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Severe or Pervasive Should Not Mean Impossible and Unattainable: Why the "Severe or Pervasive" Standard for a Claim of Sexual Harassment and Discrimination Should Be Replaced with a Less Stringent and More Current Standard

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SEVERE OR PERVASIVE SHOULD NOT MEAN IMPOSSIBLE AND UNATTAINABLE: WHY THE "SEVERE OR PERVASIVE" STANDARD FOR A CLAIM OF SEXUAL HARASSMENT AND DISCRIMINATION SHOULD BE REPLACED WITH A LESS STRINGENT AND MORE CURRENT STANDARD

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I. INTRODUCTION

Since 2017, the "#MeToo" and "TimesUp" movements have spurred action regarding ending workplace harassment.[1] As of late, "state lawmakers across the country have been working to meet the bravery of the survivors coming forward by enacting meaningful, substantive policy reforms to stop and prevent sexual harassment."[2] However, despite these state laws expanding workplace protections for sexual harassment victims, "[t]he COVID-19 economic crisis has left workers more desperate to keep a paycheck and, thus, more vulnerable to workplace harassment, underscoring the urgent need for stronger workplace harassment laws . . . ."[3] Even before the COVID-19 pandemic upended workplace culture in the United States, according to a survey conducted by the National Women's Law Center[4]

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1. For example, in an Equal Employment Opportunity Commission ("EEOC") Press Release dated June 11, 2018, entitled the "EEOC Select Task Force on Harassment Hears from Experts on How to Prevent Workplace Harassment," Suzanne Hultin of the National Conference of State Legislatures:

> [T]estified that over "125 pieces of legislation have been introduced this year in 32 states." Hultin noted that many states are looking to go beyond federal regulations to prevent workplace sexual harassment. She projected that proposals to address and prevent harassment would continue to be a priority for state legislatures this year and next.

EEOC Select Task Force on Harassment Hears from Experts on How to Prevent Workplace Harassment, U.S. EQUAL EMP. OPPORTUNITY COMM'N (June 11, 2018), https://www.eeoc.gov/newsroom/eeoc-select-task-force-harassment-hears-experts-how-prevent-workplace-harassment.

2. ANDREA JOHNSON ET AL., NAT'L WOMEN'S L. CTR., PROGRESS IN ADVANCING ME TOO WORKPLACE REFORMS IN #20STATESBY2020 2 (2019), https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/07/20-States-By-2020-report.pdf; *see* Andrew R. Turnbull & Cooper J. Spinelli, *Is Time Up for the Severe or Pervasive Standard? Harassment Claims in 2020 and Beyond*, MORRISON FOERSTER EMP. L. COMMENT. (Feb. 11, 2020), https://elc.mofo.com/topics/Is-Time-Up-For-The-Severe-Or-Pervasive-Standard-.html.

3. Samone Ijoma & Andrea Johnson, *Maryland Must Join the Movement to Modernize Workplace Harassment Law*, NAT'L WOMEN'S L. CTR. (Mar. 24, 2021), https://nwlc.org/blog/maryland-must-join-the-movement-to-modernize-workplace-harassment-law.

4. The National Women's Law Center, [founded in 1972,] fights for gender justice—in the courts, in public policy, and in our society—working across the issues that are central to the lives of women and girls. We use the law in all its forms to change culture and

published on May 3, 2019, 66% of voters thought it was "important for Congress to prioritize preventing sexual harassment and assault" and "90% support[ed] strengthening protections against sexual harassment and sexual violence in the workplace and in schools."[5]

As of today, "[f]rom New York to California to Virginia, there is growing movement in states and localities to remove harmful barriers that workplace harassment survivors face when bringing claims against their employers."[6] For example, California and New York deleted the severe or pervasive requirement for filing a claim, and a number of other states and counties considered legislation to do this, as well. Additionally, numerous states now prohibit or limit employers from requiring employees to sign nondisclosure agreements ("NDAs") as a condition of employment or as part of a settlement, prohibit or limit provisions regarding arbitration agreements, and require anti-harassment training for employees and employers.[7] Additionally, other reforms have included extending protection to individuals beyond employees and including smaller employers, as well as extending the statute of limitations to remove barriers to accessing justice, and closing a loophole in employer liability.[8]

Despite this positive trend, a considerable amount of work still needs to be done to ensure that all states protect survivors and ensure access to justice for those individuals. Specifically, "[o]ne of the ways community-based organizations are mobilizing around these issues is in support of legislation that disavows the harmful and outdated requirement that harassing conduct be 'severe or pervasive' to be considered unlawful."[9] Thus, one clear-cut way to strengthen access to justice for victims is to delete the severe or pervasive requirement and establish a new, less stringent standard for filing a claim, as "[t]he 'severe or pervasive' standard does not reflect the realities of our workplaces, power dynamics, or modern understandings of harassment at work and its impacts on those who experience it."[10]

> drive solutions to the gender inequity that shapes our society and to break down the barriers that harm all of us—especially women of color, LGBTQ people, and low-income women and families. For nearly 60 years, we have been on the leading edge of every major legal and policy victory for women.

About, NAT'L WOMEN'S L. CTR, https://nwlc.org/about (last visited Oct. 13, 2021).

5. *NWLC Survey Finds Overwhelming Support for Gender Justice Policies*, NAT'L WOMEN'S L. CTR. (May 3, 2019), https://nwlc.org/resources/nwlc-survey-finds-overwhelming-support-for-gender-justice-policies.

6. Ijoma & Johnson, *supra* note 3.

7. JOHNSON ET AL., *supra* note 2, at 2.

8. *Id.* at 5, 9-10.

9. Ijoma & Johnson, *supra* note 3.

10. *Id.*

Therefore, this Article will discuss that although the federal government can and should minimize the "severe or pervasive" standard, states and local governments should lead this charge to ensure that their citizens have adequate access to justice for sexual harassment and discrimination claims, and to put would-be harassers on notice that harassment and discrimination will not be tolerated. The Article will begin by discussing the origins of sexual harassment and discrimination protection, and specifically, the "severe or pervasive" standard.[11] Next, it will address how certain states and local jurisdictions have removed and/or replaced the "severe or pervasive" standard with a more sensible and up-to-date standard.[12] Then, the Article will address that although eliminating NDAs and prohibiting mandatory arbitration provisions are positive changes, these changes are not enough. Finally, the Article will argue that it is imperative that all states enact laws to change the "severe or pervasive" standard to a less stringent and more realistic, current standard.[13]

II. ORIGINS OF SEXUAL HARASSMENT AND DISCRIMINATION PROTECTION AND, SPECIFICALLY, THE "SEVERE OR PERVASIVE" STANDARD

There is a rich statutory and case law history leading to the current "severe or pervasive" standard for sexual harassment claims. The beginnings of workplace protections for women took shape in 1963 when Congress passed the Equal Pay Act, "which protects men and women who perform substantially equal work in the same establishment from sex-based wage discrimination."[14] The following year, Title VII of the Civil Rights Act of 1964 ("Title VII") was enacted.[15] The basis for sexual harassment claims originates with Title VII, as Title VII specifically states that:

> It shall be an unlawful employment practice for an employer –
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any

11. *See infra* Part II.
12. *See infra* Part III.
13. *See infra* Part V.
14. *Timeline of Important EEOC Events*, U.S. EQUAL EMP. OPPORTUNITY COMM'N https://www.eeoc.gov/youth/timeline-important-eeoc-events (last visited Oct. 13, 2021).
15. 42 U.S.C. § 2000e-2(a) (1964).

> individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[16]

Thus, Title VII provides the basis for protection from sexual harassment and discrimination.[17] Although it does not itself lay out specific language regarding the protections afforded for sexual harassment and discrimination, it does explicitly prohibit employment discrimination based on one's sex.[18] Generally, Title VII attempts to remove "arbitrary barriers to sexual equality at the workplace"[19] and is specifically designed to protect an individual from being discriminated against "with respect to his compensation, terms, conditions, or privileges of employment."[20]

In 1965, the Equal Employment Opportunity Commission ("EEOC") was established to enforce the requirements set out in Title VII.[21] Specifically, "[t]he U.S. Equal Employment Opportunity Commission (EEOC) is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's . . . sex (including pregnancy, gender identity, and sexual orientation) . . . ."[22]

On January 14, 2015, the EEOC held a public meeting entitled "Harassment in the Workplace," with the purpose of the meeting being to "examine the issue of workplace harassment[–]its prevalence, its causes, and strategies for prevention and effective response. At the start of that meeting, EEOC Chair Jenny R. Yang announced the formation of EEOC's Select Task Force on the Study of Harassment in the Workplace ("the Select Task Force")."[23] In Chair Yang's Opening Statement at that Harassment in the Workplace Meeting ("Workplace Harassment Meeting") of the EEOC, she stated that the goal of the Select Task Force was to:

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16. *See id.* ("The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees."); *see also Facts About Sexual Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/publications/fs-sex.cfm (last visited Oct. 13, 2021).

17. 42 U.S.C. § 2000e-2(a).

18. *Id.*

19. Henson v. City of Dundee, 682 F.2d 897, 901 (11th Cir. 1982).

20. 42 U.S.C. § 2000e-2(a)(1).

21. *Timeline of Important EEOC Events*, *supra* note 14.

22. *Overview*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/index.cfm (last visited Oct. 13, 2021).

23. CHAI R. FELDBLUM & VICTORIA A. LIPNIC, U.S. EQUAL EMP. OPPORTUNITY COMM'N, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (2016).

> [C]onvene experts across the employer, employee, human resources, academic, and other communities to identify strategies to prevent and remedy harassment in the workplace. Through this task force, we hope to reach more workers so they understand their rights and also to reach more in the employer community so we can understand the challenge that they face and promote some of the best practices that we've seen working.[24]

After the Select Task Force was assembled, they spent the next eighteen months holding a series of meetings (some public, some closed work sessions, and some private), receiving testimony from witnesses and numerous public comments.[25] As a result, in June 2016, the Co-Chairs of the EEOC's Select Task Force, Chai R. Feldblum and Victoria A. Lipnic, presented the Report of the Co-Chairs of the EEOC Select Task Force on the Study of Harassment in the Workplace ("EEOC Report").[26] The Preface of EEOC Report began by highlighting that although over thirty years ago, in *Meritor v. Savings Bank*, "the U.S. Supreme Court recognized claims for sexual harassment as a form of discrimination based on sex under Title VII of the Civil Rights Act of 1964" and "[i]n the years that followed, courts have filled in the legal landscape even further," that "[s]ix years ago, when we came to EEOC as commissioners, we were struck by how many cases of sexual harassment EEOC continues to deal with every year."[27]

In 2018, the Select Task Force met again "to hear from expert witnesses on '*Transforming #MeToo Into Harassment-Free Workplaces*' at a meeting open to the public."[28] The Acting EEOC Chair, Victoria Lipnic, stated that the 2016 EEOC Report "laid the groundwork for the launch of a renewed effort to prevent harassment."[29] During that meeting, "[l]egal scholars and attorneys who represent workers and employers highlighted a range of issues raised in the wake of high-profile allegations of sexual harassment since October 2017 and the rise in the #MeToo and #TimesUp movements."[30] Some of the issues raised included: the benefits of arbitration; the potential for a counterproductive result if NDAs are prohibited, as they could lead to

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24. *See id.*; *see also* Kristy D'Angelo-Corker, *Don't Call Me Sweetheart! Why the ABA's New Rule Addressing Harassment and Discrimination Is So Important for Women Working in The Legal Profession Today*, 23 LEWIS & CLARK L. REV. 263, 275 (2019).

25. FELDBLUM & LIPNIC, *supra* note 23.

26. *Id.*

27. *Id.*

28. *EEOC Select Task Force on Harassment Hears from Experts on How to Prevent Workplace Harassment*, *supra* note 1.

29. *Id.*

30. *Id.*

increased litigation rather than private resolution; the fact that many state legislatures have introduced proposals addressing sexual harassment; the strategies developed to promote a workplace free of harassing conduct; and the need for sexual harassment training.[31] Thus, the meeting reviewed many of the current strategies being used to combat sexual harassment and discrimination in order to determine next steps or areas of improvement.

Notably, according to the EEOC, in 2020, all charges alleging harassment totaled over 24,000.[32] Over the years, the number of sexual harassment claims filed with the EEOC has remained steady,[33] such that 11,497 sex-based harassment charges were filed in fiscal year 2020, and the charges filed in fiscal years 2010 through 2020 similarly ranged between 11,000 to just over 13,000.[34] Of the charges filed in 2020, 6,587 of those specifically alleged sexual harassment[35] with those charges resulting in monetary benefits totaling $65.3 million.[36] On average, only approximately sixteen to just under eighteen percent of the claims are brought by males,[37] indicating that a large majority of the claims are brought by women. Thus, there is a clear need to protect women in the workplace, as sexual harassment and discrimination are still prevalent.

Thus, according to the EEOC's Fact Sheet on Sexual Harassment and Discrimination ("EEOC Fact Sheet"), sexual harassment is defined as:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when submission to or rejection of this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance or creates an intimidating, hostile, or offensive work environment.[38]

The EEOC Fact Sheet explicitly outlines that:

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31. *Id.*

32. *All Charges Alleging Harassment (Charges filed with EEOC) FY 2010 – FY 2020*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/statistics/all-charges-alleging-harassment-charges-filed-eeoc-fy-2010-fy-2020 (last visited Oct. 13, 2021).

33. *Id.*

34. *Id.*

35. *Id.* The EEOC Report Executive Summary highlighted that "[w]orkplace [h]arassment [r]emains a [p]ersistent [p]roblem" and went on to note that as of the total number of harassment charges received in 2015, "that alleged harassment from employees working for private employers or for state and local government employers, approximately . . . 45% alleged harassment on the basis of sex." FELDBLUM & LIPNIC, *supra* note 23.

36. *All Charges Alleging Sex-Based Harassment (Charges filed with EEOC) FY 2010 – FY 2020*, *supra* note 32.

37. *Id.*

38. *Facts About Sexual Harassment*, *supra* note 16.

> Sexual harassment can occur in a variety of circumstances, including but not limited to the following:
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> - The victim, as well as the harasser, may be a woman or a man. The victim does not have to be of the opposite sex.
> - The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a co-worker, or a non-employee.
> - The victim does not have to be the person harassed, but could be anyone affected by the offensive conduct.
> - Unlawful sexual harassment may occur without economic injury to or discharge of the victim.
> - The harasser's conduct must be unwelcome.[39]

The EEOC Fact Sheet also explains that "[w]hen investigating allegations of sexual harassment, [the] EEOC looks at the whole record: the circumstances, such as the nature of the sexual advances, and the context in which the alleged incidents occurred. A determination on the allegations is made from the facts on a case-by-case basis."[40] Finally, the EEOC Harassment page further specifies that, "[f]or inappropriate behavior to rise to the level of illegal harassment, it must be unwelcome or unwanted. It must also be severe (meaning very serious) or pervasive (meaning that it happened frequently)."[41] Thus, although the current guidance regarding sexual harassment claims from the EEOC, the agency tasked with handling it, is relatively well-defined, the road to having these protections has been arduous.

A. Early Case Law—Reed v. Reed *and* Meritor Savings Bank v. Vinson

Understanding the historical legal background providing protection from sexual harassment and discrimination lays the groundwork for understanding why the current "severe or pervasive" standard must be deleted and replaced. As of 1971, Ruth Bader Ginsburg, then a law professor at Rutgers, established the American Civil Liberties Union Women's Rights Project, which, early on, "was the major, and sometimes the only, national legal arm of the growing movement for gender equality, recognized as the spokesperson for women's interests in the Supreme Court, and the 'premier' representative of women's rights

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39. *Id.*

40. *Id.*

41. *Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/youth/harassment (last visited Oct. 13, 2021).

interests in that forum."[42] For example, the "Women's Rights Project challenged the constitutionality of sex discrimination in *Reed v. Reed*, where the Supreme Court ultimately extended 'to women equality with men under the equal protection clause of the Fourteenth Amendment.'"[43] In *Reed*, the Supreme Court stated that:

> The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[44]

Despite the Court's statements in *Reed* regarding equal protection, it was not until 1986 in *Meritor Savings Bank v. Vinson* that the concept of sexual harassment was formally recognized. Thus, although Title VII does not explicitly include sexual harassment and discrimination in the plain language of the statute, the United States Supreme Court formally recognized the concept in *Meritor Savings Bank v. Vinson*, when the Court held that sexual harassment creating a hostile or abusive work environment was a violation of Title VII.[45]

Understanding the beginnings of a hostile environment claim solidified in *Meritor* is critical, as it lays the groundwork for cases and legal landscape that follows. In *Meritor*, Mechelle Vinson brought suit against her employer, Meritor Savings Bank, and Sidney Taylor, the vice president of that bank, claiming that "during her four years at the bank she had 'constantly been subjected to sexual harassment' by Taylor in violation of Title VII."[46] Ultimately, the District Court "found that [Vinson] 'was not the victim of sexual harassment and was not the victim of sexual discrimination' while employed at the bank."[47] Additionally, "[a]lthough it concluded that [Vinson] had not proved a violation of Title VII, the District Court nevertheless went on to address the bank's liability," and "ultimately concluded that 'the bank was

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42. *The History of the ACLU Women's Rights Project*, AM. CIV. LIBERTIES UNION, https://www.aclu.org/other/history-aclu-womens-rights-project (last visited Oct. 13, 2021); *see* D'Angelo-Corker, *supra* note 24, at 276.

43. D'Angelo-Corker, *supra* note 24, at 276 (citing PHYLISS HORN EPSTEIN, WOMEN-AT-LAW: LESSONS LEARNED ALONG THE PATHWAYS TO SUCCESS 15 (2004)); Reed v. Reed, 404 U.S. 71, 77 (1971); *The History of the ACLU Women's Rights Project*, *supra* note 42.

44. 404 U.S. at 75-76 (citing F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)).

45. 477 U.S. 57, 66-67 (1986).

46. *Id.* at 60.

47. *Id.* at 61.

without notice and cannot be held liable for the alleged actions of Taylor.'"[48]

The Court of Appeals reversed the District Court's decision, "relying on its earlier holding in *Bundy v. Jackson*,"[49] where:

> The court stated that a violation of Title VII may be predicated on either of two types of sexual harassment: harassment that involves the conditioning of concrete employment benefits on sexual favors, and harassment that, while not affecting economic benefits, creates a hostile or offensive working environment. The court drew additional support for this position from the Equal Employment Opportunity Commission's Guidelines on Discrimination Because of Sex, 29 CFR § 1604.11(a) (1985), which set out these two types of sexual harassment claims.[50]

The opinion went on to explain that the Appellate Court further concluded that the claim was of the hostile environment type, and that as "the District Court had not considered whether a violation of this type had occurred, the court concluded that a remand was necessary."[51] The opinion explained that the Appellate Court also "concluded that the District Court's finding that any sexual relationship" between the parties "'was a voluntary one' did not obviate the need for a remand."[52] "'[U]ncertain as to precisely what the [district] court meant' by this finding, the Court of Appeals held that if the evidence otherwise showed that 'Taylor made Vinson's toleration of sexual harassment a condition of her employment,' her voluntariness 'had no materiality whatsoever.'"[53] Thus, the Court of Appeals ultimately reversed the judgment of the District Court and remanded the case.[54]

The Supreme Court then granted certiorari and affirmed "but for different reasons."[55] The Supreme Court began its analysis by presenting the plain language of Title VII and explaining that "[t]he prohibition against discrimination based on sex was added to Title VII at the last

48. *Id.* at 62.

49. 641 F.2d 934.

50. *Meritor*, 477 U.S. at 62.

51. *Id.*

52. *Id.*

53. *Id.* (citing Vinson v. Taylor, 753 F.2d 141, 146 (D.C. Cir. 1985)). "The court then surmised that the District Court's finding of voluntariness might have been based on 'the voluminous testimony regarding respondent's dress and personal fantasies,' testimony that the Court of Appeals believed 'had no place in this litigation.'" *Id.* at 63 (citing *Vinson*, 753 F.2d at 146 n.36). Moreover, "[a]s to the bank's liability, the Court of Appeals held that an employer is absolutely liable for sexual harassment practiced by supervisory personnel, whether or not the employer knew or should have known about the misconduct." *Id.*

54. *Id.*

55. *Id.*

minute on the floor of the House of Representatives" with the "principal argument in opposition" being "that 'sex discrimination' was sufficiently different from other types of discrimination that it ought to receive separate legislative treatment."[56] The Court further stated that "[t]his argument was defeated, the bill quickly passed as amended, and we are left with little legislative history to guide us in interpreting the Act's prohibition against discrimination based on 'sex.'"[57] It was noted that Vinson argued, "and the Court of Appeals held, that unwelcome sexual advances that create an offensive or hostile working environment violate Title VII."[58] The Supreme Court agreed and indicated that, "[w]ithout question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex."[59] Meritor Savings did not challenge that concept, but argued, instead, that Congress was more concerned with "'tangible loss' of 'an economic character,'" however, the Supreme Court flatly rejected that view based on two specific reasons.[60]

First, the Court stated that "the 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."[61] Second, "in 1980 the EEOC issued Guidelines specifying that 'sexual harassment,' as there defined, is a form of sex discrimination prohibited by Title VII."[62] The opinion went on to note that the EEOC Guidelines, although "not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance,"[63] and that they "fully support the view that harassment

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56. *Id.* at 63-64.

57. *Id.* at 64.

58. *Id.*

59. *Id.*

60. *Id.* at 64-65.

61. *Id.* at 64 (citing City of Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).

62. The Supreme Court noted that the EEOC guidelines are an "administrative interpretation of the Act by the enforcing agency." *Id.* at 65. The EEOC:

> [I]ssued guidelines declaring sexual harassment a violation of Section 703 of Title VII, establishing criteria for determining when unwelcome conduct of a sexual nature constitutes sexual harassment, defining the circumstances under which an employer may be held liable, and suggesting affirmative steps an employer should take to prevent sexual harassment.

Policy Guidance on Current Issues of Sexual Harassment, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Mar. 19, 1990), https://www.eeoc.gov/laws/guidance/policy-guidance-current-issues-sexual-harassment.

63. *Meritor*, 477 U.S. at 65.

leading to noneconomic injury can violate Title VII."[64] The Court further noted that the EEOC Guidelines define "sexual harassment" by first describing "the kinds of workplace conduct that may be actionable under Title VII" and clarified that such conduct included "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."[65] The Court went on to state that, relevant to the instant case:

> [T]he Guidelines provide that such sexual misconduct constitutes prohibited "sexual harassment," whether or not it is directly linked to the grant or denial of an economic *quid pro quo*, where "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[66]

The Court then stated that, "[i]n concluding that so-called 'hostile environment' (that is, non quid pro quo) harassment violates Title VII, the EEOC drew upon a substantial body of judicial decisions and EEOC precedent holding that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult."[67] Thus, the Court delineated the two types of sexual harassment as being quid pro quo harassment ("this for that") and hostile work environment harassment.[68]

The Court in *Meritor* noted some examples where it was shown that the protections went beyond economic considerations. For example, the Court discussed *Rogers v. EEOC*, which "was apparently the first case to recognize a cause of action based on discriminatory work environment"[69] and explained that protections under Title VII go beyond economic aspects of employment.[70] The Court stated that, in *Rogers*, "[t]he Court of Appeals for the Fifth Circuit held that a Hispanic complainant could establish a Title VII violation by demonstrating that her employer created an offensive work environment for employees by giving discriminatory service to its Hispanic clientele."[71] Specifically, the Court in *Meritor* declared that:

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64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.* at 65-66; *see* Rogers v. Equal Emp. Opportunity Comm'n, 454 F.2d 234, 238 (5th Cir. 1971).
70. *Meritor*, 477 U.S. at 65-66.
71. *Id.*

> [T]he phrase "terms, conditions or privileges of employment" in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination . . . . One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers . . . .[72]

The Court in *Meritor* then went on to note that "[c]ourts applied this principle to harassment based on race,"[73] and specifically stated that "[n]othing in Title VII suggests that a hostile environment based on discriminatory sexual harassment should not be likewise prohibited. The Guidelines thus appropriately drew from, and were fully consistent with, the existing case law."[74]

Moreover, the Court acknowledged that "[s]ince the Guidelines were issued, courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment."[75] The Court specifically referred to an Eleventh Circuit case, *Henson v. Dundee*, where the Court of Appeals stated:

> Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.[76]

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72. *Id.* at 66.

73. *Id.* (citing Firefighters Institute for Racial Equality v. St. Louis, 549 F.2d 506, 514-15 (8th Cir. 1977)); *see* Gray v. Greyhound Lines, East, 545 F.2d 169, 176 (1976). As it pertains to religion, see Compston v. Borden, Inc., 424 F. Supp. 157, 161 (S.D. Ohio 1976). As it pertains to national origin, see Cariddi v. Kan. City Chiefs Football Club, Inc., 568 F.2d 87, 88 (8th Cir. 1977).

74. *Meritor*, 477 U.S. at 66.

75. *Id.*

76. *Id.* at 67 (citing Henson v. City of Dundee, 682 F.2d 892, 902 (1982)). In *Henson*, the court discussed a number of elements required to establish a hostile environment sexual harassment claim, which included that:

> [A]n employee must show: (1) that he or she belongs to a protected group; (2) that the employee has been subject to unwelcome sexual harassment, such as sexual advances, requests for sexual favors, and other conduct of a sexual nature; (3) that the harassment must have been based on the sex of the employee; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) a basis for holding the employer liable.

Mendoza v. Borden, 195 F.3d 1238, 1245 (11th Cir. 1999) (citing *Henson*, 682 F.2d at 903-05).

The Court in *Meritor* clarified further that not all behavior that may be referred to as harassment would rise to the level of affecting a "'term, condition, or privilege' of employment within the meaning of Title VII."[77] The severe or pervasive language was solidified as the Court then stated that, "[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[78] The Court went on to state that the conduct in this case was sufficient to allow Vinson to state a claim for hostile environment sexual harassment.[79] The Court indicated that the question at hand to be determined was "whether the District Court's ultimate finding that respondent 'was not the victim of sexual harassment'"[80] was accurate. The Supreme Court found that the Court of Appeals correctly found that District Court incorrectly held as it did based on "two erroneous views of the law."[81]

First, the Court stated that the District Court erroneously made its findings believing that an economic effect had to occur, which was incorrect, and, thus, never considered the "hostile environment" theory of sexual harassment.[82] As a result, "the Court of Appeals' decision to remand was correct."[83] Second, the District Court found that there was no actionable harassment because the relationship was voluntary, however the District Court should have examined whether or not the sexual advances were "unwelcome," as that is key to a sexual harassment claim, not voluntariness.[84] Thus, the Court unequivocally stated that "[t]he correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary."[85] Ultimately, "the judgment of the Court of Appeals reversing the judgment of the District Court" was affirmed, and the case was "remanded for further proceedings."[86] Thus, in *Meritor*, the Supreme Court laid out that a hostile work environment claim for sexual harassment or discrimination must be based on unwelcome behavior which is severe or pervasive enough to create a hostile or abusive work

77. *Meritor*, 477 U.S. at 67.
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.* at 67-68.
82. *Id.*
83. *Id.* at 68.
84. *Id.*
85. *Id.* The court went on to also discuss that agency principles may be relevant with regard to employer liability. *Id.* at 70-72.
86. *Id.* at 73.

environment against an individual who is in a protected class based on their gender.

B. *Evolution of the Hostile Work Environment Claim—Case Law After* Meritor

Numerous cases came after *Meritor*, and these cases further addressed and clarified the requirements for bringing an actionable hostile work environment claim. For example, in 1993, the Court granted certiorari in *Harris v. Forklift Systems, Inc.*, to "resolve a conflict among the Circuits on whether conduct, to be actionable as 'abusive work environment' harassment . . . must 'seriously affect [an employee's] psychological well-being' or lead the plaintiff to 'suffe[r] injury.'"[87] In *Harris*, a former employee filed a Title VII action claiming that the conduct of the company's president created an "abusive work environment" as a result of her gender, such that he often directed unwanted sexual innuendos at her and insulted her based on her gender.[88] The Court began its examination of the conflict among the Circuits by referencing its holding in *Meritor* and reiterating the lack of necessity for an individual to show economic or tangible discrimination in order to have a valid claim, as the "terms, conditions, or privileges of employment" language demonstrated Congress' intent to encompass all disparate treatment of men and women in the employment, not simply that behavior causing economic or tangible loss.[89] The Court firmly stated that, "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment,' Title VII is violated."[90]

Thus, the Court reaffirmed the "severe or pervasive" standard and clarified further that the standard "takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury."[91] The Court went on to further elucidate the standard laid out in *Meritor* which addressed both an objective and subjective component, when it stated that:

> 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

87. 510 U.S. 17, 20 (1993).
88. *Id.* at 19.
89. *Id.* at 21.
90. *Id.* (citation omitted).
91. *Id.*

> 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.[92]

The Court went on to bluntly state that, "Title VII comes into play before the harassing conduct leads to a nervous breakdown,"[93] as a hostile, abusive work environment "can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers."[94] Furthermore, the Court noted that although the *Meritor* case laid out numerous examples of cases showing "especially egregious examples of harassment,"[95] they should not "mark the boundary of what is actionable."[96]

Moreover, the Court in *Harris* unequivocally stated that although Title VII certainly "bars conduct that would seriously affect a reasonable person's psychological well-being,"[97] a hostile work environment claim under Title VII does not require a showing of psychological harm.[98] Thus, the Court held that, "[s]o long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious."[99] The Court further indicated that as this determination is not concrete, the determination of whether or not an environment is "hostile" or "abusive" should "be determined only by looking at all the circumstances."[100] Finally, the Court stated that such circumstances "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,"[101] and clarified that although "[t]he effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive . . . no single factor is required."[102]

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92. *Id.* at 21-22.
93. *Id.* at 22.
94. *Id.* (citing Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66 (1986)).
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.* (citation omitted).
100. *Id.* at 22-23 (citation omitted).
101. *Id.* at 23.
102. *Id.*

Then, in 1998, in *Oncale v. Sundowner Offshore Servs., Inc.*, the Supreme Court held that same-sex harassment was actionable under Title VII in the context of a hostile work sexual harassment claim and clarified further what type of contact generally would qualify as sexual harassment or discrimination.[103] Respondents argued that "recognizing liability for same-sex harassment will transform Title VII into a general civility code for the American workplace,"[104] however, the Court swiftly dismissed this argument, indicating that this "risk is no greater for same-sex than for opposite-sex harassment, and is adequately met by careful attention to the requirements of the statute."[105] The Court clarified that "Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at '*discriminat*[*ion*] . . . because of . . . sex.'"[106] The Court clarified that it has "never held that workplace harassment, even harassment between men and women, is automatically discrimination because of sex merely because the words used have sexual content or connotations,"[107] but rather the Court specified that it more critically focused on the issue laid out in Title VII's text which is "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."[108]

Moreover, the Court went on to state that:

> There is another requirement that prevents Title VII from expanding into a general civility code: As we emphasized in *Meritor* and *Harris*, the statute does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex. The prohibition of harassment on the basis of sex requires neither asexuality nor androgyny in the workplace; it forbids only behavior so objectively offensive as to alter the "conditions" of the victim's employment.[109]

The Court went on to note that in all harassment cases, "the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances'"[110] and "that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by

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103. 523 U.S. 75, 80-82 (1998).
104. *Id.* at 80.
105. *Id.*
106. *Id.* (alteration in original).
107. *Id.*
108. *Id.* (citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993)).
109. *Id.* at 81.
110. *Id.* (citing *Harris*, 510 U.S. at 23).

its target."[111] The Court clarified that "[t]he real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed."[112] The Court went on to further explain that, "[c]ommon sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive."[113]

The Court in *Faragher v. City of Boca Raton* further solidified this point when it stated that "[a] recurring point in these opinions is that 'simple teasing,' offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'"[114] The *Faragher* Court went on to note that these standards are in place to keep Title VII from becoming a general civility code, and that "[p]roperly applied, they will filter out complaints attacking 'the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.'"[115]

This line of reasoning used in *Oncale* and *Faragher* contains discriminatory considerations at its core, in that it assumes that men and women "routinely" interact a certain way with "members of the same sex and of the opposite sex," however this statement is laced with sexist connotations, as each individual will act how one chooses, not based solely on their gender.[116] Additionally, it implies there may be certain "teasing or roughhousing" among members of the same sex which should be considered acceptable conduct, despite it being discriminatory

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111. *Id.*

112. *Id.* at 81-82.

113. *Id.* at 82.

114. 524 U.S. 775, 788 (1998) (citation omitted). The *Faragher/Ellerth* defense also resulted from this case though it will not be discussed in any detail in this Article. In short, the *Faragher/Ellerth* defense states that:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule Civ. Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

Id. at 807.

115. *Id.* at 788.

116. *Id.*; *see also Oncale*, 523 U.S. at 81.

or harassing, yet the standard should not allow for any sexually discriminatory or harassing conduct to be considered acceptable.[117]

C. *Differing Applications of the "Severe or Pervasive" Standard in the Federal Circuits*

Thus, according to the precedent case law from the Supreme Court discussed above, generally, in order to file a sexual harassment claim under Title VII, the conduct must be unwelcome, based on the sex of the employee, and be severe or pervasive to alter the conditions of employment and create a hostile or abusive atmosphere.[118] The "severe or pervasive" standard requires that both an objective and subjective component be shown.[119] Objectively, the environment must be such that a reasonable person would find it to be hostile or abusive, while at the same time, the victims themselves must also subjectively perceive the environment to be abusive.[120] Furthermore, a court must look at the totality of the circumstances to determine whether or not the environment is hostile or abusive,[121] and some of the factors that should be examined include: "(1) the frequency of the conduct; (2) the severity of the conduct; (3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (4) whether the conduct unreasonably interferes with the employee's job performance."[122] Additionally, "the context of offending words or conduct is essential to the Title VII analysis,"[123] since "simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment,'"[124] as Title VII does not create a "general civility code" for the workplace.[125]

Although the general standard for severe or pervasive conduct has been laid out by the Supreme Court, the "severe or pervasive" standard has been interpreted quite differently by the federal circuit courts when those courts are deciding whether the conduct in question satisfies the "severe or pervasive" standard, and thus creates a hostile work

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117. *Oncale*, 523 U.S. at 82.

118. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66-68 (1986); Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-23 (1993); Parker v. Reema Consulting Servs., Inc. 915 F.3d 297, 302 (4th Cir. 2019).

119. *See Meritor*, 477 U.S. at 67-68; *Harris*, 510 U.S. at 21-22.

120. *Harris*, 510 U.S. at 21-22.

121. *Id.* at 23.

122. Mendoza v. Borden, Inc., 195 F.3d 1238, 1246 (11th Cir. 1999) (citing Allen v. Tyson Foods, 121 F.3d 642, 647 (11th Cir. 1997)).

123. Reeves v. C.H. Robinson Worldwide, Inc., 594 F.3d 798, 810 (11th Cir. 2010).

124. Clark Cnty. Sch. Dist. v. Breedan, 532 U.S. 268, 271 (2001).

125. *Reeves*, 594 F.3d at 809.

environment. Some of the interpretations have created an unreasonably high bar for victims to meet, as many courts have interpreted the standard so archaically and narrowly that the holdings are incredibly insensitive and out of touch with the victim's suffering, such that the interpretations have led individuals to suffer through unimaginable circumstances only to be told that the behavior inflicted on them was not severe or pervasive *enough*.[126] Historically, such a holding is followed by a weak rationale from a court trying to explain away that although the behavior was boorish, rude, or inappropriate for a workplace, it did not rise to the level of being severe *enough* or did not happen *enough* times to warrant a finding of a hostile work environment.[127]

Other jurisdictions seem to be much more willing to contemplate the suffering faced by the victim and find that the "severe or pervasive" standard should not be an impossible standard to meet. In many of those instances, conduct that satisfies the standard is typically found to be severe or pervasive when a court finds that the conduct is humiliating and/or threatening and truly interferes with the victim's ability to successfully perform their job.[128] Therefore, a thorough examination of how the circuit courts have interpreted the severe or pervasive language over time is necessary to effectively highlight the wildly different variations in interpretations and, thus, the need to delete the standard and replace it with a new standard.

In 1999, the Eleventh Circuit, in *Mendoza v. Borden*, reaffirmed many of the concepts from previous cases and specifically discussed the requirements for the subjective and objective components of the "severe or pervasive" standard. For example, the court indicated that "[t]he employee must 'subjectively perceive' the harassment as sufficiently severe and pervasive to alter the terms or conditions of employment, and this subjective perception must be objectively reasonable."[129] The court went on to state that, "[t]he environment must be one that 'a reasonable person would find hostile or abusive' and that 'the victim . . . subjectively perceive[s] . . . to be abusive.'"[130] The court then reiterated that the objective severity of harassment "should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'"[131] The court then noted that the "fact intensive" analysis should consider the four factors, which were

126. Ijoma & Johnson, *supra* note 3.
127. *Id.*
128. Mendoza v. Borden, Inc., 195 F.3d 1238, 1248 (11th Cir. 1999).
129. *Id.* at 1246.
130. *Id.*
131. *Id.*

identified by the Supreme Court "in determining whether harassment objectively altered an employee's terms or conditions of employment."[132] Thus, the court clarified that "courts should examine the conduct in context, not as isolated acts, and determine under the totality of the circumstances whether the harassing conduct is sufficiently severe or pervasive to alter the terms or conditions of the plaintiff's employment and create a hostile or abusive working environment."[133]

Then, in *Reeves v. C.H. Robinson Worldwide Inc.*, in 2010, also in the Eleventh Circuit, the court reiterated many of the principles and added to the discussion by indicating that:

> [A] member of a protected group cannot be forced to endure pervasive, derogatory conduct and references that are gender-specific in the workplace, just because the workplace may be otherwise rife with generally indiscriminate vulgar conduct. Title VII does not offer boorish employers a free pass to discriminate against their employees specifically on account of gender just because they have tolerated pervasive but indiscriminate profanity as well.[134]

Moreover, the Court went on to clarify though, that, "the context of offending words or conduct is essential to the Title VII analysis," such that "[e]ven gender-specific terms cannot give rise to a cognizable Title VII claim if used in a context that plainly has no reference to gender."[135]

Finally, the court indicated that it was also guided by the principle "that words and conduct that are sufficiently gender-specific and either severe or pervasive may state a claim of a hostile work environment, even if the words are not directed specifically at the plaintiff."[136] In order to further clarify what would satisfy the "severe or pervasive" standard, the court went on to explain that:

> It is enough to hear co-workers on a daily basis refer to female colleagues as "bitches," "whores" and "cunts," to understand that they view women negatively, and in a humiliating or degrading way. The

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132. *Id.*

133. *Id.* (citation omitted); *see* Reeves v. C.H. Robinson Worldwide Inc., 594 F.3d 798, 808 (11th Cir. 2010); Clark Cnty. Sch. Dist. v. Breeden, 532 U.S. 268, 270-71 (2001); Allen v. Mich. Dep't. of Corr., 165 F.3d 405, 415 (6th Cir. 1999).

134. 594 F.3d at 810 (citing Williams v. Gen. Motors Corp., 187 F.3d 553, 564 (6th Cir. 1999)) ("We do not believe that a woman who chooses to work in the male-dominated trades relinquishes her right to be free from sexual harassment.").

135. *Id.*

136. *Id.* at 811 (citing Ocheltree v. Scollon Prods., Inc., 335 F.3d 325, 331-32 (4th Cir. 2003) (en banc) (concluding that Title VII may be violated even when the plaintiff is not individually targeted); *see also* Petrosino v. Bell Atl., 385 F.3d 210, 221-23 (2d Cir. 2004).

> harasser need not close the circle with reference to the plaintiff specifically: "and you are a 'bitch,' too."[137]

The court continued this line of reasoning by stating that "words or conduct with sexual content that disparately expose members of one sex to disadvantageous terms or conditions of employment also may support a claim under Title VII."[138]

Along those lines, in 2019, in *Parker v. Reema Consulting Services, Inc.*, the Fourth Circuit held that rumors that an individual slept with her boss to obtain a promotion satisfied the "severe or pervasive" standard and was harassment based on sex.[139] The court found the "severe or pervasive" standard to be satisfied because "the harassment related to the rumor was all-consuming from the time the rumor was initiated until the time [the individual] was fired."[140] The court also found that "[t]he harassment emanating from the rumor also had physically threatening aspects, even though harassment need not be physically threatening to be actionable" and "[t]hat this harassment came from [the individual's] supervisor made it all the more threatening."[141]

However, in the Eighth Circuit, in 2021, the court admitted that it has "often noted that our precedent 'sets a high bar' for 'sufficiently severe or pervasive' conduct."[142] For example, in *Paskert v. Kemna-ASA Auto Plaza, Inc.*, as recent as 2020, the court noted that "[t]his court has previously described the 'boundaries of a hostile work environment claim,' and demonstrated that some conduct well beyond

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137. *Reeves*, 594 F.3d at 811. The court noted to "*See Yuknis v. First Student, Inc.*, 481 F.3d 552, 553-54 [sic] (7th Cir. 2007) [sic] (observing that comments need not be directed specifically at a person to be discriminatory; comments addressed to the plaintiff's 'target area'—that is, her protected group—may constitute actionable harassment)." *Id.*

138. *Id.* (citing *Petrosino*, 385 F.3d at 222) ("[T]he depiction of women in the offensive jokes and graphics was uniformly sexually demeaning and communicated the message that women as a group were available for sexual exploitation by men.").

139. 915 F.3d 297, 303 (4th Cir. 2019).

140. *Id.* at 305.

141. *Id.* (citing Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 763 (1998)) ("[A] supervisor's power and authority invests his or her harassing conduct with a particularly threatening character."); *see also* Hernandez v. Fairfax Cnty., 719 Fed. App'x. 184, 187-188 (4th Cir. 2018) (finding the "severe or pervasive" standard satisfied where supervisor "physically invaded Hernandez's personal space on numerous occasions and made sexually suggestive comments to her," supervisor informed various colleagues of his suspicions of victim having an inappropriate relationship with a colleague, victim repeatedly asked supervisor to stop this conduct, and supervisor monitored movements of victim).

142. Lopez v. Whirlpool Corp., 989 F.3d 656, 663 (8th Cir. 2021) (citing Paskert v. Kemna-ASA Auto Plaza, Inc., 950 F.3d 535, 538 (8th Cir. 2020)). In *Lopez*, the court found that the behavior did not rise to the level of severe or pervasive where an individual touched a victim almost every time he saw her, despite her repeated requests to stop both directly and to her supervisor, invaded her personal space, and blew on her finger to fix an injury and called her baby, rather than letting her obtain first aid. *Id.* at 660, 663.

the bounds of respectful and appropriate behavior is nonetheless insufficient to violate Title VII."[143] The court in *Paskert* discussed the *McMiller* case from 2013 where "the court outlined several cases illustrating conduct that was not sufficient to amount to actionable severe or pervasive conduct."[144] The court explained that:

> [I]n *McMiller* we described the facts of *Duncan v. General Motors Corp.* in which a supervisor sexually propositioned [the employee], repeatedly touched her hand, requested that she draw an image of a phallic object to demonstrate her qualification for a position, displayed a poster portraying the plaintiff as the "president and CEO of the Man Hater's Club of America," and asked her to type a copy of a "He-Men Women Hater's Club" manifesto.[145]

The *Paskert* court continued, "[t]he court held these facts were not sufficiently severe or pervasive enough to establish a Title VII hostile work environment claim."[146] The court went on to state that, "in *McMiller* the court summarized the facts of *LeGrand v. Area Resources for Community and Human Services*, where it determined even more outrageous conduct, including graphic sexual propositions and even incidental unwelcome sexual contact, did not establish severe or pervasive conduct sufficient to be actionable."[147] Although the behavior "ranged from crass to churlish and were manifestly inappropriate . . . the three isolated incidents, which occurred over a nine-month period"[148] they did not satisfy the standard, as they "were not so severe or pervasive as to poison [the individual's] work environment."[149]

Thus, it took overwhelmingly severe or pervasive behavior for the Eighth Circuit to find the standard satisfied. For example, in *Eich v. Board of Regents for Central Missouri State University*, the Eighth Circuit Court found the conduct to be pervasive enough when over a

> [S]even-year period, plaintiff employee was subjected to numerous instances of sexual innuendo and touching by two male employees, including several instances of one of the male employees brushing against her breast, running his fingers through her hair, rubbing her

143. 950 F.3d at 538.

144. *Id.* (citing McMiller v. Metro, 738 F.3d 185, 188-89 (8th Cir. 2013)).

145. *Id.* (citing *McMiller*, 738 F.3d at 188) (citing Duncan v. General Motors Corp., 300 F.3d 928, 931-35 (8th Cir. 2002)).

146. *Id.*

147. *Id.* (citing *McMiller*, 738 F.3d at 188) (citing LeGrand v. Area Res. for Cmty. & Human Servs., 394 F.3d 1098, 1100-03 (8th Cir. 2005)).

148. *LeGrand*, 394 F.3d at 1102-03.

149. *Id.* at 1103.

> shoulders, and running his fingers up her spine, in addition to standing behind her and simulating a sexual act while she was bent over during training sessions.[150]

On the other hand, the Second Circuit seems to read the severe or pervasive language as a much less stringent standard, specifically in those situations where the incidents are numerous, rather than isolated. For example, in 2020, the *Legg v. Ulster County* court ultimately found that "[d]rawing all reasonable inferences in favor of [the victim], we have no difficulty concluding that the jury had a legally sufficient evidentiary basis for finding that [the victim] experienced a hostile work environment at the Ulster County Jail."[151] This resulted as numerous female plaintiffs testified that they saw "pornographic magazines circulated freely and openly among male Ulster County Jail officers, and numerous officers—including supervisors—used pornographic screensavers on their work computers."[152] The plaintiff stated that she found pornographic magazines in her desk and work area, as well as "testified about workplace incidents concerning sexual comments and banter, inappropriate touching, and, in [plaintiff's] case, male officers' practice of making 'references to my butt [and] references to my chest and what they would like to do sexually.'"[153] Additionally, the victim complained specifically of a co-worker's behavior which included one incident of putting "his hand around [her] chair and" having "his head right next to [hers], breathing down [her] neck continuously and he would come up behind [her] all the time," as well as numerous occasions of him making inappropriate sexual comments to her.[154]

Although the Second Circuit seems to have a less stringent standard, particularly in those situations where the behavior occurs on numerous occasions, in *Redd v. New York Division of Parole*, the court clarified that "[i]solated incidents usually will not suffice to establish a hostile work environment, although we have often noted that even a single episode of harassment can establish a hostile work environment if the incident is sufficiently 'severe.'"[155] The court went on to clarify that

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150. *Harassment*, THOMSON REUTERS PRACT. L. LAB. & EMP., https://1.next.westlaw.com/Document/Ibb0a149cef0511e28578f7ccc38dcbee/View/FullText.html?transitionType=SearchItem&contextData=(sc.QATypeAhead)&firstPage=true&bhcp=1 (last visited Oct. 13, 2021) (citing Eich v. Bd. of Regents for Cent. Mo. State Univ., 350 F.3d 752, 755-56, 758-59 (8th Cir. 2003)).

151. 979 F.3d 101, 115 (2d Cir. 2020).

152. *Id.* at 107.

153. *Id.* at 108.

154. *Id.*

155. 678 F.3d 166, 175-76 (2d Cir. 2012) (citing *e.g.*, Pucino v. Verizon Communs., Inc., 618 F.3d 112, 119 (2d Cir. 2010)); Kaytor v. Elec. Boat Corp., 609 F.3d 537, 546 (2d Cir. 2010);

it "must take care, however, not to view individual incidents in isolation" as the work environment must be viewed using the totality of the circumstances approach.[156] Thus, the court held that an issue of fact existed as to whether or not the conduct was severe or pervasive, when a female employee alleged that a female supervisor's contact consisted of touching her breast on three separate occasions.[157]

Similarly, in *Howley v. Town of Stratford*, the Second Circuit reiterated that "[u]sually, a single isolated instance of harassment will not suffice to establish a hostile work environment unless it was 'extraordinarily severe.'"[158] Thus, here, where a male individual at a work event berated a female colleague "at length, loudly, and in a large group in which [the victim] was the only female and many of the men were her subordinates," and "his verbal assault included charges that [the victim] had gained her office of lieutenant only by performing fellatio," the court found that:

> It cannot be concluded as a matter of law that no rational juror could view such a tirade as humiliating and resulting in an intolerable alteration of [the victim's] working conditions: In an occupation whose success in preserving life and property often depends on firefighters' unquestioning execution of line-of-command orders in emergency situations, the fomenting of gender-based skepticism as to the competence of a commanding officer may easily have the effect, among others, of diminishing the respect accorded the officer by subordinates and thereby impairing her ability to lead in the life-threatening circumstances often faced by firefighters.[159]

The court also stated that the victim presented evidence that the individual "had perpetrated repeated acts of harassment" after the original incident "in order to undermine further [the victim's] subordinates' respect for her, and hence to cast doubt on the degree of compliance and cooperation she could expect from them."[160] Ultimately,

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Howley v. Town of Stratford, 217 F.3d 141, 153 (2d Cir. 2000); Quinn v. Green Tree Credit Corp., 159 F.3d 759, 768 (2d Cir. 1998), *abrogated in part on other grounds by* Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 122 (2002); Torres v. Pisano, 116 F.3d 625, 631 n.4 (2d Cir. 1997); *see, e.g.*, Feingold v. New York, 366 F.3d 138, 150 (2d Cir. 2004) ("[A] single act can create a hostile work environment if it in fact 'work[s] a transformation of the plaintiff's workplace.'") (quoting Alfano v. Costello 294 F.3d 365, 374 (2d Cir. 2002)).

156. *Redd*, 678 F.3d at 176.

157. *Id.* at 182.

158. 217 F.3d at 153 (citing Cruz v. Coach Stores, Inc., 202 F.3d 560, 570 (2d Cir. 2000)); *see also* Kotcher v. Rosa & Sullivan Appliance Ctr., Inc., 957 F.2d 59, 62 (2d Cir. 1992).

159. *Id.* at 154.

160. *Id.* at 154-55.

the court vacated the judgment of the district court and remanded it to the district court for trial.[161]

In the Tenth Circuit, as far back as 1998, one instance of conduct was also found to be severe where a customer pulled a waitress's hair, grabbed her breast, and then placed his mouth on it.[162] The court stated that such behavior "was more than a mere offensive utterance" and that "[g]rabbing [the victim's] hair and breast while she attempted to take their orders and serve their beer is physically threatening and humiliating behavior which unreasonably interfered with Ms. Lockard's ability to perform her duties as a waitress."[163]

However, the Seventh Circuit aligns itself more with the high bar set in the Eight Circuit, as it appears to require an almost insurmountable standard, as many of the court's decisions appear to be laced with misogyny and a lack of understanding of sexual harassment at its basic form. For example, in 1995, in *Baskerville v. Culligan International Co.*, employer was entitled to judgment in a case in which the behavior of the plaintiff's supervisor included making masturbation gestures while conversing with her, grunting suggestively as she turned to leave his office, referring to her as a "pretty girl," and commenting that his office did not get "hot" until she walked in."[164] In *Baskerville*, the court stated that "[t]he concept of sexual harassment is designed to protect working women from the kind of male attentions that can make the workplace hellish for women"[165] and that "[o]n one side lie sexual assaults; other physical contact, whether amorous or hostile, for which there is no consent express or implied; uninvited sexual solicitations; intimidating words or acts; obscene language or gestures; pornographic pictures,"[166] while "[o]n the other side lies the occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers."[167] The court specified that what separates the two "is not a bright line . . . this line between a merely unpleasant working environment on the one hand and a hostile or

161. *Id.* at 156.

162. Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1072 (10th Cir. 1998).

163. *Id.* The court ultimately held that "looking at all the circumstances, as we must, we are persuaded that the record contains sufficient evidence to support the jury's conclusion that the harassing conduct of the customers was severe enough to create an actionable hostile work environment." *Id.* (citation omitted).

164. Equal Emp. Opportunity Comm'n v. Costco Wholesale Corp., 903 F.3d 618, 625 (7th Cir. 2018) (citing Baskerville v. Culligan Int'l Co., 50 F.3d 428, 430 (7th Cir. 1995)).

165. 50 F.3d at 430.

166. *Id.*

167. *Id.*

deeply repugnant one on the other."[168] Some examples given by the court to try to show that the behavior was not actionable included that

> He never touched the plaintiff. He did not invite her, explicitly or by implication, to have sex with him, or to go out on a date with him. He made no threats. He did not expose himself, or show her dirty pictures. He never said anything to her that could not be repeated on primetime television.[169]

Unimaginably, the court went on to state that:

> The reference to masturbation completes the impression of a man whose sense of humor took final shape in adolescence. It is no doubt distasteful to a sensitive woman to have such a silly man as one's boss, but only a woman of Victorian delicacy—a woman mysteriously aloof from contemporary American popular culture in all its sex-saturated vulgarity—would find [the man's] patter substantially more distressing than the heat and cigarette smoke of which the plaintiff does not complain. The infrequency of the offensive comments is relevant to an assessment of their impact. A handful of comments spread over months is unlikely to have so great an emotional impact as a concentrated or incessant barrage.[170]

Thus, the Seventh Circuit Court seemed to not only completely minimize the victim's subjective view of the situation, despite the requirement that it be part of the analysis, but also to allow the boorish, intolerable behavior that offends even a reasonable person, and dismissed such behavior as simply annoying "patter."[171]

Years later, in 2001, the Seventh Circuit, in *Worth v. Tyer*, seemed to express a slightly less stringent application of the "severe or pervasive" standard, but only because the situation involved direct physical contact.[172] Thus, although the court still minimized the verbal aspects of harassment, when discussing the facts of the case, the court noted that, "contrary to defendants' assertions, the conduct at issue here is neither 'tepid' nor 'equivocal.' Rather, a supervisor touching one's breast near the nipple for several seconds is severe enough to remove

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168. *Id.* at 431.

169. *Id.*

170. *Id.*

171. *Id.* The Seventh Circuit held similarly in *Saxton v. Am. Tel. & Tel. Co.* when it upheld summary judgment for the defendant and stated that "[c]ertainly any employee in Saxton's position might have experienced significant discomfort and distress at the result of her superior's uninvited and unwelcome advances," and "[t]hus, although it might be reasonable for us to assume that [the supervisor's] inaccessibility, condescension, impatience, and teasing made Saxton's life at work subjectively unpleasant, the evidence fails to demonstrate that his behavior was not 'merely offensive.'" Saxton v. Am. Tel. & Tel. Co., 10 F.3d 526, 534-35 (7th Cir. 1993).

172. *See* 276 F.3d 249, 267-68 (7th Cir. 2001).

such conduct from any safe harbor."[173] The court also clarified that "[t]here is no minimum number of incidents required to establish a hostile work environment," as "[h]arassment need not be both severe *and* pervasive to impose liability; one or the other will do."[174] The court went on to state that "[t]he fact that conduct that involves touching as opposed to verbal behavior increases the severity of the situation,"[175] specifically because "direct contact with an intimate body part constitutes one of the most severe forms of sexual harassment."[176]

The Seventh Circuit appeared to have made additional progress, finding in 2009 that "[a] successful hostile work environment claim based on sexual harassment need not involve sexual conduct, but can be successful by showing the work environment was sexist. Thus, this Court has held that a showing of 'anti-female animus' is sufficient to prevail in a hostile work environment claim."[177]

But then, in 2018, in *Swyear v. Fare Foods Corp.*, the Seventh Circuit continued its practice of ignoring verbal harassment and even ignored physical contact between parties, which appeared to promote a culture, and almost acceptance, of sexual harassment in the workplace.[178] In *Swyear*, the victim began working at a company and found the environment to be "aggressive, disrespectful, and rude," as many employees and customers were discussed using sexual and inappropriate nicknames.[179] Specifically, she stated that during an overnight business trip, a colleague who was training her invited her to dinner, repeatedly touched her arm and lower back, and suggested skinny-dipping.[180] Moreover, as the individuals' hotel rooms were connected, he followed her into her room after dinner, got into her bed, said that he thought she needed a "cuddle buddy," all while being under the influence of alcohol.[181] After the victim indicated that she was tired and wanted to go to bed, her colleague knocked on her door and called her on the phone numerous times.[182] Approximately one week after this incident, the individual participated in a performance review and was

173. *Id.* at 268; *see also id.* at 257 (discussing the facts of the case with a heavier emphasis on the defendant's physical touching of the plaintiff).

174. *Id.* at 268 (citing Hostetler v. Quality Dining, Inc., 218 F.3d 798, 808 (7th Cir. 2000)).

175. *Id.*

176. *Id.*

177. Swyear v. Fare Foods Corp., 911 F.3d 874, 880 (7th Cir. 2018) (citing Scruggs v. Garst Seed Co., 587 F.3d 832, 840 (7th Cir. 2009)).

178. *Id.* at 874.

179. *Id.* at 878.

180. *Id.* at 879.

181. *Id.*

182. *Id.*

told to improve her work performance in a few areas and, within thirty minutes of that meeting ending, she reported what had happened at the hotel to the company's human resources supervisor.[183] Within two weeks of the meeting, the victim was terminated.[184] The court found that the harassment was not severe or pervasive such that although "the environment at [the company] was at times inappropriate and offensive," it was not permeated with sexism to create a hostile work environment.[185] Specifically, "the nicknames were not directed towards [the victim], nor were they used to physically threaten or humiliate her. Rather, they were crude and immature jokes that typically do not result in employer liability."[186] Most importantly, the court relied on *Hostetler v. Quality Dining* quoting that:

> Cumulatively or in conjunction with other harassment, such acts might become sufficiently pervasive to support a hostile environment claim, but if few and far between they typically will not be severe enough to be actionable in and of themselves. A hand on the shoulder, a brief hug, or a peck on the cheek lie at this end of the spectrum. Even more intimate or more crude physical acts—a hand on the thigh, a kiss on the lips, a pinch of the buttocks—may be considered insufficiently abusive to be described as "severe" when they occur in isolation.[187]

The court went on to state that:

> The incident with [the victim's colleague] reflected entirely inappropriate behavior by a coworker, but does not constitute sexual harassment alone or when considered with the above-described incidents. [The victim's colleague's] actions were not severe as compared with acts this Court has found sufficient to create a hostile or abusive work environment.[188]

Thus, rather than recognizing the need for change within the circuit, the court simply used precedent as an excuse for maintaining the status quo and allowing repugnant behavior to go unpunished.

On the other hand, the Fifth Circuit was willing to find the "severe or pervasive" standard satisfied when similar behavior was ongoing. For example, in *Lauderdale v. Texas Department of Criminal Justice*, the Fifth Circuit court found it to be sufficiently pervasive behavior when "[t]he plaintiff employee's supervisor called her on the phone at night

183. *Id.*
184. *Id.* at 880.
185. *Id.* at 881.
186. *Id.*
187. *Id.* at 882 (citing Hostetler v. Quality Dining, Inc., 218 F.3d 798, 808 (7th Cir. 2000)).
188. *Id.*

for several months. Even though the calls were not severe or explicitly sexual (aside from a stated desire to 'snuggle' with the plaintiff), the conduct was sufficiently pervasive to create a hostile work environment."[189] Additionally, in *Aryain v. Wal-Mart Stores Texas LP*, the court found behavior to be pervasive enough when, for example, over an "entire four-month duration of employment, plaintiff employee endured almost daily sexual comments and advances from her direct supervisor, including requests for dates and telling her that her 'butt looks good.'"[190]

Decisions from the remaining circuits have a similar lack of uniformity and certainty regarding the application of the "severe or pervasive" standard. As such, the sampling of how the severe or pervasive language has been interpreted in the federal circuit courts demonstrates the need for a change to the actual standard itself, as the application of the current standard has allowed abhorrent behavior to go unpunished in some jurisdictions and not others, and victims to suffer a lack of access to justice.

III. STATE AND LOCAL LEGISLATION WHICH REMOVES OR REPLACES THE "SEVERE OR PERVASIVE" STANDARD

Although sexual harassment and discrimination claims can be brought under the various laws in each state which prohibit sexual harassment and discrimination, and, thus, these claims would not fall under Title VII, the state courts still rely on the "severe or pervasive" standard when analyzing these claims. However, as a result of the continued media coverage from the many high profile sexual harassment and discrimination cases in recent years, a number of states across the country have been inspired to reevaluate the overly harsh "severe or pervasive" standard used in sexual harassment cases to determine whether a lesser or new standard may be more appropriate.[191] Some examples of criticisms of the standard have included comments such that the standard is "out of touch with current societal normal and creat[es] an unnecessary roadblock for victims of harassment to have their claims

189. *Harrassment*, *supra* note 150.

190. *Id.*

191. Erik A. Christiansen, *How Are the Laws Sparked by #MeToo Affecting Workplace Harassment*, A.B.A. (May 8, 2020) https://www.americanbar.org/groups/litigation/publications/litigation-news/featured-articles/2020/new-state-laws-expand-workplace-protections-sexual-harassment-victims.

decided by a jury,"[192] as well as "that it imposes too high of a burden on plaintiffs by focusing on whether the conduct 'was really that bad' instead of on whether it 'undermined equal opportunity.'"[193] Thus, as of 2019, a number of states have enacted or are considering enacting legislation to either remove and/or lessen the "severe or pervasive" standard required in order to file a sexual harassment claim.

A. California Fair Employment and Housing Act Updated

In September 2018, California lawmakers led the way with providing access to justice to victims of sexual harassment and discrimination by lowering the burden for bringing a claim in the state, through approval of Senate Bill No. 1300, Chapter 955, entitled "Unlawful employment practices: discrimination and harassment."[194] The Legislative Counsel's Digest attached to the bill states that the California Fair Employment and Housing Act ("FEHA") "makes it an unlawful employment practice for an employer . . . to engage in harassment of an employee or other specified person . . . ."[195] Specifically, section 12923, which was added to the Government Code, begins by explaining the *intent* of the Legislature "with regard to application of the laws about harassment contained in this part,"[196] thereby showing that the legislature wanted its intent for inclusion of the law to be clear.[197] Immediately following, subsection (a) of section 12923 goes on to unequivocally state that "[t]he purpose of these laws is to provide all Californians with an equal opportunity to succeed in the workplace and should be applied accordingly by the courts."[198] Subsection (a) further states that:

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192. Eric Bachman, *A Movement Is Afoot to Redefine Hostile Work Environment/Harassment Laws*, FORBES (Jan. 6, 2021, 1:43 PM), https://www.forbes.com/sites/ericbachman/2021/01/06/a-movement-is-afoot-to-redefine-hostile-work-environment-harassment-laws/?sh=2c6e5139337f.

193. Turnbull & Spinelli, *supra* note 2.

194. S.B. 1300, 2018 Legis. Counsel (Cal. 2018) ("An act to amend Sections 12940 and 12965 of, and to add Sections 12923, 12950.2, and 12964.5 to, the Government Code, relating to employment.").

195. *Id.* It goes on to state that it "makes harassment of those persons by an employee, other than an agent or supervisor, unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action." *Id.* Additionally, "[u]nder FEHA, an employer may also be responsible for the acts of nonemployees, with respect to sexual harassment of employees and other specified persons, if the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action." *Id.*

196. *Id.* (emphasis added).

197. Turnbull & Spinelli, *supra* note 2.

198. S.B. 1300, 2018 Legis. Counsel (Cal. 2018).

> The Legislature hereby declares that harassment creates a hostile, offensive, oppressive, or intimidating work environment and deprives victims of their statutory right to work in a place free of discrimination when the harassing conduct sufficiently offends, humiliates, distresses, or intrudes upon its victim, so as to disrupt the victim's emotional tranquility in the workplace, affect the victim's ability to perform the job as usual, or otherwise interfere with and undermine the victim's personal sense of well-being.[199]

Thus, this section expands the concept of hostile work environment to also include environments that are "offensive, oppressive, or intimidating" and specifically delineates that the harassing conduct in question must sufficiently offend, humiliate, distress, or intrude upon the victim.[200] Moreover, subsection (a) further clarifies that the legislature "affirmed its approval of the standard set forth by Justice Ruth Bader Ginsburg in her concurrence in Harris v. Forklift Systems [sic],"[201] specifically, that in a workplace harassment suit:

> 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.[202]

Most significantly, subsection (b) speaks directly of the "severe or pervasive" standard and clarifies that "[a] single incident of harassing conduct is sufficient to create a triable issue regarding the existence of a hostile work environment if the harassing conduct has unreasonably interfered with the plaintiff's work performance or created an intimidating, hostile, or offensive working environment."[203] This standard appears to be less stringent than the previous "severe or pervasive" standard required in California.[204] Additionally, it is

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199. *Id.* (citation omitted),

200. *Id.*; *see* Turnbull & Spinelli, *supra* note 2 ("[S]imple teasing, offhand comments, or isolated incidents that are not extremely serious or pervasive do not rise to the level of unlawful harassment.").

201. S.B. 1300, 2018 Legis. Counsel (Cal. 2018); *see* Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring).

202. *Harris*, 510 U.S. at 25.

203. S.B. 1300, 2018 Legis. Counsel (Cal. 2018).

204. *See* Kelley v. Conco Co., 126 Cal. Rptr. 3d 651, 666 (Cal. Ct. App. 2011) ("With respect to the pervasiveness of harassment, courts have held an employee generally cannot recover for harassment that is occasional, isolated, sporadic, or trivial; rather, the employee must show a concerted pattern of harassment of a repeated, routine, or a generalized nature.") (quoting Lyle v. Warner Bros. Television Prods., 132 P.3d 211, 223 (Cal. 2006)); *see* Herberg v. California Inst. of the Arts, 124 Cal. Rptr. 2d 1, 6 (Cal. Ct. App. 2002) (stating that liability for sexual harassment may not be imposed based on a single incident that does not involve egregious conduct akin to a physical

important to note that this subsection clarifies that one incident may be sufficient, which is at odds with many of the rationales in the federal circuit court cases discussed above. The section further states that:

> The Legislature hereby declares its rejection of the United States Court of Appeals for the 9th Circuit's opinion in *Brooks v. City of San Mateo*[205] [sic] and states that the opinion shall not be used in determining what kind of conduct is sufficiently severe or pervasive to constitute a violation of the California Fair Employment and Housing Act.[206]

Thus, the legislature made a definitive move to reduce the conduct required to satisfy the "severe or pervasive" standard for a claim of sexual harassment in California.

Subsection (c) goes on to reaffirm that "[t]he existence of a hostile work environment depends upon the totality of the circumstances and a discriminatory remark, even if not made directly in the context of an employment decision or uttered by a nondecision maker, may be relevant, circumstantial evidence of discrimination."[207] Additionally, subsection (d) indicates that "[t]he legal standard for sexual harassment should not vary by type of workplace,"[208] as "[i]t is irrelevant that a particular occupation may have been characterized by a greater frequency of sexually related commentary or conduct in the past."[209]

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assault or the threat thereof); Smith v. Nw. Fin. Acceptance, Inc., 129 F.3d 1408, 1414 (10th Cir. 1997) ("[I]solated incidents of harassment, while inappropriate and boorish, do not constitute pervasive conduct.").

205. 229 F.3d 917, 924 (9th Cir. 2000). In *Brooks v. City of San Mateo*, the court stated that:

> Because only the employer can change the terms and conditions of employment, an isolated incident of harassment by a co-worker will rarely (if ever) give rise to a reasonable fear that sexual harassment has become a permanent feature of the employment relationship. By hypothesis, the employer will have had no advance notice and therefore cannot have sanctioned the harassment beforehand. And, if the employer takes appropriate corrective action, it will not have ratified the conduct. In such circumstances, it becomes difficult to say that a reasonable victim would feel that the terms and conditions of her employment have changed as a result of the misconduct.

Id.

206. S.B. 1300, 2018 Legis. Counsel (Cal. 2018) (emphasis added); *see* Turnbull & Spinelli, *supra* note 2 (explaining that the new standard in subsection (b) "is a much lower bar than current California precedent, holding that conduct that is not 'extreme' must have involved "more than a few isolated incidents" to be unlawful").

207. S.B. 1300, Legis. Counsel (Cal. 2018) ("In that regard, the Legislature affirms the decision in Reid v. Google, Inc. [sic] in its rejection of the 'stray remarks doctrine.'"); *see* Christiansen, *supra* note 191 ("Employers in California also may be held liable for harassment committed by nonemployees if the employer knew, or should have known, of the offending conduct. Individuals in California also may be held personally liable, along with their employer, for harassment.").

208. S.B. 1300, Legis. Counsel (Cal. 2018).

209. *Id.*

Subsection (d) explains that "[i]n 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."[210] This standard seems to be in direct contradiction[211] with *Oncale*, which directs that the "objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position"[212] and that such "inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target."[213] Thus, subsection (d) presents additional new considerations under this new law.

Although a number of recent unpublished cases in California, examining hostile work environment claims in the context of sexual harassment, have referenced section 12923 since it took effect in late 2018, most of the opinions have chosen to ignore section 12923 or "have recognized it with seemingly little to no impact on their ruling."[214] However, one case discussing race-based harassment did address the impact of section 12923 and notably stated that it "codified numerous opinions concluding a single racial slur can be so offensive it creates a triable issue as to the existence of a hostile work environment. Thus, the question is not whether a single, particularly egregious epithet can create a hostile work environment—under certain circumstances, it can."[215] The court, however, then went on to state that, "[r]ather, the pertinent question is whether the single alleged racial epithet made by Bailey's co-worker was, in context, so egregious in import and consequence as to be 'sufficiently severe or pervasive to alter the conditions of [Bailey's] employment.'"[216] Consequently, although the court was willing to recognize that one incident can be *enough*, it still ultimately indicated that the "severe or pervasive" standard was the proper standard. Therefore, it does not appear that the minimization of the severe or pervasive requirement has yet to have made a large impact on the court's

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210. *Id.* Subsection (d) clarified that "[t]he Legislature hereby declares its disapproval of any language, reasoning, or holding to the contrary in the decision Kelley v. Conco." *Id.*

211. Turnbull & Spinelli, *supra* note 2 (suggesting that the bill serves as "non-binding statutory guidance encouraging courts to apply more lenient standards when reviewing harassment claims").

212. 523 U.S. 75, 81 (1998).

213. *Id.*

214. *See* Turnbull & Spinelli, *supra* note 2; Duran v. Atl. Mem'l Hosp. Assocs., Inc., No. NC060366, 2020 WL 1698399 (Cal. Ct. App. Apr. 7, 2020); Russell v. City & Cty. of S.F., No. CGC-15-562245, 2021 WL 1115504 (Cal. Ct. App. Mar. 24, 2021).

215. Bailey v. S.F. Dist. Att'y's Office, No. CGC-15-549675, at *5 (Cal. Ct. App. Sept. 16, 2020).

216. *Id.*

analysis in sexual harassment cases, and, thus, the need to make the change is urgent, as this is a significant step in ensuring adequate access to justice for victims of sexual harassment.

B. New York State Human Rights Law Updated

Recently, New York State lessened the requirements for victims of sexual harassment and discrimination to bring a claim in New York, as state lawmakers realized the need for additional protections for victims of sexual harassment and discrimination. Previously, New York State law followed federal law regarding the conduct required to bring a claim, as the "severe or pervasive" standard was in place. However, in August of 2019, legislation was signed by Governor Cuomo "that strengthened protections against discrimination and harassment, including sexual harassment, in the New York State Human Rights Law."[217] Ironically, as of early August 2021, Governor Cuomo is now in the spotlight himself, facing sexual harassment allegations, and is being urged to resign with calls coming from as high up as President Biden.[218]

In a New York State Division of Human Rights Press Release dated October 11, 2019 ("NYS DHR Press Release"), it was noted the:

> Division of Human Rights Commissioner Angela Fernandez said "All workers deserve a work environment free of sexual harassment and discrimination. The elimination of the 'severe or pervasive' standard along with other changes, including the requirement that the Human Rights Law be liberally construed, regardless of any federal rollback of rights, is a tremendous step forward. The Division of Human Rights will use its powers fully to enforce these important measures."[219]

The NYS DHR Press Release went on to note that Governor Cuomo originally "proposed these wide-ranging reforms in his 2019 Women's Justice Agenda, and again in his FY 2020 Executive Budget."[220] Then, "[w]hen the initiative was not taken up by the legislature, and with just 11 days remaining in the legislative session, the Governor launched the Women's Justice Agenda: The Time Is Now

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217. *Id.* at *3; *see also New Workplace Discrimination and Harassment Protections*, N.Y. STATE DIV. HUM. RTS. https://dhr.ny.gov/workplaceharassment (last visited Oct. 13, 2021).

218. Katie Glueck, *Under Fire and Alone, Cuomo Fights for His Political Life*, N.Y. TIMES (Aug. 3, 2021), https://www.nytimes.com/2021/08/03/nyregion/cuomo-guilty.htm.

219. *Governor Cuomo Announces Sweeping New Workplace Discrimination and Harassment Protections Go Into Effect Today*, N.Y. STATE DIV. HUM. RTS. (Oct. 11, 2019), https://dhr.ny.gov/new-workplace-protections-effective.

220. *Id.*

campaign to urge lawmakers to take action before the close of session."[221]

Upon signing the comprehensive legislation, Governor Cuomo noted that "[t]here has been an ongoing, persistent culture of sexual harassment, assault and discrimination in the workplace, and now it is time to act."[222] He went on to strongly state that:

> By ending the absurd legal standard that sexual harassment in the workplace needs to be "severe or pervasive" and making it easier for workplace sexual harassment claims to be brought forward, we are sending a strong message that time is up on sexual harassment in the workplace and setting the standard of equality for women.[223]

Between August 2019 and August 2020, the provisions of the law went into effect at varying times.[224] "The legislation strengthened New York's anti-discrimination laws to ensure employees can seek justice and perpetrators will be held accountable by eliminating the restriction that harassment be 'severe or pervasive' in order to be legally actionable . . . ."[225] The law also mandated "that all non-disclosure agreements allow employees to file a complaint of harassment or discrimination" and extended "the statute of limitations for employment sexual harassment claims filed from one year to three years."[226]

According to the Fact Sheet entitled "Important Updates to the New York State Human Rights Law" available on the New York State Division of Human Rights website, effective October 11, 2019:

> The Human Rights Law now protects victims of harassment, including sexual harassment, in important new ways:
>
> - Harassment is against the law whenever an individual is subjected to inferior terms, conditions or privileges of employment.
> - The harassment need not be severe or pervasive in order for the employer to be liable. (However, the employer may raise a

221. *Id.*

222. *Governor Cuomo Signs Legislation Enacting Sweeping New Workplace Harassment Protections*, N.Y. STATE DIV. HUM. RTS. (Aug. 12, 2019), https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-enacting-sweeping-new-workplace-harassment-protections.

223. *Id.*

224. *New Workplace Discrimination and Harassment Protections*, *supra* note 217.

225. *Id.*

226. *Id.*

> defense that the actions were not more than "petty slights or trivial inconveniences.")[227]

Specifically, Assembly Bill 8421 ("New York AB 8421") in the 2019-2020 Regular Session amended section 296 of the Consolidated Laws of New York, Executive, Article 15: Human Rights Law, as Section 1(h) now reads that:

> 1. It shall be an unlawful discriminatory practice:
> (h) for an employer, licensing agency, employment agency or labor organization to subject any individual to harassment because of an individual's age, race, creed, color, national origin, sexual orientation, gender identity or expression, military status, sex, disability, predisposing genetic characteristics, familial status, marital status, domestic violence victim status, or because the individual opposed any practices forbidden under this article or because the individual has filed a complaint, testified or assisted in any proceeding under this article, *regardless of whether such harassment would be considered severe or pervasive under precedent applied to harassment claims*.[228]

As the severe or pervasive requirement was explicitly deleted, Section 1(h) went on to clarify that "[s]uch harassment is an unlawful discriminatory practice when it subjects an individual to inferior terms, conditions or privileges or employment because of the individual's membership in one or more of these protected categories."[229] The lessened standard is more manageable, as it lowers the bar for victims of sexual harassment and discrimination as to what will constitute actionable conduct and gives those victims a viable path to justice.

The NYS DHR Press Release went on to highlight that additional protections in Section 1(h) include that "[i]n order to establish liability, the complainant does not have to identify a similarly situated person/employee that was treated more favorably" and that "[a] complainant does not have [to] complain to their employer or file a formal grievance in order to establish liability."[230] These changes from

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227. *Important Updates to the New York State Human Rights Law*, N.Y. STATE, DIV. HUM. RTS. (Oct. 11, 2019), https://dhr.ny.gov/sites/default/files/pdf/nysdhr-legal-updates-10112019.pdf. "These measures are central components of the Governor's 2019 Women's Justice Agenda." *Governor Cuomo Announces Sweeping New Workplace Discrimination and Harassment Protections Go Into Effect Today*, *supra* note 219.

228. N.Y. EXEC. LAW § 296(1)(h) (McKinney 2020) (emphasis added).

229. *Id.*

230. *Important Updates to the New York State Human Rights Law*, *supra* note 227; *see* N.Y. EXEC. LAW § 296(1)(h) (McKinney 2020). The lack of a requirement for filing a formal grievance appears to do away with the *Faragher/Ellerth* defense, as, under this defense, which is available under the federal law and previously under the New York State law, an employer can escape

the previous law also ease the requirements imposed on victims when filing a claim.

Additionally, not only did New York delete the "severe or pervasive" standard, but it also changed the employers covered, as now all employers within the state will be bound by the requirements of the new law, since, effective February 8, 2020, "The Human Rights Law will apply to all employers within New York State, even those with fewer than four employees."[231] Specifically, the New York AB 8421 indicated that "Section 1. Subdivision 5 of section 292 of the executive law, as amended by chapter 363 of the laws of 2015, is amended,"[232] such that the definition of employer to "include all employers within the state, including the state and all political subdivisions thereof."[233] This is far more comprehensive than the federal standard of Title VII, which applies to those employers with fifteen or more employees.[234] Additionally, it should be noted that section 300 of the New York Executive Law states that the provisions of the article:

> Shall be construed liberally for the accomplishment of the remedial purposes thereof, regardless of whether federal civil rights laws, including those laws with provisions worded comparably to the provisions of this article, have been so construed. Exceptions to and exemptions from the provisions of this article shall be construed narrowly in order to maximize deterrence of discriminatory conduct.[235]

Thus, it is clear that the intent is for the provisions to be construed more generously than federal laws, such that greater protections are afforded to victims of harassment.

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liability under certain conditions. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

231. *Important Updates to the New York State Human Rights Law*, *supra* note 227. This protection will have the largest impact on harassment other than sexual harassment, as the previous version of the law still applied to all employers within the state when sexual harassment was involved. Previously, the language of the statute read:

> The term "employer" does not include any employer with fewer than four persons in his or her employ except as set forth in section two hundred ninety-six b of this article, provided, however, that in the case of an action for discrimination based on sex pursuant to subdivision one of section two hundred ninety-six of this article, with respect to sexual harassment only, the term "employer" shall include all employers within the state.

N.Y. Assemb. B. 8421 (N.Y. 2019).

232. N.Y. Assemb. B. 8421 (N.Y. 2019).

233. *Id.* Currently, Executive Law Section 292 states as follows: "5. The term 'employer' shall include all employers within the state." *Id.*

234. 42 U.S.C. § 2000e(b) (1964). According to Title VII, section 2000e(b) "[t]he term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . . ." *Id.*

235. N.Y. EXEC. LAW § 300 (McKinney 2020).

C. *Other Jurisdictions Considering Removing or Minimizing the "Severe or Pervasive" Standard*

Besides California and New York, other states are considering removing and/or redefining the standard, to a less stringent standard than severe or pervasive, in their anti-harassment and anti-discrimination laws. For example, lawmakers in Maryland, specifically Montgomery County in Maryland, Colorado, Vermont, and Minnesota have taken steps to put forth legislation within their states to lower the standard required in sexual harassment claims, however not all have passed the legislative process successfully.[236] Additionally, the Supreme Court of Minnesota also recently rejected the change in a case before the court.[237]

1. Maryland and Montgomery County, Maryland

The State of Maryland recently joined California and New York when it introduced legislation in Senate Bill 834 ("Maryland SB 834") defining sexual harassment in the context of employment to include:

> Conduct, which need not be severe or pervasive, that consists of unwelcome sexual advances, requests for sexual favors, or other conduct of a sexual nature when . . . [b]ased on the totality of the circumstances, the conduct unreasonably creates a working environment that a reasonable person would perceive to be abusive or hostile.[238]

This is a substantial change from the previous language which defined sexual harassment as:

> Oral, written, or physical conduct, whether or not the conduct would be considered sufficiently severe or pervasive under precedent applied to sexual harassment claims, that consists of unwelcome sexual advances, requests for sexual favors, or other verbal, written, or physical conduct of a sexual nature when . . . the conduct has the

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236. Bachman, *supra* note 192; *see* Turnbull & Spinelli, *supra* note 2.

237. Susan Fitzke, *Severe or Pervasive Remains the Standard to Evaluate Claims of Sexual Harassment in Minnesota*, LITTLER (June 5, 2020), https://www.littler.com/publication-press/publication/severe-or-pervasive-remains-standard-evaluate-claims-sexual-harassment.

238. S.B. 834, Reg. Sess. (Md. 2021). The National Women's Law Center gave "testimony in support of Maryland Senate Bill 834, disavowing the harmful and outdated 'severe or pervasive' standard used to evaluate hostile work environment claims and putting in place a new standard to that better reflects the lived experiences of survivors and modern understandings of workplace harassment," and the testimony explained "how the 'severe or pervasive' standard used in federal law and many state laws has been harmful to survivors, especially women of color survivors, and has led courts to minimize the harmful impact of harassment and throw out many cases." *Testimony in Support of Maryland Workplace Harassment Bill*, NAT'L WOMEN'S L. CTR. (Mar. 23, 2021), https://nwlc.org/resources/testimony-in-support-of-maryland-workplace-harassment-bill.

> purpose or effect of unreasonably interfering with an individual's work performance or creating a working environment that is perceived by the victim to be abusive or hostile.[239]

The legislature left intact the other requirements, such that "submission to the conduct is made either explicitly or implicitly a term or condition of employment of an individual" and "submission to or rejection or the conduct is used as a basis for employment decisions affecting the individual."[240] Most recently, the legislation received a favorable vote at the Economic Matters Committee meeting on April 12, 2021.[241] Thus, it appears that the legislation is on track for full passage.

Additionally, in October 2020, in Montgomery County Maryland, in Bill 14-20 ("Montgomery Bill 14-20"), Chapter 27, Human Rights and Civil Liberties Sections 27-19, the County Council voted to update the Human Rights Law regarding harassment in the workplace, removing the "severe or pervasive" standard and replacing it with a less stringent standard. Specifically, in a memorandum dated September 21, 2020, accompanying the Montgomery Bill 14-20, it was noted that according to precedent case law in Maryland, "the County may, among other things, 'decide what will constitute actionable discrimination' within the County."[242] Thus, Montgomery County determined the grave importance of defining and prohibiting discrimination in employment under Chapter 27 of their County Code, as it currently "does not define 'discriminatory harassment' or 'sexual harassment' *per se*, although these practices generally fall within the County's prohibition against employment discrimination under Section 27-19."[243]

Accordingly, the legislature introduced the Montgomery Bill 14-20 which "would alter the level of harassing conduct that constitutes an employment discrimination claim under County law."[244] The memorandum highlighted that "[h]arassment would not need to raise to the level of being 'severe or pervasive' to be actionable; the harassment would be actionable as long as it was 'more than a petty slight, trivial inconvenience, or minor annoyance.'"[245] Specifically, the Memorandum noted that "these standards of prohibited harassment would be similar to those used under a recently enacted law of the State of New York (New

239. S.B. 834, Reg. Sess. (Md. 2021).

240. *Id.*

241. *Id.*

242. Memorandum from Christine Wellons, Legislative Att'y to the Health & Hum. Servs. Comm. (Sept. 24, 2020). *See also* Montgomery Cnty. B. 14-20 (Md. 2020).

243. *See* Memorandum from Christine Wellons, *supra* note 242.

244. *Id.*

245. *Id.*

York Senate Bill 6577, which was signed into law by Governor Cuomo on August 12, 2019)."[246]

2. Vermont

Similarly, in the 2019 Annual Report of the Vermont Human Rights Commission, the commission submitted a recommendation to the legislature regarding the "severe or pervasive" standard of proof. Specifically, the recommendation stated that:

> The "severe or pervasive" standard of proof for harassment claims by plaintiffs who have legitimately been affected by harassing behavior has become a nearly insurmountable barrier to prevailing in a court of law. The State of Vermont should adopt a standard that is less than "severe or pervasive," that takes into consideration the impact of discrimination on victims and does not punish the victim for failing to follow the protocols of the entity.[247]

The recommendations section of the Annual Report went on to also suggest that "[t]he State of Vermont should consider an amendment to our existing sexual harassment laws that better defines 'unwelcomed,'" since sexual harassment is dependent on the conduct being "unwelcomed" and the "current sexual harassment laws do not reflect existing power dynamics between parties and the pressures upon a person whose housing, employment or benefits is conditioned on their decision to acquiesce to the advances of those in positions of power."[248] Thus, the commission, in its "unique position to observe the barriers to fighting discrimination" in the state, saw the need for the "severe or pervasive" standard to be examined and, ultimately, amended.[249] Despite this acknowledgement by the Vermont Human Rights Commission for the need to lessen the severe or pervasive requirement, the legislature itself in Vermont has yet to act to make any formal change.

3. Colorado

The Protecting Opportunities and Workers' Rights Act, formally Senate Bill 21-176 ("Colorado SB 21-176"), was recently introduced in Colorado as a pathway to protection for women while at work.[250] The legislative declaration section of Colorado SB 21-176 states that "all

246. *Id.*
247. VT. HUM. RTS. COMM'N., ANN. REP. FISCAL YEAR 2019 6 (2019).
248. *Id.* at 7.
249. *Id.* at 6-7.
250. *See* S.B. 21-176, 73rd Gen. Assemb., 1st Reg. Sess. (Colo. 2021).

Coloradans should have an equal opportunity to succeed in the workplace and are entitled to a workplace that is free from discrimination and harassment based on their protected status."[251] The section goes on to discuss studies and data showing that despite some positive "strides in improving workplace environments by making them free from harassment and discrimination,"[252] there is still an ongoing problem which must be addressed to "ensure a safe workplace environment for all . . . ."[253]

Thus, Section 24-34-400.2.(1)(f)(2), states as follows:

> Additionally, the General Assembly:
> (a) Finds that the 'severe or pervasive' standard created by courts to determine if harassment at work is a discriminatory or unfair employment practice does not take into account the realities of the workplace or the harm that workplace harassment causes; and
> (b) Rejects the 'severe or pervasive' standard for proof of workplace harassment in favor of a standard that prohibits unwelcome harassment.

Moreover, Colorado SB 21-176 also deletes the language requiring the finding of a hostile work environment and changes the definition of "harass" to include subjecting "an individual to unwelcome verbal, written, or physical conduct,"[254] where the following factors are met: the individual is a member of a protected class;[255] "submission to the conduct is made either explicitly or implicitly a term or condition of the individual's employment,"[256] "submission to or rejection of the conduct is used as a basis for employment decisions affecting the individual,"[257] or "when taken as a whole, the conduct would be offensive to a reasonable person in the same protected class or who shares the same or similar characteristics as the individual subjected to the conduct and was offensive to the individual."[258]

Colorado SB 21-176 goes on to require a totality of the circumstances test be applied when determining whether or not the conduct was offensive to a reasonable person and to the individual bringing the claim.[259] When examining whether it would be offensive to

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251. *See id.* § 6.
252. *Id.*
253. *Id.*
254. *See id.* §§ 6, 7.
255. *Id.* § 7.
256. *Id.*
257. *Id.*
258. *Id.*
259. *Id.*

a reasonable person, the following should be reviewed: "type of conduct," "nature of the conduct," and "frequency of the conduct, recognizing that a single act of harassment may be offensive to a reasonable person in the totality of the circumstances."[260] When examining whether the conduct would be offensive to the individual, the review[261] must consist of an examination of the "totality of the circumstances of the conduct, including: (I) the identity of the individual engaging in the conduct; and (II) whether the individual who was subjected to the conduct felt explicit or implicit pressure to condone, encourage, or participate in the conduct."[262] Finally, Colorado SB 21-176 goes on to state that for a claim under this section, "the legal standard for harassment does not vary by type of workplace. It is irrelevant that a particular occupation may have been characterized by a greater frequency of discriminatory conduct in the past" and, most importantly, that "the conduct does not need to be severe or pervasive to constitute a discriminatory or unfair employment practice under this subsection (1)(a)."[263] This standard directly speaks against the "severe or pervasive" standard and, specifically, disagrees with *Oncale* and other decisions by stating that it is irrelevant that a particular occupation was characterized by discriminatory conduct in the past. Disappointingly, despite the clear protections afforded in this bill, Colorado SB 21-176 essentially failed on June 7, 2021, as it was postponed indefinitely by the House Committee on Judiciary.[264]

4. Minnesota

In June 2020, in *Kenneh v. Homeward Bound, Inc.*, "the Minnesota Supreme Court issued a unanimous decision affirming that the severe or pervasive standard remains the test for assessing claims of sexual harassment under the Minnesota Human Rights Act (MHRA)."[265] This came after a rejection in 2019 in the Minnesota Senate of a bill that would have replaced the "severe or pervasive" standard.[266] Despite its rejection of lessening the standard, the court did discuss the current

260. *Id.*

261. *Id.*

262. *Id.*

263. *See id.* § 8. Section 24-34-402(1)(a)(I) describes that "[i]t is a discriminatory or unfair employment practice for an employer to refuse to hire, to discharge, to promote or demote, to harassment during the course of employment, or to discriminate in matters of compensation, terms, conditions, or privileges against any individual otherwise qualified because" that individual is part of a protected class. *Id.*

264. Colo. S.B. 21-176, LEGISCAN (Jun. 7, 2021), https://legiscan.com/CO/bill/SB176/2021.

265. *See* Fitzke, *supra* note 237.

266. Turnbull & Spinelli, *supra* note 2.

appropriateness and applicability of the standard, specifically noting that:

> For the severe-or-pervasive standard to remain useful in Minnesota, the standard must evolve to reflect changes in societal attitudes towards what is acceptable behavior in the workplace. As we recognized 30 years ago, the "essence" of the Human Rights Act is "societal change"; "[r]edress of individual injuries caused by discrimination is a means of achieving that goal."[267]

The court went on to highlight that "[t]oday, reasonable people would likely not tolerate the type of workplace behavior that courts previously brushed aside as an 'unsuccessful pursuit of a relationship,' or 'boorish, chauvinistic, and decidedly immature.'"[268] Despite these statements from the court and although "[s]ix different *amici* participated in filing briefs in support of the plaintiff's appeal, each asserting that Minnesota should change or discontinue its longstanding use of the severe or pervasive standard,"[269] the Supreme Court still reversed in part and remanded.[270]

IV. ELIMINATING NONDISCLOSURE AGREEMENTS AND PROHIBITING MANDATORY ARBITRATION PROVISIONS ARE POSITIVE CHANGES, BUT THEY ARE NOT ENOUGH

In conjunction with lessening the "severe or pervasive" standard for filing a claim to make it easier for victims to sue in state court, states have also moved forward with "banning the nondisclosure agreements that predators have used to silence victims and protect their careers," prohibiting mandatory pre-dispute arbitration clauses, and requiring employee training.[271] Although these changes are being made with positive intentions, they are not enough and are receiving mixed responses, as some have pointed out potentially negative impacts with these changes.

In response to:

> [R]eporting about Harvey Weinstein (among others) using confidentiality agreements to silence victims, Congress in December 2017 amended section 162(q) of the tax code to prohibit 'ordinary and necessary' business expense deductions for 'any settlement or payment

267. Kenneh v. Homeward Bound, Inc., 944 N.W.2d 222, 231 (Minn. 2020) (citation omitted).
268. *Id.*
269. *See* Fitzke, *supra* note 237.
270. *Kenneh*, 944 N.W.2d at 234.
271. *See* Christiansen, *supra* note 191.

> related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement.'[272]

Additionally, "[t]o further curb abuse, state legislatures in California, New Jersey, New York, Tennessee, Vermont, and Washington have also adopted different approaches to curtail the use of nondisclosure settlement agreements."[273] The purpose of the restrictions on NDAs is to forbid employers from using NDAs in settlement agreements with the goal of resolving sexual harassment claims, though the impacts could potentially be more far-reaching than intended. For example:

> California passed three new laws that impact nondisclosure provisions. First, a claimant cannot be silenced in California from disclosing factual information concerning actionable behavior, but a claimant may elect to keep his or her identity confidential. Second, California law voids contracts that prevent a party from testifying about actionable conduct when compelled to do so by lawful process. Finally, California makes it an unlawful employment practice to require an employee to sign a nondisclosure agreement that denies the claimant the right to disclose information about actionable conduct.[274]

Also, New York, in 2018, amended its laws to prohibit an employer from including an NDA in a settlement agreement involving a claim of sexual harassment.[275] The law did, however, leave it up to the employee's preference, as to whether or not the NDA should be included, as arguably, there are times that an NDA may protect an employee.[276] Additionally, the law provides that "any provision in a contract or other agreement between an employer or agent of an

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272. *Id.*

273. *Id.* The article highlights that "New Jersey similarly declares confidentiality agreements that conceal the details of a harassing behavior to be against public policy and unenforceable, while also protecting a claimant's identity." *Id.* Additionally, it points out that:

> Illinois passed the Workplace Transparency Act, which prohibits any "contract, agreement, clause, covenant, waiver or other document" that restricts an employee from reporting allegations of unlawful conduct to federal, state, or local officials for investigation. Tennessee provides that an employer shall not require an employee to execute or renew a nondisclosure agreement concerning sexual harassment claims. Vermont similarly prohibits concealment of sexual harassment facts by agreement. Finally, Washington voids any nondisclosure agreement that prevents an employee from disclosing sexual harassment or sexual assaults as a condition of employment.

Id. Workplace Transparency Act, 820 ILL. COMP. STAT. 101-0220/96/1-25 (2021); *see* N.J. STAT. ANN. §§ 10:5-12.7–10:5-12.11 (West 2021); TENN. CODE ANN. § 50-1-108 (2021); 21 VT. STAT. ANN. § 495h (2021); WASH. REV. C. § 4.24.840 (2021).

274. *See* Christiansen, *supra* note 191; *see also* CAL. CIV. PROC. CODE § 1001 (2019); CAL. CIV. PROC. CODE § 1002 (2020).

275. N.Y. GEN OBLIG. LAW § 5-336(1)(a) (McKinney 2021).

276. *Id.* § 5-336(1)(b).

employer and any employee or potential employee of that employer . . . that prevents disclosure of factual information related to any future claim of discrimination is void and unenforceable."[277] An exception was included, such that a provision may be added as long as it "notifies the employee or potential employee that it does not prohibit him or her from speaking with law enforcement, the equal employment opportunity commission, the state division of human rights, a local commission on human rights, or an attorney retained by the employee or potential employee."[278] Furthermore, some states, including "Maryland, New Jersey, New York, Vermont, and Washington have also passed laws prohibiting pre-arbitration agreements, class action waivers, and jury trial waivers in sexual harassment cases."[279]

Although these statutory attempts are all being made to provide access to justice to victims, it is unclear whether or not disallowing NDAs and arbitration agreements is the right path. For example, when the EEOC's Select Task Force reconvened in June of 2018, "Kathleen McKenna, a partner at Proskauer Rose, who represents employers, testified that arbitration provides a neutral and confidential process to resolve individual harassment complaints for conduct that employers 'invariably prohibit and work to guard against.'"[280] In her testimony, she "also explained that proposals to prohibit non-disclosure agreements are likely to be counterproductive, as that could lead to an increase in litigation rather than private resolution."[281]

Others have also argued that NDAs can protect employees during an ongoing dispute and should not be completely dismissed. For example, "[d]iscoverable facts can be embarrassing and harmful to both parties. Therefore, it is often desirable for both parties to utilize an NDA so that neither side must publicly respond to the other's version of events."[282] Additionally, it may be true that, "[e]mployers that feel they cannot seek an NDA that preserves their good name will be less inclined to consider settlement in the first place or include clauses that benefit the employee as part of the resolution."[283] Thus, this could lead to victims losing a settlement option that may otherwise have been available.

277. *Id.* § 5-336(2).

278. *Id.*

279. *See* Christiansen, *supra* note 191.

280. *EEOC Select Task Force on Harassment Hears from Experts on How to Prevent Workplace Harassment*, *supra* note 1.

281. *Id.*

282. Emily Haigh & David Wirtz, *#MeToo: In Defense of Nondisclosure Agreements*, LITTLER (Feb. 26, 2020), https://www.littler.com/publication-press/publication/metoo-defense-nondisclosure-agreements.

283. *Id.*

Additionally, others have argued that "now clients will wonder whether they should fight instead of settle because there is no way to obtain confidentiality" and that this "might lead to attempts to circumvent the statutes by, for example, dropping the sexual harassment claims and then settling."[284] Although settlement is, at times, the best option, it may not always be, yet these statutory provisions may make settling a more appealing, though less advantageous, solution for the victim. Despite the attempts by states to limit or prohibit employers from requiring employees to sign NDAs as a condition of employment or as part of a settlement, prohibiting provisions regarding arbitration agreements, and requiring anti-harassment training for employees and employers,[285] changes still need to be made to ensure that all states protect victims of sexual harassment by ensuring access to justice for those individuals.

V. RECOMMENDATIONS

Despite some of the current positive changes being made by legislatures and employers, the most effective way to provide access to justice for victims and put would-be harassers on notice that harassment and discrimination will not be tolerated is to lessen the "severe or pervasive" standard. Sexual harassment continues to be a serious problem in the workplace, such that victims suffer emotional, economic, and professional consequences with often zero to, at best, limited recourse. Thus, the "severe or pervasive" standard applied in sexual harassment claims should be deleted or altered to create a less stringent, more realistic standard, in line with today's societal and workplace conditions and dynamics.

As noted, the "severe or pervasive" standard has been interpreted quite differently by different courts and some of those interpretations have led to outrageous outcomes. For example, many jurisdictions have set an unreasonably high bar for victims to meet, and, in those jurisdictions, outcomes have led individuals to suffer through situations involving unimaginable harassment and discrimination, only to have the court hold that the behavior was not severe or pervasive *enough* to qualify as conduct which created a hostile work environment. These holdings are not only insensitive to the individual's suffering, but they

284. *See* Christiansen, *supra* note 191. The article was quoting David Gevertz, Atlanta, Georgia, cochair of the ABA Section Leader of the Employment & Labor Relations Law Committee who stated that, "[t]he pendulum has swung, and confidentiality provisions have been abused by powerful people with deep pockets who can afford to buy silence," however, he also noted that "I would have preferred courts to have been more liberal in permitting discovery, rather than enacting legislation." *Id.*

285. JOHNSON ET AL., *supra* note 2.

lay the groundwork for a continued disregard to the harassment and discrimination suffered by individuals in the workplace.

For example, "[w]hen a survivor brings a harassment lawsuit, courts should consider all the ways the employer harassed the survivor. Instead of viewing events in their totality, under the 'severe or pervasive' standard, judges often parse apart each instance of harassment and consider each in isolation."[286] As such, "[j]udges applying the standard determine whether the conduct is egregious or frequent enough, and their own biases and experiences can impact the analysis—leading cases to be dismissed before they are fully and fairly heard by a jury."[287] "This framework minimizes survivors' experiences and the impact of harassment at work."[288] Once the "severe or pervasive" standard is deleted or altered, and replaced with a new, more clear-cut, practicable standard, it can be more uniformly applied.

Thus, each state should pass legislation to replace the "severe or pervasive" standard with a more appropriate standard, such as has been done in New York or California. For example, the New York statute defines harassment as "an unlawful discriminatory practice when it subjects an individual to inferior terms, conditions or privileges of employment because of the individual's membership in one or more of these protected categories."[289] The California statute similarly provides that:

> [H]arassment creates a hostile, offensive, oppressive, or intimidating work environment and deprives victims of their statutory right to work in a place free of discrimination when the harassing conduct sufficiently offends, humiliates, distresses, or intrudes upon its victim, so as to disrupt the victim's emotional tranquility in the workplace, affect the victim's ability to perform the job as usual, or otherwise interfere with and undermine the victim's personal sense of well-being.[290]

Such language provides a more appropriate standard, as an individual must be subjected to inferiority, oppression, or intimidation to bring a claim (rather than severe or pervasive conduct), which are at the core of why sexual harassment and discrimination is so damaging.

Although the potential lack of effect of changing the language has been noted, the potential benefits outweigh these concerns. For example,

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286. Ijoma & Johnson, *supra* note 3.
287. *Id.*
288. *Id.*
289. N.Y. EXEC. LAW § 296(1)(h) (McKinney 2021).
290. S.B. 1300, 2018 Legis. Counsel (Cal. 2018).

David Gevertz, the Atlanta, Georgia cochair of the American Bar Association ("ABA") Section Leader of the Employment & Labor Relations Law Committee, stated that "[w]eakening the substantive legal standard to require less than the federal 'severe or pervasive' standard in state court will not change the results," as "[p]laintiffs' lawyers can already avoid the federal 'severe or pervasive' standard by pleading state law claims for assault, battery, negligent hiring, and negligent supervision."[291] Although these other legal options may be available to attorneys, lowering the "severe or pervasive" standard does more than simply change the outcome in a particular case. Rather, it sets the standard at a manageable level and shows plaintiffs that their claims will be properly acknowledged and shows potential offenders that over-the-top harassing or discriminatory behavior will no longer be tolerated.

Additionally, Gevertz opined that "[j]urors are sensitive to the news about celebrities, and during moments like the present, juries tend to become more liberal in their verdicts, regardless of whether the standard is 'severe or pervasive' or not."[292] Thus, he indicated that "[j]urors will fine-tune the standards in ways that outstrip the laws," and that "jury justice is much more efficient than legislative justice. Changing the laws is an inefficient way to get the same result."[293] Contrary to this opinion, although legislation is a slower process, hoping that juries find in favor of victims because of a change in societal views is a frightening, uncertain way to proceed with providing justice for a victim. As is clear, a jury is an unsure piece of an equation, as it can change each day and on a whim. Changing the "severe or pervasive" standard lays the groundwork for alerting would-be offenders to the fact that they must behave in a certain way, otherwise their victim will have the right to bring the claim to court.

Additionally, it has been noted that the new laws may increase litigation, though this may not necessarily be a negative result, as:

> The outdated "severe or pervasive" standard leads many survivors to not make a complaint or seek help for fear their claims will not be legally actionable. Given the bad court interpretations that have come out of "severe or pervasive," these concerns are not unfounded. Placing this burden on plaintiffs does little to incentivize employers to create safe and harassment-free workplaces.[294]

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291. *See* Christiansen, *supra* note 191.
292. *Id.*
293. *Id.*
294. Ijoma & Johnson, *supra* note 3.

Thus, lowering the standard puts the burden on employers to create an environment that will foster a harassment- and discrimination-free environment.

Finally, another route that has been taken to combat sexual harassment and discrimination, which will work in conjunction with the lessening of the "severe or pervasive" standard, is to require that employers implement programs and conduct sexual harassment prevention training for employers and employees. For example, as a result of the Select Task Force on the Study of Harassment in the Workplace, and as part of the Report of the Co-Chairs Chai R. Feldblum and Victoria A. Lipnic, the EEOC included an Anti-Harassment Policy checklist and a Harassment Report System and Investigations checklist which were each meant to be a useful tool in taking steps to prevent harassment in the workplace, and responding to harassment when it occurs. Also as a result of the EEOC Report, as of the 2018 reconvening of the EEOC Committee "the EEOC developed an innovative training program called Respectful Workplaces that has been provided in over 200 training sessions to over 5,200 employees and supervisors in 18 states."[295] Moreover, some states, such as California, Connecticut, Delaware, Maine, and New York have enacted new training requirements concerning sexual harassment and discrimination.[296] Although such trainings can serve as a means of preventing harassment before it happens, it is first important to change the "severe or pervasive" standard, as it will stand as a deterrent to would-be harassers that such behavior will be punished and lay the proper groundwork for putting employers on notice, as well.

VI. CONCLUSION

It is imperative that all states enact laws to change the "severe or pervasive" standard to a less stringent and more realistic, current standard to ensure that their citizens have adequate access to justice within their borders for sexual harassment and discrimination claims and to put would-be harassers on notice that harassment and discrimination will be punished.

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295. FELDBLUM & LIPNIC, *supra* note 23. *EEOC Select Task Force on Harassment Hears from Experts on How to Prevent Workplace Harassment*, *supra* note 1. Also, the Press Release noted that "[s]ince June 2016, when the report was released, the EEOC has also conducted about 2,700 outreach events related to harassment, reaching approximately 300,000 individuals." *Id.*

296. CAL. GOV'T CODE § 12940 (West 2018); CAL. GOV'T CODE § 12950.1(a) (2018); CONN. AGENCIES REGS. § 46a-54-204 (2016); ME. STAT. tit. 26, § 807(3) (2016); N.Y. LAB. LAW § 201-g (McKinney 2021).