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Title VII and the #MeToo Movement*

The issue of sexual harassment is having its spotlight moment.¹ The #MeToo movement has galvanized women worldwide, with women speaking out as never before about sex-based mistreatment they have experienced on the job.² Many of the women leading the movement are high profile---actresses or media stars³---and their voices have inspired other women (and some men) from all walks of life to share their “me too” stories. The past six months have seen numerous men, many of them also high profile, lose their jobs over allegations of sexual misconduct in the workplace.⁴ Those allegations range from the most egregious---allegations of rape or repeated forcible touchings---to those that involve conduct reasonable people may consider

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¹ The #MeToo movement was sparked by a New York Times story on the Hollywood producer, Harvey Weinstein. Jodi Kantor and Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES October 5, 2017.

² The MeToo hashtag was used 500,000 times in its first 24 hours. Margaret Renkl, *The Raw Power of #MeToo*, N.Y. TIMES October 19, 2017. The hashtag appeared after the actress Alyssa Milano posted, on October 15, 2017, an invitation saying, “If you have been sexually harassed or assaulted write “me too” as a response.” The “silence breakers” of the #MeToo Movement were named Time’s Person of the Year for 2017. Stephanie Zacharek, Elina Dockterman & Haley Sweetland Edwards, *Time Person of the Year 2017: The Silence Breakers*, TIME, <http://time.com/time-person-of-the-year-2017-silence-breakers/>. The term “me too” has surfaced before in employment discrimination; it was a term used somewhat derogatorily to refer to efforts by plaintiffs to introduce evidence of discrimination against other members of her protected class. In *Sprint/United Management Co. v. Mendelsohn*, 552 U.S. 379 (2008), the Supreme Court held the admissibility of such evidence must be decided on a case by case basis by the district court, rather than relying on per se rules of admissibility or inadmissibility.

³ Prominent examples include Ashley Judd, Mira Sorvino, and Uma Thurman, among numerous others.

⁴ Glamour Magazine has been posting online a running list of powerful men who have been accused of wrongdoing, with pictures of the men accused, the allegations against them, and the outcome of those allegations. See *Post-Weinstein, These are the Powerful Men Facing Sexual Harassment Allegations*, GLAMOUR, Feb 26, 2018, <https://www.glamour.com/gallery/post-weinstein-these-are-the-powerful-men-facing-sexual-harassment-allegations>. As the preface to the list notes,

Now, in a post-Weinstein world, legions of women have felt empowered to speak out and share their own #MeToo stories---both on social media and in major news outlets. Weinstein sparked an avalanche of accusations against high profile men in media, politics, Silicon Valley, and Hollywood, all with varying degrees of repercussions. Sexual harassment in the workplace is certainly nothing new, but it’s safe to say the issue is now, rightfully, taking center stage.

“merely offensive.”⁵ Some allegations involve recent or even presently ongoing conduct, but many more allege conduct that occurred years or even decades ago. Some of these allegations involve conduct that federal law prohibits; some of these allegations, quite frankly, do not.

There is understandable outrage over the way women have been and are being treated at work, and the #MeToo movement has harnessed the power of that outrage in a way this area of the law has seldom, if ever, seen. No person should be required to “run a gauntlet of sexual abuse in return for the privilege of being allowed to work[.]”⁶ At the same time, federal law, while it prohibits sexual harassment in the workplace, does not make actionable every sexual interaction that occurs, even when those interactions are unwelcome. The law sees sexual harassment on a continuum, ranging from the “merely offensive” conduct that is not actionable to the severe or pervasive conduct that is. And it places on the victim of harassment an obligation, in many situations, to speak up in a timely manner---to take steps to stop harassing conduct from becoming so serious that it would be actionable.⁷

It is important to understand, in this #MeToo moment, the elements of a federal claim of sexual harassment. Much of the headline grabbing conduct would not, in fact, state a legally viable claim,⁸ for reasons that will be explored below. That is a critically important point to understand.

⁵ See *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 21 (1993) (reinforcing that “merely offensive” conduct is not sexual harassment within the meaning of Title VII).

⁶ *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982).

⁷ As explored *infra* notes 50-52, this burden results from an affirmative defense available to employers in some, but not all, sexual harassment cases.

⁸ For a recent discussion of this point, see Yuki Noguchi, *Sexual Harassment Cases Often Rejected by Courts*, NPR (Nov. 28, 2017, 7:28 AM), <https://www.npr.org/2017/11/28/565743374/sexual-harassment-cases-often-rejected-by-courts>. As the article notes, “The standard for harassment under the law is high, and only an estimated 3 percent to 6 percent of the cases ever make it to trial.” Quoting law professor Sandra Sperino, who reviewed over 1000 sexual harassment cases dismissed before trial, “You’ll see case after case where a woman was groped at work and the court will dismiss the case as a matter of law, finding that’s not sexual harassment.” Moreover, a great many of the most highly publicized #MeToo claims would not be legally actionable for one simple reason---they are time-barred. See notes *infra* 36-39 for a discussion of the time limits governing Title VII claims.

But a law’s interpretation can shift and change over time, and it is possible that the #MeToo movement will lead judges (and juries should a case proceed past summary judgment to trial) to think differently, and more empathetically, about how workplace harassment affects women and to assess whether it is actionable accordingly.⁹ Conduct that may have been viewed as relatively harmless in even the recent past may take on a more sinister hue in the context of the #MeToo movement. This is a time to reflect, assess and determine how our anti-discrimination laws should be best understood in order to protect women, and men, in the workplace. In the space below, in addition to describing the current state of the law, I’ll identify where and how the #MeToo movement might play a significant role in reshaping how the law could and should respond to sexual harassment in the workplace.

I. How Title VII Defines Sexual Harassment

Title VII, a federal anti-discrimination law, prohibits workplace discrimination because of sex.¹⁰ Originally enacted in 1964, it was not until 1986 that Title VII’s prohibition on sex discrimination was interpreted by the Supreme Court in *Meritor Savings Bank v. Vinson* to encompass sexual harassment.¹¹ For years, conduct we now recognize as unlawful harassment was regarded as merely personal in nature, having nothing to do with the law’s prohibitions against

⁹ *Id.* As law professor Deborah Rhode notes, “Often times it takes a kind of cultural consciousness raising moment like the one that we’re having now to force a reevaluation of standards.”

¹⁰ Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e—2000e-17. Title VII, which applies to employers with 15 or more workers, prohibits discrimination because of race, sex, color, religion or national origin. Most states have their own statutes outlawing workplace discrimination, which are closely patterned after Title VII. In addition, state tort law claims such as assault, battery, intentional infliction of emotional distress or even wrongful discharge in violation of public policy can also provide a remedy in some circumstances for sexual harassment. The focus of this Essay, however, is on Title VII.

¹¹ *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986).

workplace discrimination, even when it took the form of such blatant acts as firing workers who refused to sleep with their supervisors.¹²

The Supreme Court's decision in *Meritor* was a game changer, putting sexual harassment firmly within the definition of sex discrimination. By the time the *Meritor* decision was handed down, harassment known as "quid pro quo"---the sleep with me or you're fired form of harassment---had been recognized by the lower courts as the sex discrimination it so clearly was, at least when the worker was fired for refusing her boss's advances.¹³ But *Meritor* went further, holding that even when the harassment results in no tangible detriment to the victim---i.e., no loss of pay or job or promotion, etc---it could still run afoul of the law.¹⁴ This form of sexual harassment became known as creating a "hostile work environment."

There were caveats, however. Not every pass, wolf whistle or creepy comment would be actionable. Only if the conduct was sufficiently severe or pervasive, a standard the *Meritor* Court did not define, would it constitute discrimination within the meaning of Title VII.¹⁵ And the conduct had to be "unwelcome."¹⁶

Several years later, in *Harris v. Forklift Sys.*¹⁷, the Court laid down one marker.

Rebuffing the court below, the Supreme Court held that harassing conduct need not be so severe

¹² See Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 Yale L.J. 1683, 1701-1704 (1998) (discussing such cases and the development of the quid pro quo and hostile work environment theories of sexual harassment).

¹³ See Schultz, *supra* note 12, at 1703-05 (collecting cases). Pre-*Meritor*, the EEOC Guidelines also recognized sexual harassment as sex-based discrimination. 29 C.F.R. § 1604.11(a) (1985).

¹⁴ *Meritor*, 477 U.S. at 64. "[T]he language of Title VII is not limited to 'economic' or 'tangible' discrimination. The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent "'to strike at the entire spectrum of disparate treatment of men and women'" in employment."

¹⁵ *Id.* at 67. "For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" (brackets in original).

¹⁶ *Id.* at 68. "The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.' 29 CFR § 1604.11(a) (1985). While the question whether particular conduct was indeed unwelcome presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact...[t]he correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome[.]"

¹⁷ 510 U.S. 17 (1993).

as to cause mental distress to run afoul of Title VII.¹⁸ But other than ruling out the notion that sexual harassment must result in a mental breakdown to be actionable, the Court did precious little to further define where the bar lies.¹⁹ It described its standard as taking:

a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury. As we pointed out in *Meritor*, "mere utterance of an . . . epithet which engenders offensive feelings in a employee," . . . does not sufficiently affect the conditions of employment to implicate Title VII. Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment -- an environment that a reasonable person would find hostile or abusive -- is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.²⁰

As Justice Scalia noted in his concurrence, this is hardly a clear standard.²¹ But he conceded he could come up with no better one.

In *Oncala v. Sundowner Offshore Services, Inc.*,²² moreover, the Court emphasized that the harassment must be *because of sex*; not all harassing conduct occurring in the workplace violates the law. It must be motivated by sex (or race or other statutorily protected characteristic) to come within the statute's prohibitions. Boorish behavior alone, no matter how egregious, does not, in and of itself, violate Title VII. It must occur "because of" sex. And even when it is because of sex, it must be sufficiently severe or pervasive. Title VII, the Court observed, is not a "general civility code."²³

¹⁸ *Id.*

¹⁹ *Id.* at 23. As the Court stated, "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 interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required."

²⁰ *Id.* at 21-22.

²¹ *Id.* at 24 (Scalia, J., concurring).

²² 523 U.S. 75 (1998).

²³ *Id.*

In most cases, the “because of sex” element has been readily assumed or established and has not proved too much of a stumbling block for sexual harassment claims.²⁴ But determining when the alleged conduct rises to the level of being sufficiently severe or pervasive, well, that’s been much tougher.²⁵

Generally speaking, the courts have assumed women (and let’s face it, most of the victims in these cases are women)²⁶ are made of pretty stern stuff when it comes to dealing with sex-based behavior in the workplace. Crude comments, even repeated ones, lewd gestures, and even unwanted touchings have been deemed insufficiently severe or pervasive to warrant the law’s intervention.²⁷ “Severe” has been reserved for the most egregious stand alone acts----

²⁴ As *Oncale* confirms, there is an inference the harassment was “because of sex” when the sexual advances are made by a heterosexual to a member of the opposite sex. The “because of sex” element has proved most problematic in same sex harassment cases, like *Oncale*. See, e.g., *EEOC v. Boh Bros. Constr. Co., LLC.*, 731 F.3d 444 (5th Cir. 2013).

²⁵ Let’s look, for example, at the conduct alleged in the *Harris v. Forklift*, *supra* note 5 at 21. As described by the Court,

throughout Harris' time at Forklift, Hardy [the Company’s president] often insulted her because of her gender and often made her the target of unwanted sexual innuendos. 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. In mid-August 1987, Harris complained to Hardy about his conduct. Hardy said he was surprised that Harris was offended, claimed he was only joking, and apologized. He also promised he would stop, and based on this assurance Harris stayed on the job. But in early September, Hardy began anew: While Harris was arranging a deal with one of Forklift's customers, he asked her, again in front of other employees, ‘what did you do, promise the guy . . . some [sex] Saturday night?’ On October 1, Harris collected her paycheck and quit. (citations omitted).

Were those allegations sufficient to support a hostile work environment claim? The *Harris* Court did not decide, instead remanding the case to the lower court, where the claim was settled.

²⁶ According to the EEOC, roughly 85% of the sexual harassment claims filed in 2017 were filed by women. Charges Alleging Sex-Based Harassment (Charges filed with EEOC), U.S Equal Employment Opportunity Commission, https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm.

²⁷ See, e.g., *McMiller v. Metro*, 738 F.3d 185 (8th Cir. 2013)(sexual advances not sufficiently severe or pervasive); *Watson v. Heartland Health Laboratories, Inc.*, 790 F.3d 856 (8th Cir. 2015)(sexual touching, sexual slurs not enough); *Beamon v. Tyson Foods*, 2015 WL 6159479 (M.D. Ga. 2015) (supervisor showing plaintiff pornographic

rapes, for example, have been regarded as severe, as have, in the rare instance, particularly offensive remarks in a particularly sensitive setting.²⁸ In most cases, the question is whether the harassing words or conduct, taken as a whole, are pervasive enough to state a claim. And time after time, the conduct at issue has been held not to meet the requisite bar.²⁹

It's entirely possible the #MeToo movement will have an impact here. Today, there is a heightened awareness of the damage harassing conduct inflicts on its victims and a rising intolerance for perpetrators.³⁰ Because the definition has been so nebulous, lower courts (and juries, should a case get that far) have freedom to determine that conduct that may not have been regarded as sufficiently severe or pervasive even just a few years ago should now be recognized as actionable. After all, as the Court has reminded us, context matters,³¹ and in today's context, workplace behavior that may have been viewed more permissively in the past will likely now receive heightened scrutiny. Moreover, because these cases are necessarily so fact-based, circuit precedent may not be the constraint it often is in recognizing discrimination as actionable.

But there's a limit. The Court has made clear that there is a level of sex based, inappropriate conduct that workers, frankly, just need to deal with, even when that conduct

videos multiple times, along with sexual comments, not enough); *Hockman v. Westward Commc'ns., LLC*, 407 F.3d 317 (5th Cir. 2004)(supervisor's comments about female employee's body, slapping her on the rear, brushing up against and attempting to kiss her not sufficiently severe or pervasive); *Paul v. Northrup Grumman Ship Sys.*, 309 F. App'x 825 (5th Cir. 2009)(rubbing pelvic region against female employee's hips and buttocks in a confrontation lasting 90 seconds not enough to be actionable). As Professor Rhode explains, "Courts have really required the situation to be pretty hellish before they'll find it actionable." *Noguchi, supra* note 8. As the NPR article notes, multiple incidents over a short period of time may not be deemed pervasive or if they occurred over a longer period of time, they may be deemed too sporadic, and if the groping didn't involve direct skin contact, it may be viewed as less serious.

²⁸ *Little v. Windermere Relocation, Inc.*, 301 F.3d 958 (9th Cir. 2002)(rape is sufficiently severe); *Berry v. Chicago Transit Auth.*, 618 F.3d 688 (7th Cir. 2010)(supervisor's grabbing plaintiff's breasts and rubbing his body against her sufficiently severe); *Howley v. Town of Stratford*, 217 F.3d 141 (2d Cir. 2000)(referring to plaintiff as a f'ing whining c*** who got her job by performing oral sex was sufficiently severe).

²⁹ For a description of numerous such cases, see SANDRA F. SPERINO AND SUJA A. THOMAS, *UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW* 32-40 (Oxford University Press 2017).

³⁰ See *GLAMOUR, supra* note 4, for a description of outcomes of allegations, even when the allegations have been denied by the alleged perpetrator.

³¹ *Oncale*, 523 U.S. at 81. ("In...harassment cases, that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target").

occurs at the hands of supervisors. Rude and crude are likely still not enough to meet the law's standards. Severity or pervasiveness remain requisites for a sexual harassment claim.³²

As is unwelcomeness. Consensual sexual relationships, even between a boss and his subordinate, are not banned by Title VII.³³ The law does not presume that a difference in power in the workplace hierarchy necessarily means that any sexual conduct that occurs is the result of undue pressure or an implied threat. Sex in the workplace, in other words, can be welcomed. Which makes pertinent the question of how one knows in advance whether or not an overture will be welcomed? Is "one free pass" still the Title VII standard (assuming it ever was?).³⁴

In short, there is an incomplete congruence between what the law currently regards as substantively actionable workplace harassment and what the #MeToo movement has claimed as within its scope.³⁵ Of course, there is a large area of overlap. Much of the sex-based workplace conduct the #MeToo movement has brought to the forefront of public discussion would be conduct that any reasonable judge or jury would regard as unwelcome and sufficiently severe or pervasive. But, and this is the important point, not all of it is.

³² "We have made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment, and the Courts of Appeals have heeded this view. See, e.g., *Carrero v. New York City Housing Auth.*, 890 F.2d 569, 577-578 (C.A.2 1989); *Moylan v. Maries County*, 792 F.2d 746, 749-750 (C.A.8 1986); See also 1 Lindemann & Grossman 805-807, n. 290 (collecting cases granting summary judgment for employers because the alleged harassment was not actionably severe or pervasive)." *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998).

³³ Even when other workers have complained that their supervisor is favoring his paramour, no Title VII violation has been found. The seminal case in this area is *DeCintio v. Westchester Cty. Med. Ctr.*, 807 F.2d 304 (2d Cir. 1986), and the court's approach, whatever its analytical flaws, still is the prevailing view. See *Tenge v. Phillips Modern Ag. Co.*, 446 F.3d 903 (8th Cir. 2006); *Preston v. Wisconsin Health Fund*, 397 F.3d 539 (7th Cir. 2005). See also *Kelly v. Howard I. Shapiro & Assoc.*, 716 F.3d 10 (2d. Cir. 2013)(complaints about "sexual favoritism" for paramours not protected under Title VII's anti-retaliation provisions).

³⁴ On remand in *Harris v. Forklift Sys., Inc.*, the district court limited Harris's case to the single harassing incident that occurred after she complained because the company president was unaware she was offended until she informed him that his remarks and conduct were unwelcome. *Harris v. Forklift Sys., Inc.*, 66 F.E.P. 1886 (M.D. Tenn. 1994). Small wonder the case settled.

³⁵ See *Noguchi, supra* note 8.

Moreover, in order to state a viable sexual harassment claim, there must have been a timely complaint of discrimination.³⁶ Filing a charge with the EEOC is a prerequisite for a Title VII claim. The time period for doing so is quite short---either 180 or 300 days, depending upon the jurisdiction one is in. In claims involving a hostile work environment, however, where pervasiveness often is present because numerous incidents have accumulated over time, it would be unreasonable to require *all* harassing events to have occurred within that short time frame. And the law does not impose that requirement. All the complained of conduct need not have occurred within that 180 or 300 day time period, *but at least one act* contributing to the claim must fall within it for a hostile work environment claim to be timely filed.³⁷ As for the so-called “quid pro quo” claims, those charges must be filed within the 180/300 day period.³⁸

Here is where a significant gap exists between many of the allegations publicized by the #MeToo movement and those the law regards as actionable. Many of the allegations involve conduct alleged to have occurred many years or even many decades ago. Such claims would be dismissed out of hand were they to be pursued in a court of law, as opposed to being publicized in the media, social or mainstream. As the Supreme Court has stated, “a discriminatory act which is not made the basis for a timely charge ...is merely an unfortunate event in history which has no present legal consequences.”³⁹

³⁶ 42 U.S.C. § 2000e-5(e)(1)(Section 706).

³⁷ Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101 (2002). Of course, some conduct that would constitute sexual harassment under Title VII could also form the basis of a state law tort claim alleging assault, battery, intentional infliction of emotional distress or even wrongful discharge in violation of public policy. If a governmental employer is involved, there may even be a possible constitutional claim for gender discrimination. Such claims would expand the time period for bringing suit to 2-3 years, generally speaking. While this article's focus is on Title VII, it is important to remember that additional remedies for harassment may be found.

³⁸ *Id.* For a good discussion of the limitation periods for filing sexual harassment claims and the impact on the #MeToo movement, see *Law Talk with BJ: #MeToo Meets the Law: A Discussion of Sexual Harassment Law*, (Feb. 28, 2018) (downloaded using iTunes).

³⁹ *United Air Lines v. Evans*, 431 U.S. 553, 558 (1977).

So why, then, are men losing their jobs over conduct that is alleged to have occurred many years ago?⁴⁰ Perhaps it is because their employers are in the public eye and are particularly sensitive to negative press coverage. When the employer is the New York Times, the New Yorker, NBC, CBS, Fox or ABC News, organizations that have been aggressively pursuing #MeToo news stories against other employers, this explanation seems particularly apt.⁴¹ Moreover, when the alleged harasser is high profile, allegations against him can drag his employer into the public eye, leading that employer to want to distance itself from the allegations in order to avoid a negative impact on its bottom line.

But in the typical workplace, when neither the employer nor the alleged harasser is particularly high profile or newsworthy (in other words, in the workplaces where most people work), are employers firing their employees based on newly made accusations of wrongdoing alleged to have occurred years ago? It's hard to say, but it's not likely. Memories fade, witnesses are often unavailable, and thus determining what happened in the distant past is a daunting task. While employers certainly can, in the usual case, fire employees for whatever reason they wish, including on the basis of a stale and unproven allegation of harassment (more about that later), they are unlikely to do so, particularly if the worker accused has an otherwise unblemished record and/or is a productive worker who enhances the employer's bottom line.

That does not mean that a prudent employer should ignore harassment allegations that would be time barred by the statute. To the extent they can be investigated, they should be. And even if there can be no effective investigation due to the passage of time, having the allegations on file may prove important should future allegations be made. The #MeToo movement may

⁴⁰ See GLAMOUR, *supra* note 4, for a description of the repercussions that have followed reports of sexual misconduct, even misconduct alleged to have occurred in the distant past.

⁴¹ See *Law Talk*, *supra* note 38.

shape how employers respond to stale claims, encouraging employers to treat them seriously, to open investigations, and to keep the accusations on file, even when the results of any investigation are inconclusive.

II. Employer Liability

There is more standing in the way of actionable claims. For Title VII purposes, it's not enough that the conduct be sex-based, unwelcome and sufficiently severe or pervasive. It also must be attributable to a statutory employer, either directly or vicariously. Otherwise, it does not violate Title VII. Title VII prohibits discrimination by employers, not by the world at large, or even by supervisors in their individual capacity.⁴²

In *Burlington Industries, Inc. v. Ellerth*⁴³ and *Faragher v. City of Boca Raton*⁴⁴, the Supreme Court confronted this issue head on. In the wake of *Meritor* and *Harris*, lower courts had divided the universe of sexual harassment claims into two categories. Quid pro claims, those in which the employee experiences a job detriment as a result of sexual harassment, like being fired or being denied a promotion for refusing to sleep with the boss, were uniformly viewed as appropriately tagged to the employer. Just as if an employee had been fired because of his race, a worker fired for refusing to sleep with the boss was a claim for which the employer could be held responsible, even if the action was against company policy and the higher ups were wholly unaware of the impermissible motivation for the termination. But when it came to hostile work environment claims, courts followed a different path. Was it fair, they asked, to hold employers

⁴² See generally Rebecca Hanner White, *Vicarious and Personal Liability for Employment Discrimination*, 30 GA. L. REV. 509 (1996).

⁴³ 524 U.S. 742 (1998).

⁴⁴ 524 U.S. 775 (1998).

automatically liable when a supervisor creates a hostile work environment, one that results in no tangible job detriment to an employee? Most courts said no; only if the employing entity knew or should have known of the harassing conduct and failed to take steps to correct it should the employer be on the hook.⁴⁵

This state of the law resulted in elaborate judicial discussions about whether the harassment alleged fit into the quid pro quo category, as opposed to falling on the hostile work environment side of the line. If a supervisor's comments, for example, created the impression that a failure to accede to his requests for sexual favors would result in a loss of job opportunities but there was no follow through on that threat, was that quid pro quo or hostile work environment?⁴⁶ What if the job actions resulting from a failure to accede took the form of a heightened share of more onerous assignments, but assignments within the job description and carrying no economic consequence?⁴⁷ If these examples were viewed as quid pro quo harassment, then the employer would be liable, and a claim would exist. If they were instead viewed as "merely" the creation of a hostile work environment, then there would be no employer liability, and thus no claim, unless the employer was aware of the harassment and failed to act. The seventh circuit's en banc decision in *Ellerth* is a good illustration of this dilemma; the en banc case resulted in eight separate opinions wrestling with the question of whether the conduct alleged should be properly categorized as quid pro quo (for which the employer would be vicariously liable for the harassment) or as a hostile work environment (for which it would be liable only if it were deemed to have been negligent).

⁴⁵ *Ellerth*, 524 U.S. at 751-54 (describing the approach of the lower courts).

⁴⁶ The *Ellerth* case, for example, involved threats, not carried out, to retaliate against Ellerth if she refused her supervisor's sexual overtures.

⁴⁷ The *Faragher* case, for example, involved such a scenario.

In its decision in *Ellerth* and the companion case of *Faragher*, the Supreme Court eschewed these labels. The issue, the Court recognized, was when, under the statute, the employer should be held liable, directly or vicariously, for sexual harassment that occurs in its workplace.⁴⁸

Turning to the Restatement of Agency, the Court held as follows. First, if the harassment results in a tangible job action, then the employer is automatically vicariously liable. This vicarious liability results from the agency relationship. But for the power vested in the supervisor by the employer, the wrong could not have occurred. It is the supervisor's status *as supervisor* that enables him to take the tangible job action. Those without supervisory status cannot, the Court reasoned, take tangible job actions, and thus it is appropriate to hold the employer liable for the tangible job actions its agent could not have taken without that authority.⁴⁹

Hostile work environments, on the other hand, do not necessarily depend upon supervisory status for their creation. Even co-workers can create a hostile work environment. Accordingly, the Court drew a distinction between the two forms of harassment, when it comes to employer liability, by creating an affirmative defense in hostile work environment claims.⁵⁰ If the hostile work environment occurs at the hands of a supervisor, employer liability will be *presumed*; the Court recognized the supervisor's status as supervisor may well make it easier for him to create the hostile environment.⁵¹ But that presumption, importantly, can be rebutted. If

⁴⁸ *Ellerth*, 524 U.S. at 754.

⁴⁹ *Id.* at 760-63. *See also Faragher*, 524 U.S. at 785-804 for a discussion of the reasons for automatic vicarious liability in cases involving tangible acts of discrimination and the affirmative defense for hostile work environment claims.

⁵⁰ *Id.* at 763-65.

⁵¹ *Faragher*, 524 U.S. at 803.

“When a person with supervisory authority discriminates in the terms and conditions of subordinates' employment, his actions necessarily draw upon his superior position over the people who report to him, or those under them, whereas an employee generally cannot check a supervisor's abusive conduct the same

the employer can prove (1) that it took reasonable steps to prevent and to correct the hostile work environment created by its supervisor *and* (2) if the victim unreasonably failed to take advantage of corrective or preventive measures or to avoid harm otherwise, then the employer can avoid liability.⁵²

Ellerth and *Faragher*, of course, left questions in their wake. What constitutes a tangible job action? For example, is a constructive discharge a tangible job action for which the employer is automatically liable? Not necessarily, according to the Court in *Pennsylvania State Police v. Suders*.⁵³ Who counts as a supervisor, as opposed to a co-worker, in cases involving hostile work environments? Only someone, said the Court in *Vance v. Ball State University*,⁵⁴ who has been empowered to take tangible job actions against the particular victim; tangible job actions were described as those effecting “a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”⁵⁵ Absent such authority, no vicarious employer liability will exist.

In sum, Title VII thus does not operate as a blanket prohibition against inappropriate sex-based behavior in the workplace. To date, courts have required that the conduct be fairly egregious to be considered severe or pervasive. They have been unwilling to presume that an

way that she might deal with abuse from a co-worker. When a fellow employee harasses, the victim can walk away or tell the offender where to go, but it may be difficult to offer such responses to a supervisor, whose ‘power to supervise -- [which may be] to hire and fire, and to set work schedules and pay rates -- does not disappear . . . when he chooses to harass through insults and offensive gestures rather than directly with threats of firing or promises of promotion.’ Estrich, *Sex at Work*, 43 *Stan. L. Rev.* 813, 854 (1991). Recognition of employer liability when discriminatory misuse of supervisory authority alters the terms and conditions of a victim’s employment is underscored by the fact that the employer has a greater opportunity to guard against misconduct by supervisors than by common workers; employers have greater opportunity and incentive to screen them, train them, and monitor their performance.” *Id.*

⁵² *Id.* at 765. It is important for lower courts to remember that this is a disjunctive, not a conjunctive, standard. If the employer cannot establish one prong of the defense, it loses, even if it can establish the other.

⁵³ 542 U.S. 129 (2004).

⁵⁴ 570 U.S. 421 (2013).

⁵⁵ *Id.* at 429.

imbalance of power necessarily equates to unwelcomeness when it comes to romantic overtures. And the law places on the victim, in cases where no tangible job action is at issue, the burden of speaking up, of making use of whatever employer anti-harassment policies are in place. Otherwise, her claim may be forfeited. And, even where all these requisites have been met, she must file a charge with the EEOC in a timely manner.

To see how uncertain the terrain is, let's imagine an employee whose supervisor puts his hand on her thigh during a performance review. We'll make the hypo a little easier by giving him hiring and firing authority, thus cementing his supervisory status under *Vance*. She believes that pushing his hand away or telling him to stop will affect her performance evaluation, although he never says as much. She does not push his hand away, and she does not report him to HR even though she is aware of her company's policy against sexual harassment. She gets a glowing performance evaluation. Does she have a Title VII claim? The answer, as you should understand by now, is not so simple.

Was there a tangible job action? Presumably not. Thus, there would be no automatic employer liability here.

Does his placing his hand on her thigh create a hostile work environment? Assuming this is a one time event, the answer is not clear. Courts have found actions more egregious than this to not rise to the requisite level, although the fact that it occurred in the context of a discussion about her job performance may well (and I believe should) affect the analysis. And it's certainly possible that this is where the #MeToo movement could have an impact, with the widespread discussion in the media about workplace harassment and its impact on women leading decisionmakers to view conduct such as this as sufficiently severe, even if not pervasive.

But what about the affirmative defense? Even though he is a supervisor within the meaning of *Vance* and even if we assume his conduct meets the threshold for severity (a very high bar), her employer has a policy against workplace harassment, one that she is well aware of. And she has failed to make use of it. Thus, even if the requisites for a claim were otherwise met, the affirmative defense likely would be found satisfied here. The employer has taken the steps it can take to correct and prevent harassment and, as the law stands now, she would be viewed as unreasonably failing to take advantage of those steps.

But wait. This is a pretty heavy burden to put on her, isn't it? She didn't cross any lines in the workplace; he did. And now she must shoulder the burden of reporting his conduct and risking the negative job consequences that may flow from that reporting. There is always the possibility she won't be believed. Sexual harassment claims are often matters of she said/he said, and if he denies the conduct happened, where does that leave her?

Of course, were she to make a complaint against him, the company could fire him merely on the basis that an allegation was made without risking any liability under Title VII.⁵⁶ But most companies, at least until now, have been loath to fire productive supervisory personnel on the

⁵⁶ See Elizabeth Chuck, *Accusations in the MeToo Era: How Companies Handle Complaints*, NBC NEWS (Dec. 1, 2017, 8:27 AM) <https://www.nbcnews.com/storyline/sexual-misconduct/accusations-metoo-era-how-companies-handle-complaints-n829326> (“employment attorneys and human resource experts say terminating or suspending an employee who faces unproven allegations of sexual harassment is often the safest decision a company can make to protect other employees. It’s also completely legal in most states, they add.”). This has been standard advice for years, and not simply to protect other employees. The advice is given to protect the company should a claim be brought or future allegations be made. This advice is grounded in the assumption that the alleged harasser is at will, as most workers in this country are. An at will employee is one who lacks protection against dismissal, with or without cause. Some alleged harassers, however, do have protection against firing without good cause, such as those who have a fixed term contract or who work under a collective bargaining agreement or other arrangements that prevent terminations without just cause. In those situations, firing a worker over unproven allegations of harassment can result in litigation. For example, James Levine, recently fired by the Metropolitan Opera after the New York Times reported allegations of harassment dating back to 50 years ago, has sued for breach of contract. See Michael Cooper, *James Levine, Fired Over Abuse Allegations, Sues the Met Opera*, N.Y. TIMES (Mar. 15, 2018).

basis of uncredited allegations of harassment.⁵⁷ And since much harassment takes place without witnesses looking on, determining whether allegations are true is often difficult. So our victim, should she complain, likely now will continue to work with a supervisor she has accused of making a pass at her, with the at best awkward work environment that may result. No wonder she may think twice before making a complaint.

III. Retaliation

Let's change our hypothetical a bit. Let's assume she does follow her company's internal procedure and report the incident. Even if the company takes no action against her supervisor, either because it deems the allegation insufficiently serious or not credited, she's now protected from retaliation, isn't she? In other words, surely she can't be punished because she did what the company's policy encouraged her to do?

Not so fast. Title VII does prohibit discrimination against those who have filed charges or who have otherwise opposed actions prohibited by the statute.⁵⁸ When a worker uses the

⁵⁷ As noted earlier, the #MeToo movement's allegations against prominent men have resulted in adverse action against them, even when the allegations have been denied and are unproven. See *supra* notes 4, 40-41. And, as noted above, for many years, employment lawyers routinely have advised their clients that the safer course of action in cases where it is unclear whether the alleged harassment occurred is to simply fire the person alleged to have done the harassing. His ability to recover for the termination, particularly if he is at will, often poses a much lower risk to the employer than doing nothing and having to defend against subsequent allegations. But a quick perusal of the caselaw does not show employers following that path to date.

⁵⁸ 42 U.S.C. § 2000e-3(a). Protection under the participation clause has been deemed pretty much absolute by the courts; participation conduct involves actions such as filing a charge with the EEOC, filing a lawsuit or testifying at trial. Protection for opposition conduct (opposing without formal charges of discrimination) is far from absolute. To date, internal complaints have been deemed opposition, not participation, conduct. See *Clark County School District v. Breeden*, 532 U.S. 268 (2001). In *Crawford v. Metro. Gov't of Nashville & Davidson County*, 555 U.S. 271 (2009), the Court held that participation in an employer's investigation of a complaint is opposition conduct; it declined to address whether it could also be protected under the participation clause.

statute's formal mechanisms to complain, her protection against retaliation is pretty much ironclad. When she opposes through other means, her protection is less certain.⁵⁹

In our hypothetical, the worker filed no charges with the EEOC,⁶⁰ but she did oppose the conduct, making use of her company's anti-harassment policy. However, is what she complained of in fact prohibited by the statute? Probably not, as the law currently stands. Recall that we wondered whether this one time incident, even assuming her allegation was deemed credible, would meet the requisite level of severity. If not, then she would have no claim for sexual harassment. And if what she was reporting was not in fact sexual harassment, would she have protection against retaliation for reporting it to her employer?

The lower courts, for the most part, have read the statute to protect not only opposing what is in fact unlawful but also conduct that a victim reasonably and in good faith believes is unlawful.⁶¹ In other words, even if a court were to determine that discrimination in fact did not occur, if our hypothetical victim reasonably and in good faith believed she was the victim of harassment, her internal complaint would be protected against retaliation. The Supreme Court, however, has not yet embraced this reading of the statutory language, suggesting that it may require that conduct in fact be unlawful before complaints about it will be protected.⁶²

⁵⁹ See *infra* notes 61-64.

⁶⁰ And had she done so on the basis of this incident alone, her claim for sexual harassment would likely have been unsuccessful for the reasons discussed in Section II above.

⁶¹ See, e.g., *EEOC v. Rite Way Serv.*, 819 F.3d 235 (5th Cir. 2016); *Clark v. Cache Valley Elec. Co.*, 573 F. App'x. 693 (10th Cir. 2014).

⁶² *Clark County School District v. Breeden*, 532 U.S. 268, 270 (2001).

"The Court of Appeals for the Ninth Circuit has applied § 2000e-3(a) to protect employee "opposition" not just to practices that are actually "made . . . unlawful" by Title VII, but also to practices that the employee could reasonably believe were unlawful. 2000 U.S. App. LEXIS 17564, 2000 WL 991821, at *1 (stating that respondent's opposition was protected "if she had a reasonable, good faith belief that the incident involving the sexually explicit remark constituted unlawful sexual harassment"); *Trent v. Valley Electric Assn. Inc.*, 41 F.3d 524, 526 (CA9 1994). We have no occasion to rule on the propriety of this interpretation, because even assuming it is correct, no one could reasonably believe that the incident recounted above violated Title VII." *Id.*

The lower courts, however, have continued to find opposition conduct protected if employees had a reasonable, good faith belief that what they were opposing was unlawful.

But assuming that a reasonable and good faith belief is sufficient, as the lower courts have done, does she have one here? We will assume she made the report in good faith, but is it reasonable for her to believe that this one time incident rises to the requisite level of severity?⁶³ There is obviously some room between conduct the law in fact condemns as unlawful and conduct that is not unlawful but that a reasonable person could well believe is. In other words, even if not unlawful, her complaints about the conduct could still be protected.⁶⁴

Here, too, the #MeToo movement may have another impact. To the extent there is a growing awareness and recognition of the harms of sex based harassment, courts may be more willing to find a victim's belief that an unwanted touching or suggestive comments violated the law to be reasonable, even if the conduct itself does not meet the standard.

The *Ellerth* Court's affirmative defense, with the burden placed on victims to speak up, also suggests that an even wider berth of protection should be given to those who make use of their company's internal procedures, as several commentators, and even a few courts, have noted.⁶⁵ The purpose of the affirmative defense, after all, is to allow the employer to prevent and correct inappropriate behavior before it rises to the requisite level of severity or pervasiveness. As the Court observed, employers and employees want workplaces free of harassment, not lawsuits.⁶⁶ And the affirmative defense was one the Court essentially read into the statute. Thus, it could be viewed as participation conduct, as some commentators have urged.

⁶³ Courts have often found internal complaints of sexual harassment unprotected when the conduct that is alleged to have occurred is not sufficiently severe or pervasive, a result that has drawn much criticism from commentators. See, e.g., Ernest F. Lidge, III, *The Necessity of Expanding Protection from Retaliation for Employees Who Complain About Hostile Environment Harassment*, 53 U. Louisville L. Rev. 39 (2014); Deborah Brake, *Retaliation in an EEO World*, 89 Ind. L.J. 115 (2014); Craig Robert Senn, *Redefining Protected "Opposition" Activity in Employment Retaliation Cases*, 37 Cardozo L. Rev. 2035 (2016).

⁶⁴ See *Boyer-Liberto v. Fountainbleau Corp.*, 786 F.3d 264, 284 (4th Cir. 2015)(en banc)("an employee will have a reasonable belief that a hostile work environment is occurring based on an isolated incident if that harassment is physically threatening or humiliating.").

⁶⁵ See *Boyer-Liberto v. Fountainbleau Corp.*, 786 F.3d 264 (4th Cir. 2015)(en banc) and sources cited infra note 67.

⁶⁶ Faragher, 524 U.S. at 805-06.

Absolutely protecting those who speak out at the earliest opportunity, before the conduct can progress to severe or pervasive proportions, would seem in keeping with the Court's creation of the affirmative defense. Accordingly, regarding such activity as within the reach of the statute's participation clause, with its absolute protection, would seem in keeping with the goals of the affirmative defense.⁶⁷

That, however, to date has not occurred.⁶⁸ The Supreme Court, in *Crawford v. Metro Government of Nashville and Davidson County*, held that participation in an internal investigation was opposition conduct but declined to determine whether it should fall within the participation clause.⁶⁹ Lower courts have found such internal complaints to be opposition, not participation, conduct, thus leaving those who complain subject to the "reasonable, good faith" test. Thus, while the affirmative defense pushes workers to speak up promptly to allow harassing behavior to be nipped in the bud, the anti-retaliation provision has not been read to protect all such complaints. As has been pointed out, there is an inconsistency between an affirmative defense that places on victims the onus of speaking up and an interpretation of the anti-retaliation provision that declines to protect all those who do.⁷⁰

Here again, #MeToo may prove influential. Women are speaking up, at least to reporters and through social media, but usually only after they've left the job. If they are to take the crucially important step of speaking up in their workplaces, they need to know they will be protected from retaliation when they do. Harmonizing the *Ellerth/Faragher* affirmative defense with the reach of Title VII's anti-retaliation provisions is a step the Court readily could, and

⁶⁷ See Edward A. Marshall, *Excluding Participation in Internal Complaint Mechanisms From Absolute Retaliation Protection: Why Everyone, Including the Employer, Loses*, 5 Emp. Rts. & Emp. Pol'y J. 549 (2001); Brake, *supra* note 63; Dorothy E. Larkin, Note, *Participation Anxiety: Should Title VII's Participation Clause Protect Employees Participating in Internal Investigations*, 33 Ga. L. Rev. 1181 (1999).

⁶⁸ See, e.g., *EEOC v. Total Sys. Servs., Inc.*, 221 F.3d 1171 (11th Cir. 2000).

⁶⁹ 555 U.S. 271 (2009).

⁷⁰ See sources cited *supra* note 67.

should, take without need for a statutory amendment (although a statutory amendment could certainly do the job as well). The affirmative defense was read into the statute by the Court, and when the question comes before it, reading Section 704 in a manner that helps the affirmative defense work best to do its job would make the statute more cohesive and more consistent with the Court's *Ellerth* and *Faragher* decisions.

This could happen in one of two ways. First, the Court, when it confronts the question left unanswered in *Crawford*, could hold that internal complaints and their investigation fall within the absolute protections of the participation clause. Second, the courts could (and should) be particularly generous in their construction of "reasonable, good faith belief" when it comes to allegations of sexual harassment. Not only is the line between lawful and unlawful often unclear, but employers' own policies encourage employees to bring forward complaints at the earliest opportunity in order to avoid conduct developing into harassment that may reasonably be viewed as severe or pervasive.

IV. Conclusion

The #MeToo movement is shining an unprecedented light on the sex-based conduct that has been for too long a fact of life in too many workplaces. Even with a federal law prohibiting sexual harassment, such conduct has flourished. This essay focuses on the disconnect between the law and the popular conception of it, an explanation of the current state of the law as it has been interpreted and applied, and the possibility for evolving societal norms, as reflected in the #MeToo movement, to reshape the law. Understanding the law as it presently exists, not just as

we wish it existed, is a crucial step in evolving the law to become what society wants the law to be. To reference another hashtag of the movement, #Times Up.