become a “general civility code” and recognized “an affirmative defense whereby defendants can still avoid liability if they prove that the conduct complained of consists of nothing more than what a reasonable victim of discrimination would consider ‘petty slights and trivial inconveniences.’” *Id.* at 41.

¹⁰⁴ *Id.* at 38.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ See *Mihalik v. Credit Agricole Cheuvreux N. Am., Inc.*, 715 F.3d 102, 105 (2d Cir. 2013).

and remanded the case for trial.¹⁰⁸ The case concerned Renee Mihalik, a woman working as a Vice President of an electronic equity trading company selling products to institutional clients.¹⁰⁹ Mihalik worked at the company between July 2007 and April 2008, and she faced near-constant harassment.¹¹⁰ Her workplace was a “boys-club” environment in which the male employees rated the appearance of their female colleagues, regularly watched porn at work, and talked about visiting strip clubs.¹¹¹ After Mihalik twice rebuffed her employers’ offer that she spend the night with him at the company apartment, he began to retaliate against her, and ultimately fired her.¹¹² Mihalik brought suit under the NYCHRL,¹¹³ but the district court, relying heavily on the dicta in *Williams* that the standard was not a “civility code,” held that Mihalik had presented only evidence of “sporadic insensitive comments” rather than a hostile work environment actionable under the NYCHRL.¹¹⁴

In reversing the decision, the Second Circuit analyzed the *Williams* standard and found that there was a genuine dispute as to whether Mihalik had been treated less well because of her gender.¹¹⁵ The Second Circuit criticized the lower court’s outsized emphasis on the “not a civility code” dicta in *Williams* and found that although the district court properly acknowledged the *Williams* standard, it did not correctly apply it.¹¹⁶

The *Williams* standard was codified in 2016, when New York City passed a second Restoration Act, clarifying that *Williams* and several other cases had accurately reflected the liberal, broad, remedial purpose of the NYCHRL.¹¹⁷

¹⁰⁸ *Id.* at 117.

¹⁰⁹ *Id.* at 105.

¹¹⁰ *Id.* at 105–06 (stating that, “[f]rom the moment Mihalik started, Peacock paid ‘special attention’ to her, asking her about her relationship status and whether she preferred older men or was a ‘cougar.’ Immediately, Peacock asked Mihalik to make sure her travel arrangements for a business trip coincided with his so they could ‘enjoy traveling together’ and ‘get to know each other.’ He commented on her appearance often, telling her she looked ‘sexv’ and that her red shoes meant she was ‘promiscuous.’ When she wore certain outfits, he told her that she should ‘dress like that every day. You might get more clients in turn.’ About two months after she started, he asked her if she ‘fancied dogging’ and then, when she did not know what that was, described the sex act to which he was referring. In response, Mihalik would always tell Peacock that his behavior was ‘inappropriate and unbecoming a CEO.’”).

¹¹¹ *Id.* at 106.

¹¹² *Id.* at 106–07.

¹¹³ *Id.* at 107.

¹¹⁴ *Id.* at 108.

¹¹⁵ *Id.* at 116.

¹¹⁶ *See id.* at 116–17.

¹¹⁷ N.Y.C. LOCAL L. NO. 35, §2(c) (2005); N.Y.C. COMM’N ON HUMAN RIGHTS,

2. The California Approach

On September 30, 2018, Governor Jerry Brown of California signed into law SB 1300, which among other things, expressly affirmed or rejected particular holdings in cases analyzing hostile work environment claims.¹¹⁸ In particular the bill does the following:

- Adopts the standard in Justice Ruth Bader Ginsburg’s concurrence in *Harris*: “the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment. It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to make it more difficult to do the job.”¹¹⁹
- Rejects the Ninth Circuit’s decision in *Brooks* and establishes that a single instance of “harassing conduct” may create a “triable issue” if “the harassing conduct has unreasonably interfered with the plaintiff’s work performance or created an intimidating, hostile, or offensive working environment.”¹²⁰
- Affirms the *Reid v. Google, Inc.* decision “in its rejection of the ‘stray remarks doctrine’” and clarifies that a totality of the circumstances test should be used to assess the existence of a hostile work environment.¹²¹ Further, “a discriminatory remark, even if not made directly in the context of an employment deci-

supra note 96, at 3.

¹¹⁸ S.B. 1300, 2018 Sess. (Cal. 2018).

¹¹⁹ S.B. 1300, 2018 Sess. (Cal. 2018); *Harris*, 510 U.S. at 25 (Ginsburg, J., concurring).

¹²⁰ S.B. 1300, 2018 Sess. (Cal. 2018); *Brooks*, 229 F. 3d at 924–27. Notably, *Brooks* was written by disgraced former Judge Alex Kozinski who abruptly retired in late 2017 after more than a dozen allegations of sexual harassment by former clerks and other professional contacts. His harassment included groping, calling women into his chambers to show them pornography, and making sexually suggestive comments. NAT’L WOMEN’S LAW CTR., NWLC REPORT: THE RECORD OF BRETT M. KAVANAUGH ON CRITICAL LEGAL RIGHTS FOR WOMEN 20–21 (2018), <https://nwlc.org/resources/nwlc-report-on-the-record-of-brett-kavanaugh/>.

¹²¹ S.B. 1300, 2018 Sess. (Cal. 2018); *Reid v. Google, Inc.*, 66 Cal. Rptr. 3d 744, 759 (Cal. 2007). The stray remarks doctrine refers to a line from Justice O’Connor’s concurrence in the case *Price Waterhouse v. Hopkins*, stating that “stray remarks in the workplace, while perhaps probative of sexual harassment...cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria. Nor can statements by non-decision makers, or statements by decision makers unrelated to the decisional process itself, suffice to satisfy the plaintiff’s burden in this regard.” *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O’Connor, J., concurring). This had led to courts adopting inconsistent and unclear analysis for when a remark may be sufficient to evince employment discrimination.

sion or uttered by a non-decision maker, may be relevant, circumstantial evidence of discrimination.”¹²²

- Rejects any language, reasoning, or holding in *Kelley v. Conco Companies*, which would have the result of allowing the legal standard for sexual harassment to vary by workplace.¹²³ Instead, the bill states that it is, “irrelevant that a particular occupation may have been characterized by a greater frequency of sexually related commentary or conduct in the past. In determining whether or not a hostile environment existed, courts should only consider the nature of the workplace when engaging in or witnessing prurient conduct and commentary is integral to the performance of the job duties.”¹²⁴
- Asserts that “harassment cases are rarely appropriate for disposition on summary judgment” and “affirms the decision in *Nazir v. United Airlines, Inc.*...and its observation that hostile working environment cases involve issues ‘not determinable on paper.’”¹²⁵

SB 1300 took effect on January 1, 2019.¹²⁶ While it is too early to substantively analyze any effects of the changes to the ways in which California courts are now required to view hostile work environment claims, both these changes and the New York City changes constitute concrete progress towards a more appropriate standard of evaluation that will allow plaintiffs who have experienced hostile work environment sexual harassment to gain justice in the courts.

III. CAPPED DAMAGES

One of the reasons TIME’S UP Legal Defense Fund helps to defray the costs of workplace sexual harassment cases for low-wage workers is that the damages in these cases in many states are set at such a low level that it is finically impossible to bring certain cases. Under Title VII, compensatory and punitive damages, the ones that are most likely in a sexual harassment

¹²² S.B. 1300, 2018 Sess. (Cal. 2018); see *Reid*, 66 Cal. Rptr. 3d at 759.

¹²³ S.B. 1300, 2018 Sess. (Cal. 2018); *Kelley v. Conco Companies*, 126 Cal. Rptr. 3d 651, 672 (Cal. Ct. App. 2011) (stating that “the context in which [the accused’s] behavior occurred is significant.”).

¹²⁴ S.B. 1300, 2018 Sess. (Cal. 2018).

¹²⁵ *Id.*; *Nazir v. United Airlines, Inc.*, 100 Cal. Rptr. 3d 296, 331 (Cal. Ct. App. 2009).

¹²⁶ Laura Mahoney, *California Makes It Easier to Bring Sexual Harassment Claims*, BLOOMBERG L. NEWS (Sept. 30, 2018), <https://www.bna.com/california-makes-easier-n73014482894/>.

case, are strictly limited.¹²⁷ Congress set the limitations in 1991; they are as follows:

Congressional Limitations on Damages Based on Employer Size¹²⁸

Employer Size	Amount
15-101	\$50,000
100-201	\$100,000
200-500	\$200,000
More than 500	\$300,000

The limits have not been raised since 1991.¹²⁹ Accounting for inflation, this is where they should be:

Congressional Limitations on Damages Based on Employer Size Adjusted for Inflation¹³⁰

Employer Size	Amount
15-100	\$92,796
100-200	\$185,592
200-500	\$371,184
More than 500	\$556,775

These caps apply to all types of Title VII claims – hiring, firing, and harassment.¹³¹ They are especially damaging to harassment claims, however, because compensatory and punitive damages are frequently the only type of damages available in harassment cases.¹³²

¹²⁷ 42 U.S.C. § 1981a(b)(3) (2018).

¹²⁸ *Id.*

¹²⁹ *See id.*

¹³⁰ *See id.*; Lynn Ridgeway Zehrt, *Twenty Years of Compromise: How the Caps on Damages in the Civil Rights Act of 1991 Codified Sex Discrimination*, 25 YALE J.L. FEMINISM 249, 251 (2013); *CPI Inflation Calculator*, OFFICIAL DATA, <https://www.officialdata.org/1991-dollars-in-2018> (last visited Mar. 22, 2019) (enter recovery cap amount into inflation calculator, select 1991 as the start year and 2019 as the end year).

¹³¹ 42 U.S.C. § 2000e-2(a)(1) (2018).

¹³² *See* 42 U.S.C. § 1981a (2018). Title VII does allow for back and front pay, but that requires that the individual has lost a job or a promotion, which is not a usual

Leaving aside inflationary adjustment, the setting of compensatory and punitive damages based on the size of the employer is nonsensical. Compensatory damages reflect the pain, suffering, and mental anguish endured by the plaintiff.¹³³ That pain and suffering varies based on the actions of the harasser and the effect it had on the plaintiff. It does not vary with the size of the employer. Being grabbed, groped and assaulted does not hurt less because your employer has 200 employees instead of 500. Similarly, punitive damages punish an employer who acted “with malice or reckless indifference” to federally protected rights.¹³⁴ Again, the size of the employer has nothing to do with the amount of malice with which the employer acted.

Second, the caps create perverse incentives where larger employers are not punished, nor are they incentivized to prevent harassment.¹³⁵ As one judge observed in an Americans With Disabilities Act (ADA) case against Wal-Mart where the plaintiff was awarded the maximum amount of punitive damages (\$300,000), “it took Wal-Mart only 37 seconds last year to achieve sales equal to the \$300,000 it must now pay Brady in punitive damages. There is no meaningful sense in which such an award can be considered a punishment.”¹³⁶ The court noted that the lack of punishment was evident from the facts of the case. Despite being under a consent decree to settle prior ADA violations, Wal-Mart asked the plaintiff prohibited questions and the employees who testified had no knowledge of the policies Wal-Mart had agreed to disseminate as part of a settlement of another lawsuit.¹³⁷ The better path here is what several states already provide: compensatory and punitive damages that vary with the facts of the case, rather than with arbitrary, outdated caps.¹³⁸

part of a harassment claim. Some federal race discrimination complaints can avoid the Title VII caps because they can be brought under 42 U.S.C. § 1981 which does not have statutory caps. Sex discrimination, however, is not covered by § 1981. 42 U.S.C. § 1981 (2018).

¹³³ *Id.* at § 1981a(b)(3).

¹³⁴ *Id.* at § 1981a(b)(1).

¹³⁵ One recent study estimates that in order to act as a financial incentive to for companies to work to prevent harassment, the cap would need to be raised from \$300,000 to \$7.6 million. Joni Hersch, *Valuing the Risk of Workplace Sexual Harassment*, 57 *J. Risk & Uncertainty* 111, 112 (2018).

¹³⁶ *Brady v. Wal-Mart Stores, Inc.*, No. CV 03-3843(JO), 2005 U.S. Dist. LEXIS 12151, at *11-12 (E.D.N.Y. June 21, 2005).

¹³⁷ *Id.*; see also *Waldo v. Consumers Energy Co.*, 726 F.3d 802, 810, 824 (6th Cir. 2013) (noting that male co-workers never called their female electrical line colleague by her name but only referred to her as “bitch,” “wench,” or “cunt,” locked her in a porta-potty, and mocked her and said that women should not be in their industry, and that while the jury awarded \$400,000 in compensatory damages and \$7.5 million in punitive damages, the award was limited to recovery of \$300,000 total due to the statutory cap).

¹³⁸ See, e.g. CAL. GOV’T CODE § 12965(c) (2018) (imposing no caps on compensa-

IV. SECRECY AGREEMENTS

“April 20, 2015, the Filipina-Italian model Ambra Battilana Gutierrez sat in an office in midtown Manhattan with an eighteen-page legal agreement in front of her. She had been advised by her attorney that signing the agreement was the best thing for her and her family. In exchange for a million-dollar payment from Harvey Weinstein, Gutierrez would agree never to talk publicly about an incident during which Weinstein groped her breasts and tried to stick his hand up her skirt...Weinstein used nondisclosure agreements like the one Gutierrez signed to evade accountability for claims of sexual harassment and assault for at least twenty years.”¹³⁹

Secrecy agreements occur in sexual harassment cases in two ways. First, some employers require employees to agree not to disclose information about sexual harassment complaints (or any other type of discrimination) as a condition of employment.¹⁴⁰ These agreements are signed on the first day of work, before anything has happened, and are a condition of employment. Because the worker needs the job, they have no ability to reject the agreement. One notorious example was a non-disclosure agreement (NDA) that restaurateur Mike Isabella required from his employees.¹⁴¹ According to news reports, all employees, including wait staff who were paid \$3.33/hour

tory or punitive damages in sexual harassment cases under California’s Fair Employment and Housing Act); N.Y. EXEC. LAW § 297(4)(c) (2018) (providing punitive damages only in housing discrimination claims but allowing for uncapped compensatory damages); WASH. REV. CODE § 49.58.020 (2018); *Hemmings v. Tidyman’s Inc.*, 285 F.3d 1174, 1196 (9th Cir. 2002) (refusing to use federal caps in a state discrimination claim noting “Title VII explicitly prohibits limiting state law remedies and that Title VII was not intended to force plaintiffs to choose among remedial statutes”); *Baker v. John Morrell & Co.*, 382 F.3d 816, 819, 827 (8th Cir. 2004) (interpreting IOWA CODE § 216 to cap punitive damages but allowing for compensatory damages higher than the federal cap and allowing the plaintiff to amend her Title VII complaint to allege Iowa civil rights violations so as to recover the total amount of compensatory damages of \$839,470, but reducing the \$650,000 in punitive damages to the federal cap of \$300,000); *Mayo-Coleman v. Am. Sugar Holdings, Inc.*, No. 14-cv-79(PAC), 2018 U.S. Dist. LEXIS 94821, at *6–7, 21 (S.D.N.Y. 2018) (allocating \$1,699,999 of a jury’s \$1.7 million award in compensatory damages to the New York State Human Rights Law claim, and \$1 to the Title VII punitive damages award, and ultimately remitting only \$500,000 after an excessiveness analysis).

¹³⁹ Ronan Farrow, *Harvey Weinstein’s Secret Settlements*, NEW YORKER (Nov. 21, 2017), <https://www.newyorker.com/news/news-desk/harvey-weinsteins-secret-settlements>.

¹⁴⁰ *Non-Disclosure Agreements (NDA’s)*, WORKPLACE FAIRNESS, <https://www.workplacefairness.org/nondisclosure-agreements> (last visited Nov. 18, 2018) [hereinafter NDA’s Workplace Fairness].

¹⁴¹ Jack Pointer, *Women Suing Mike Isabella Asks Court to Nullify Employee Non-Disclosure Deals*, WTOP (Apr. 4, 2018), <https://wtop.com/local/2018/04/woman-suing-mike-isabella-asks-court-nullify-employee-non-disclosuredeals/>.

had to sign a non-disclosure agreement as a condition of employment.¹⁴² The penalty for breaking the agreement was \$500,000 plus paying the employer's attorney's fees.¹⁴³

Some employers' agreements go as far as to prohibit workers from discussing discrimination with *anyone* other than the employer's representatives.¹⁴⁴ These types of employment agreements interfere with an employee's right to file an EEOC charge or limit the right to testify, assist, or participate in an investigation, hearing, or proceeding of a Title VII claim. As such, they violate public policy and are per se retaliatory under Title VII because they punish employees for participating in proceedings under the statute or opposing conduct made illegal under the statute.¹⁴⁵ Although this type of NDA should not be used, it can still be effective because it requires a worker to be willing to risk challenging it in order for it to be struck down. Thus, the better method is that the NDA expressly state that it does not apply to reporting discrimination to a government agency.¹⁴⁶

The second method is an NDA as part of a settlement or severance package.¹⁴⁷ Here, the harassment has occurred and, as part of the resolution, the worker agrees not to disclose any facts about the case or the settlement.¹⁴⁸ NDA's at this stage may be in the worker's interest as they may serve to keep facts about the case private, which is what the worker may want. NDA's as part of a settlement also give the worker some amount of leverage; the worker's agreement not to speak about the case may be worth something to the employer and thus can be a bargaining chip.

Both types of agreements are enforceable through penalties against the worker.¹⁴⁹ As a result, workers who break these agreements by speaking out about sexual harassment place themselves in danger of being fined.¹⁵⁰ Beyond the danger to the individual worker who signs an NDA, NDA's make

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ See NDA's Workplace Fairness, *supra* note 140.

¹⁴⁵ See Orley Lobel, *NDA's Are Out of Control. Here's What Needs to Change*, HARV. BUS. REV. (Jan. 30, 2018), <https://hbr.org/2018/01/ndas-are-out-of-control-heres-what-needs-to-change>.

¹⁴⁶ This is also the better method because NDA's, whether intentionally or not, can be written in a way that a worker would assume that she could not report to government agency.

¹⁴⁷ NDA's Workplace Fairness, *supra* note 140.

¹⁴⁸ See *id.*

¹⁴⁹ See *id.*

¹⁵⁰ See, e.g., Jessica Levinson, *Non-Disclosure Agreements Can Enable Abusers. Should We Get Rid of NDAs for Sexual Harassment?*, NBC THINK (Jan. 24, 2018), <https://www.nbcnews.com/think/opinion/non-disclosure-agreements-can-enable-abusers-should-we-get-rid-ncna840371>.

it easy for serial harassers to continue what they are doing. NDA's also deprive workers who are being harassed from banding together both for legal reasons and for the emotional support such a group can provide. As a result, fewer workers will ever come forward about what has happened to them.

States have stepped in to limit the use of NDA's, especially those signed as a condition of employment. For example, in just one year:

- Washington State banned pre-dispute NDA's that prohibit a worker from talking about sexual harassment or sexual assault at work.¹⁵¹ The statute does allow for NDA's as part of a settlement.¹⁵² Another new Washington statute states that such NDA's are against public policy if the testimony is needed for a civil action.¹⁵³
- New York has introduced a bill to ban nondisclosure clauses in settlements, agreements, or other resolutions of sexual harassment claims, unless the condition of confidentiality is complainant's or the plaintiff's preference.¹⁵⁴ The plaintiff also has twenty-one days to consider the nondisclosure agreement, and seven days to revoke it.¹⁵⁵
- Tennessee prohibited pre-dispute NDA's for sex harassment cases.¹⁵⁶

V. RETALIATION

Title VII prohibits retaliation against those who participate in an investigation under the statute or oppose a practice made illegal under statute.¹⁵⁷ Despite this prohibition, nearly every worker who reaches out to the TIME'S UP Legal Defense Fund includes allegations of retaliation. For example, we have heard from low-wage workers who have had their hours cut when they reported sexual harassment; countless women who have been passed over for promotions or raises after standing up to sexual harassment in their workplaces; low-wage employees working at big box retailers, where human resources departments have only allowed employees to transfer to other stores or shifts to avoid their harassers on the condition that they

¹⁵¹ S.B. 5996, 65th Leg., 2018 Reg. Sess. (Wash. 2018).

¹⁵² *Id.*

¹⁵³ See S.B. 6068, 65th Leg., 2018 Reg. Sess. (Wash. 2018).

¹⁵⁴ S.B. 7848-A, 2018 Reg. Sess. (N.Y. 2018).

¹⁵⁵ *Id.*

¹⁵⁶ Tenn. Code Ann. § 50-1-108 (2018).

¹⁵⁷ 42 U.S.C. § 2000e-3(a) (2018).

withdraw their complaints or reports of harassment; and a worker who was fired two hours after telling her employer that she had contacted the EEOC. Similarly, the EEOC reports that retaliation is regularly the most frequently filed charge with the agency.¹⁵⁸

The burden of proof in a typical retaliation case follows a three-step process. First, the worker makes out a *prima facie* case of retaliation.¹⁵⁹ Then, the employer has the burden of producing a legitimate non-discriminatory reason for its actions.¹⁶⁰ The plaintiff then has the burden of proof to show that that the real reason for the action was discriminatory.¹⁶¹

Likewise, the *prima facie* case of retaliation has three parts. First, the worker shows that she participated in the investigation or opposed a practice made unlawful under Title VII.¹⁶² The employee only has to have a reasonable good faith belief that the conduct opposed is unlawful; it is not required that the opposed conduct actually be illegal.¹⁶³ This is critical for workers facing sexual harassment because what qualifies as illegal sex harassment has to pass certain tests (see Part II).¹⁶⁴

Second, the worker has to show that she suffered a materially adverse action as result of her participation or opposition.¹⁶⁵ “Materially adverse actions” are anything that “might well deter a reasonable employee from complaining about discrimination.”¹⁶⁶ Importantly, this standard is lower than what a worker must show in a claim of discrimination, which requires an “adverse action” (which usually is linked to losing pay, not being hired, being fired).¹⁶⁷ Additionally, courts are supposed to take into account the specific worker and how the retaliation affected that person or, as the Supreme Court stated, “[c]ontext matters.”¹⁶⁸ As an example of the type of

¹⁵⁸ Press Release, U.S. EQUAL EMP’T OPPORTUNITY COMMISSION (Jan. 25, 2019), <https://www.eeoc.gov/eeoc/newsroom/release/1-25-18.cfm> (showing that in 2017, retaliation accounted for 41,097 charges or 48.8% of the workplace discrimination charges filed).

¹⁵⁹ Texas Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 252–53 (1981).

¹⁶⁰ *Id.* at 253.

¹⁶¹ *Id.*

¹⁶² See, e.g., Foster v. Univ. of Maryland - E. Shore, 787 F.3d 243, 250 (4th Cir. 2015) (stating that a plaintiff must show that he or she engaged in protected activity).

¹⁶³ See, e.g., Villa v. CavaMezze Grill, LLC, 858 F.3d 896, 901 (4th Cir. 2017).

¹⁶⁴ *Faragher*, 524 U.S. at 787–88 (explaining that, to qualify as severe or pervasive, “conduct must be extreme to amount to a change in the terms and conditions of employment...”).

¹⁶⁵ Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 54 (2006); see *Foster*, 787 F.3d at 250.

¹⁶⁶ *White*, 548 U.S. at 69.

¹⁶⁷ *Id.* at 68.

¹⁶⁸ *Id.*

context courts should consider, the Supreme Court offered this example: “[a] schedule change in an employee’s work schedule may make little difference to many workers, but may matter enormously to a young mother with school-age children.”¹⁶⁹

Third, the worker must link the retaliation to her opposition or participation.¹⁷⁰ Workers frequently do so by showing the proximity in time between the opposition or participation and the retaliation.¹⁷¹ If a worker makes out this *prima facie* case, the employer then has the burden of production (not proof) to show that the adverse action was not retaliatory.¹⁷²

Retaliation is especially dangerous in low-wage jobs. Workers in these jobs are seen as interchangeable and able to be replaced at low cost.¹⁷³ At the same time, these workers usually do not have savings or other ways to pay for rent, housing, food, or transportation.¹⁷⁴ Thus, loss of a job can push an entire family deeper into poverty and instability. Given the danger of retaliation for low-wage workers and its prevalence, what is needed is a change in the law.

First, Title VII should be changed to allow for retaliation cases to use a mixed motive method of proof. Currently, a worker can win a Title VII case of discrimination if she shows that the protected characteristic was a motivating factor in the employer’s decision making, although the damages that can be received are limited.¹⁷⁵ For retaliation cases, however, the mixed motive method of proof does not apply.¹⁷⁶

Second, once a worker makes out the *prima facie* case of retaliation, the full burden of proof, rather than merely the burden of production, should be on the employer to show that the adverse actions were not retaliatory. Essentially, this would allow individual cases of retaliation to use the prevalence of retaliation overall to establish that retaliation is the pattern or practice of all employers.¹⁷⁷ Then, as in *International Bhd. of Teamsters v. U.S.*,

¹⁶⁹ *Id.*

¹⁷⁰ *Foster*, 787 F.3d at 250.

¹⁷¹ *See id.* at 253.

¹⁷² *Id.* at 250.

¹⁷³ Karen Turner, *The Unique Challenges That Low-Wage Women Face When They’re Sexually Harassed at Work*, VOX (Apr. 6, 2017), <https://www.vox.com/conversations/2017/4/5/15190448/sexual-harassment-fox-bill-oreilly-trump>.

¹⁷⁴ *See id.*

¹⁷⁵ 42 U.S.C. § 2000e-5(g)(2)(B) (2018).

¹⁷⁶ *See University of Texas Sw. Med. Ctr. v. Nasser*, 570 U.S. 338, 359–60 (2013).

¹⁷⁷ Under *Teamsters*, through statistics and anecdotal evidence, a plaintiff can show a pattern or practice of discrimination. Once such as showing is made, in the remedy phase, the burden of proof switches to the employer to show that specific actions taken about a specific plaintiff were not made based on this pattern. *International*

the employer would have the burden of proof to show that it did not act in accordance with this pattern or practice.¹⁷⁸ While employers will undoubtedly claim that this is not fair to them, the overwhelming prevalence of retaliation and the danger it poses both to workers and to the willingness of workers to come forward requires this change be made.

CONCLUSION

For many workers, especially low-wage workers, sexual harassment has been a constant, dangerous problem that forces workers to choose to stay in unsafe, demeaning, and threatening conditions to survive. The renewed attention to sexual harassment in the workplace has led to thousands of workers – most of whom are women – sharing their stories of harassment on and offline and taking to the streets and to statehouses across the country to demand change.¹⁷⁹ While there is a long way to go, we have seen some wins, including concrete legislative gains for workers at the state level and the funding of new organizations, like the TIME'S UP Legal Defense Fund, that can help individuals respond to workplace sexual harassment.¹⁸⁰ These positive changes need to work their way into the federal law and change our culture so that all working people can earn the money they need without facing sexual harassment and retaliation.

Bhd. of Teamsters v. U.S., 431 U.S. 324, 359 (1977).

¹⁷⁸ *Id.*

¹⁷⁹ See Zoe Greenberg, *What Has Actually Changed In a Year*, N.Y. TIMES (Oct. 6, 2018), <https://www.nytimes.com/interactive/2018/10/06/opinion/Sunday/What-Has-Actually-Changed-in-a-year-me-too.html>.

¹⁸⁰ ANDREA JOHNSON ET AL., NAT'L WOMEN'S LAW CTR., #METOO ONE YEAR LATER: PROGRESS IN CATALYZING CHANGE TO END WORKPLACE HARASSMENT 1, 6 (2018), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2018/10/MeToo-Factsheet.pdf>.

268

RICHMOND PUBLIC INTEREST LAW REVIEW

[Vol. XXII:ii