Sexual Harassment and Title VII: Selected Legal Issues

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Summary

Title VII of the Civil Rights Act of 1964 (Title VII) generally prohibits discrimination in the workplace, but does not contain an express prohibition against harassment. The Supreme Court, however, has interpreted the statute to prohibit certain forms of harassment, including sexual harassment. Since first recognizing the viability of a Title VII harassment claim in a unanimous 1986 decision, the Court has also established legal standards for determining when offensive conduct amounts to a Title VII violation and when employers may be held liable for such actionable harassment, and created an affirmative defense available to employers under certain circumstances.

Given this judicially created paradigm for analyzing sexual harassment under Title VII, this report examines key Supreme Court precedent addressing Title VII sexual harassment claims, the statutory interpretation and rationales reflected in these decisions, and examples of lower federal court decisions applying this precedent. The report also discusses various types of harassment recognized by the Supreme Court—such as "hostile work environment," *quid pro quo*, constructive discharge, and same-sex harassment—and explores tensions, disagreements, or apparent inconsistencies among federal courts when analyzing these claims.

Finally, this report examines sexual harassment in the context of retaliation. Does Title VII's anti-retaliation provision protect an employee from being fired, for example, for reporting sexual harassment? How do federal courts approach the analysis of a Title VII claim alleging that an employer retaliated against an employee by subjecting him or her to harassment? The report discusses Supreme Court and federal appellate court precedent relevant to these questions.

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Introduction

The issue of sexual harassment in the workplace has received significant attention in recent months amid reports of harassment and sexual assault by high-level executives, managers, and employees across a range of industries.[1] This attention has prompted inquiries into the prevalence of harassment, the scope and sufficiency of legal protection for harassment victims, and issues ranging from the use of confidentiality provisions in settlement agreements that preclude victims from speaking publicly about allegations to how to improve procedures by which employees can seek remedy for harassment in all three branches of government.

This report addresses various legal issues related to sexual harassment and Title VII of the Civil Rights Act of 1964 (Title VII), the federal statute that generally prohibits discrimination in the workplace, including discrimination based on sex. As the statute contains neither an express prohibition against harassment nor a definition of harassment, this report examines (1) how the Supreme Court and federal appellate courts have mapped out the scope of protection that Title VII provides employees against sexual harassment, including the Supreme Court's "severe or pervasive" standard that harassment victims must meet to show a Title VII violation (which applies to most Title VII sexual harassment claims); (2) limits on employer liability for harassment; and (3) retaliation for reporting harassment, among other issues.

Background and Existing Legal Standard

Title VII makes it unlawful for employers 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."[2] Though Title VII's antidiscrimination provisions do not expressly prohibit harassment,[3] the Supreme Court and federal circuit courts interpret Title VII's prohibition against discrimination in the "terms, conditions, or privileges of employment" to prohibit *harassment* based on race, color, religion, sex, or national origin.[4]

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[1] Monica Hesse and Dan Zak, *Violence. Threats. Begging. Harvey Weinstein's 30-year Pattern of Abuse in Hollywood*, Wash. Post, Oct. 14, 2017, at https://www.washingtonpost.com/lifestyle/style/violence-threats-begging-harvey-weinsteins-30-year-pattern-of-abuse-in-hollywood/2017/10/14/2638b1fc-aeab-11e7-be94-fabb0f1e9ffb_story.html?utm_term=.c1e796b49076; Michelle Cottle, *Capitol Hill's Sexual Harassment Problem: Congress has all the Necessary Elements for a Perfect Storm of Predation*, The Atlantic, Nov. 3, 2017, at https://www.theatlantic.com/politics/archive/2017/11/capitol-hills-sexual-harassment-problem/544946/; Erik Ortiz and Corky Siemaszko, *NBC News Fires Matt Lauer after Sexual Misconduct Review*, NBC News, Nov. 30, 2017, at https://www.nbcnews.com/storyline/sexual-misconduct/nbc-news-fires-today-anchor-matt-lauer-after-sexual-misconduct-n824831; Susan Chira and Catrin Einhorn, *How Tough is it to Change a Culture of Harassment? Ask Women at Ford*, N.Y.Times, Dec. 19, 2017, at https://www.nytimes.com/interactive/2017/12/19/us/ford-chicago-sexual-harassment.html?_r=2&mtrref=www.autonews.com; Pete Wells, *Scandals Keep Breaking, but Restauranteurs Have Yet to Own Up*, N.Y.Times, Jan. 2, 2018, at https://www.nytimes.com/2018/01/02/dining/sexual-harassment-restaurants.html; Editors, *Science Suffers from Harassment*, Scientific American, Jan. 24, 2018, at https://www.scientificamerican.com/article/science-suffers-from-harassment/.

[2] 42 U.S.C. § 2000e-2(a)(1) ("It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.").

[3] *See id.* and 42 U.S.C. § 2000e-2(b) (making it unlawful for an employer "to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any 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.").

[4] Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66-67, 73 (1986) (recognizing sexual harassment as a violation of Title VII and expressly holding that such claims are actionable under Title VII). *See also, e.g.*, EEOC v. Central

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When a plaintiff raises a Title VII harassment claim, federal courts often describe the action as alleging "harassment" or a "hostile work environment."[5] The interchangeable use of those terms is perhaps best understood as reflecting the current statutory anchor of a Title VII harassment action: as the statute does not expressly prohibit or define harassment, such claims are framed as violations of Title VII's prohibition against a discriminatory and abusive work environment, based on the phrase "terms, conditions, or privileges of employment."[6]

The "Severe or Pervasive" Standard and the *Harris* Factors

The Supreme Court's legal standard for analyzing harassment claims—including sexual harassment claims—primarily focuses on whether the alleged conduct is "severe or pervasive" enough to create an abusive or hostile work environment for the victim.[7] Under this existing standard, even if a victim were to experience offensive or harassing conduct, a harasser's actions will *not* constitute a Title VII violation unless those acts in total were "severe or pervasive" enough to create an "abusive" or "hostile" work environment.

To prevail on such a claim, a plaintiff must generally (1) establish the requisite elements of a hostile work environment claim and (2) show a basis for holding the employer liable for that abusive or hostile conduct. A plaintiff can also show a violation of Title VII based on *quid pro quo* harassment, also discussed in this report.

Courts vary in their formulations of this overall analysis, but generally require that the plaintiff satisfy the following elements to establish a prima facie showing of actionable harassment (including that the conduct was sufficiently severe or pervasive, as analyzed under the last "objective" prong):

- he or she belongs to a protected category under Title VII;[8]
- the conduct was unwelcome;
- the conduct was based on the plaintiff's protected category; [9]

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Wholesalers, Inc., 573 F.3d 167, 174-77 (4th Cir. 2009) (analyzing Title VII harassment claims based on race and sex); EEOC v. WC&M Enters., Inc., 496 F.3d 393, 399-402 (5th Cir. 2007) (analyzing Title VII harassment claims based on religion and national origin).

[5] *See id.*

[6] *See* Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993) (explaining that 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,' which includes requiring people to work in a discriminatorily hostile or abusive environment") (quoting *Meritor*, 477 U.S. at 64); EEOC v. Fairbrook Medical Clinic, 609 F.3d 320, 327 (4th Cir. 2010) (explaining that a plaintiff alleging harassment can establish a Title VII violation by "'proving that discrimination based on sex has created a hostile or abusive work environment'") (quoting *Meritor*, 477 U.S. at 66).

[7] *See generally*, Pa. State Police v. Suders, 542 U.S. 129, 133 (2004) (to be actionable under Title VII, plaintiffs must show "harassing behavior 'sufficiently severe or pervasive to alter the conditions of [their] employment'") (quoting *Meritor*, 477 U.S. at 67).

[8] Title VII prohibits discrimination "because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. §§ 2000e-2(a)(1) and (a)(2).

[9] With respect to showing that the alleged harassment or hostile treatment was based on sex, some courts have held that the harassment need not necessarily have been sexual in nature. *See, e.g.*, Boumehdi v. Plastag Holdings, LLC., 489 F.3d 781, 788 (7th Cir. 2007) (stating that though "most of [harasser]'s alleged comments were sexist rather than sexual, our precedent does not limit hostile environment claims to situations in which the harassment was based on sexual desire").

- the plaintiff *subjectively* viewed the harassment as creating an abusive work environment; and
- a "reasonable" person would also *objectively* view the work environment as abusive.[10]

This last objective prong typically constitutes the most probing aspect of the analysis and is the point at which courts apply language from the Supreme Court decision, *Harris v. Forklift Systems, Inc.*,[11] to assess the severity or pervasiveness of the conduct.[12] More specifically, federal courts apply *Harris*'s instruction that a court should consider "all the circumstances," including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[13]

It should be noted that the Court has characterized its own Title VII hostile work environment jurisprudence as "mak[ing] clear that conduct must be extreme to amount to a change in the terms and conditions of employment," and has noted that the rationale for such a standard is to "ensure that Title VII does not become a 'general civility code.'"[14] "A recurring point in [our] opinions," the Court stated in *Faragher v. City of Boca Raton*, "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.'"[15]

Federal Courts' Application of the *Harris* Factors

Failure to show sufficient severity or pervasiveness, under the objective prong of the analysis, is often the basis for *dismissal* of a Title VII harassment claim, in instances when a defense does not apply.[16] Courts repeatedly note the difficulty of assessing whether harassing conduct is sufficiently severe or pervasive under *Harris* to amount to a Title VII violation[17] and the high bar

[10] *See, e.g.*, LeGrand v. Area Resources for Community and Human Services, 394 F.3d 1098, 1102 (8th Cir. 2005) (prima facie elements require the plaintiff to show: membership in a protected group, subjection to unwelcome sexual harassment, that the harassment was based on sex, and that the harassment was "sufficiently severe or pervasive as to affect a term, condition, or privilege of employment by creating an objectively hostile or abusive environment"); Mendoza v. Borden, Inc., 195 F.3d 1238, 1245 (11th Cir. 1999) (en banc) (setting forth similar elements to establish a "hostile-environment sexual-harassment claim").

[11] 510 U.S. 17, 23 (1993).

[12] *See, e.g.*, Gerald v. University of Puerto Rico, 707 F.3d 7, 18 (1st Cir. 2013) ("We proceed to the real bone of contention here—whether the harassment was sufficiently severe or pervasive. This is the factor the district court found lacking and it is also the entire focus of the [defendant]'s argument on appeal. This is not surprising since . . . the real question is typically whether the bad acts taken in the aggregate are sufficiently severe or pervasive to be actionable."); *Central Wholesalers*, 573 F.3d at 175-76 (citing and applying *Harris* factors); *Mendoza*, 195 F.3d at 1245-51 (same).

[13] *See, e.g., Central Wholesalers*, 573 F.3d at 175-76 (applying *Harris* to harassment analysis); *Mendoza*, 195 F.3d at 1245-51 (same). *See also* Faragher v. City of Boca Raton, 524 U.S. 775, 787-88 (1998) (discussing *Harris* as "direct[ing] courts to determine whether an environment is sufficiently hostile or abusive by 'looking at all the circumstances,' including the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'").

[14] *Faragher*, 524 U.S. at 788.

[15] *Id.* (quoting Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 81 (1998)).

[16] *See, e.g., LeGrand*, 394 F.3d at 1102-03 (affirming grant of summary judgment on plaintiff's harassment claim, as conduct was not sufficiently severe or pervasive to be actionable under Title VII); Mormol v. Costco Wholesale Corp., 364 F.3d 54,58-59 (2d Cir. 2004) (same); Burnett v. Tyco Corp., 203 F.3d 980, 984-85 (6th Cir. 2000) (same); Brooks v. City of San Mateo, 229 F.3d 917, 924-27 (9th Cir. 2000) (same).

[17] *See, e.g.*, Turner v. The Saloon, Ltd, 595 F.3d 679, 685 (7th Cir. 2010) ("We have acknowledged before that (continued...)

for showing such actionable harassment.[18] As the U.S. Court of Appeals for the Second Circuit (Second Circuit) has observed, "[t]he line between complaints that are easily susceptible to dismissal as a matter of law and those that are not is indistinct. . . . And on either side of the line there are . . . gradations of abusiveness."[19] As addressed in further detail below, there is substantial variance among federal circuit courts in terms of their application of this fact-intensive inquiry.

Though the Supreme Court in *Harris* observed that "[t]his is not, and by its nature cannot be, a mathematically precise test,"[20] appellate courts have since applied *Harris* with an emphasis on frequency, often numerically counting instances of harassment, noting the duration of the harassment and the severity of the conduct.[21] As a general matter, courts most readily conclude that alleged conduct is sufficiently severe or pervasive when the behavior constitutes rape[22] or involved physical threats at work,[23] repeated solicitation for sex,[24] repeated touching of intimate body parts,[25] and/or daily or regular verbal harassment.[26]

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'[d]rawing the line' between what is and is not objectively hostile 'is not always easy'"; contrasting facts involving sexual assault, obscene language or pornographic material with "'occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers.'") (citation omitted). *See also* Guess v. Bethlehem Steel Corp., 913 F.2d 463, 464 (7th Cir. 1990) (discussing the Supreme Court's holding in *Meritor* that "Title VII's prohibition against sex discrimination in working conditions" included a prohibition against sexual harassment, and noting that because "the statute does not use the term or otherwise refer specifically to the conduct described by it, the metes and bounds of the wrong have been left for definition by the courts").

[18] *See, e.g.*, EEOC v. Sunbelt Rentals, Inc., 521 F.3d 306, 315 (4th Cir. 2008) ("Our circuit has likewise recognized that plaintiffs must clear a high bar in order to satisfy the severe or pervasive test."); *Mendoza*, 195 F.3d at 1243, 1251 (conduct insufficient to constitute actionable harassment, where plaintiff alleged her supervisor looked her up and down and made a sniffing motion as he looked at her groin on two separate occasions, constantly followed her, told her he was "getting fired up," and passed by her in the hallway and rubbed his hip against her hip while touching her shoulder; stating that to hold this conduct actionable would "establish a baseline of actionable conduct that is far below that established by other circuits" and citing cases with similar or more serious allegations that failed to constitute actionable harassment as a matter of law).

[19] Redd v. New York Div. of Parole, 678 F.3d 166, 177 (2d Cir. 2012). *See also Harris*, 510 U.S. at 24 (Scalia, J., concurring) ("'Abusive' (or 'hostile,' which in this context I take to mean the same thing) does not seem to me a very clear standard—and I do not think clarity is at all increased by adding the adverb 'objectively' or by appealing to a 'reasonable person['s]' notion of what the vague word means.").

[20] *Harris*, 510 U.S. at 23.

[21] *See, e.g.*, *LeGrand*, 394 F.3d at 1102 (in applying *Harris* factors, characterizing conduct as "three isolated incidents, which occurred over a nine-month period" to hold conduct did not amount to Title VII violation); *Burnett*, 203 F.3d at 984 (holding that "a single battery coupled with two merely offensive remarks over a six-month period does not create an issue of material fact as to whether the conduct alleged was sufficiently severe to create a hostile work environment."); *Mendoza*, 195 F.3d at 1242-43, 1249 (where plaintiff alleged her supervisor looked her up and down and made a sniffing motion as he looked at her groin, passed by her in the hallway and rubbed his hip against her hip while touching her shoulder smiling, and constantly followed her, stating that "a single instance of slight physical contact, one arguably inappropriate statement, and three instances of [her supervisor]'s making a sniffing sound" occurring over an eleven-month period was "far too infrequent" to constitute a Title VII violation).

[22] *See* Lapka v. Chertoff, 517 F.3d 974, 983-84 (7th Cir. 2008) (co-worker rape was sufficiently severe to constitute actionable harassment under Title VII); Gary v. Long, 59 F.3d 1391, 1397 (D.C. Cir. 1995) ("If proven to be true, [supervisor]'s repeated verbal and physical harassment of [plaintiff], culminating in a rape, is 'not only pervasive harassment but also criminal conduct of the most serious nature' that is 'plainly sufficient to state a claim for 'hostile environment sexual harassment.'") (quoting *Meritor*, 477 U.S. at 67).

[23] *See* Kaytor v. Electric Boat Corp., 609 F.3d 537, 540-41, 550-52 (2d. Cir. 2010) (conduct sufficiently severe or pervasive, where harasser told her on at least six occasions that he wanted to choke her, often said he wished her dead, told her he would kill her if she reported his comments to upper management, and made sexual comments, among other acts).

Even when addressing conduct with these characteristics, however, federal appellate case law reflects divergent analyses based on seemingly similar facts.[27] Below are selected cases addressing harassment claims alleging serious physical and verbal misconduct, with fact-specific discussion to demonstrate applications of the "severe or pervasive" standard to behavior that could be characterized as egregious.

For example, in *Turner v. The Saloon, Ltd.*,[28] the Seventh Circuit held that evidence was sufficient to create a triable issue that the harassment was sufficiently severe or pervasive, where the harasser grabbed the plaintiff's genitals, asked the plaintiff to kiss her, pressed against the plaintiff asking if he missed her, grabbed his buttocks, and told him she missed seeing him naked when she saw plaintiff change into his work uniform. When faced with potentially similar facts in *LeGrand v. Area Resources for Community and Human Services*,[29] however, the Eighth Circuit held that the evidence was *insufficient* to show actionable harassment, where the harasser forcibly kissed the plaintiff "in the mouth," grabbed the plaintiff's buttocks, reached for the plaintiff's genitals, gripped the plaintiff's thigh, asked the plaintiff to watch pornographic movies with him,

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[24] *See* Hawkins v. Anheuser-Busch, Inc., 517 F.3d 321, 334-35 (6th Cir. 2008) (conduct sufficiently severe or pervasive, where harasser asked plaintiff to perform oral sex and have sex on multiple occasions, regularly tried to touch her, rubbed against her with his private parts, tried to grab her waist, made "lewd and sexual comments 'all the time,'" and made regular sexual references to her private body parts); Hulsey v. Pride Rests., *LLC*, 367 F.3d 1238, 1248 (11th Cir. 2004) (conduct sufficiently severe or pervasive, where harasser repeatedly propositioned plaintiff for sex, repeatedly attempted to touch her breasts, placed his hands down her pants, tried to pull off her pants, and enlisted others to hold her while he attempted to grope her).

[25] *Id.*

[26] *See Boumehdi*, 489 F.3d at 789 (where plaintiff's supervisor allegedly made "at least 18 sexist or sexual comments in less than a year's time," and similar comments were made "very often," such conduct was pervasive enough to create a hostile work environment); *WC&M Enterprises*, 496 F.3d at 400 (where plaintiff was subjected to verbal harassment on "a regular basis for a period of approximately one year," evidence was sufficient to show actionable Title VII claim).

[27] *See, e.g.*, Mormol v. Costco Wholesale Corp., 364 F.3d 54, 55-56, 58-59 (2d Cir. 2004) (conduct did not amount to actionable harassment, where plaintiff repeatedly declined her supervisor's propositions for sex, in which he told her he would not approve her vacation request unless she had sex with him, again asked her to have sex and said he would punch her time card at night so she would be paid for hours she did not work, and asked her again for sex, telling her he would give her money and make her a full-time employee but only require her to work part-time; characterizing this harassment as amounting to only a few episodes and not so severe as to "overcome its lack of pervasiveness"); Paul v. Northrop Grumman Ship Systems, 309 F. App'x 825, 826, 829 (5th Cir. 2009) (holding that conduct was not sufficiently severe or pervasive to be actionable, where harasser came up to plaintiff and placed his chest against her breasts for 30 seconds, then followed her, forced his way through the door ahead of her, and placed his hand on her stomach and rubbed his pelvic region across her hips and buttocks; stating that "non-consensual physical touching" is actionable only where "chronic and frequent.").

Divergent, or seemingly inconsistent, analyses commonly exist within a given circuit's precedent as well. *Cf.* Nitsche v. CEO of Osage Valley Elec. Co-op., 446 F.3d 841, 843-44, 846 (8th Cir. 2006) (alleged conduct over a twenty-year period was not sufficiently severe or pervasive, where the harasser, on two or three occasions, stuck a shovel between plaintiff's legs and rubbed him with it; repeatedly told him he needed to get a pap smear; called him a "stub" and suggested he had a short penis, among other acts and behavior); Eich v. Bd. of Regents for Cent. Mo. State Univ., 350 F.3d 752, 760-61 (8th Cir. 2003) (actionable harassment, where over a 7-year period, harasser brushed up against plaintiff's breasts, ran his fingers through her hair, and simulated sex acts with plaintiff while she was bent over during a handcuff training exercise, among other acts and behavior). *See also Redd*, 678 F.3d at 179-80 (conduct was sufficiently severe or pervasive, where supervisor intentionally touched plaintiff's breasts on three occasions with hands); *cf.* Quinn v. Green Tree Credit Corp., 159 F.3d 759, 768 (2d Cir. 1998) (conduct not sufficiently severe or pervasive, where supervisor intentionally touched plaintiff's breasts using papers he was holding in his hand and said she was voted as having the "sleekest ass" in the office).

[28] 595 F.3d 679, 685 (7th Cir. 2010).

[29] 394 F.3d 1098, 1100, 1103 (8th Cir. 2005).

and on another occasion suggested that the plaintiff would advance in the company if he (the plaintiff) engaged in sexual conduct with the harasser while watching pornographic movies.

Meanwhile, the First Circuit held in *Gerald v. University of Puerto Rico*[30] that the harasser's conduct—solicitation for sex on one occasion, touching the victim's breast on another occasion, and asking her in front of other co-workers why she would not have sex with him—was sufficiently severe or pervasive to constitute actionable harassment. Yet in *Brooks v. City of San Mateo*,[31] the Ninth Circuit held that the harasser's conduct did not amount to severe or pervasive harassment,[32] where the harasser touched the plaintiff's stomach while she was working and made a sexual comment, forced his hand underneath her sweater and bra to touch her bare breast, and then approached her as though he was going to "fondle her breasts again."[33] The court emphasized that the conduct was "highly reprehensible," but under the applicable standard, repeatedly characterized the behavior as a single episode of harassment and an "entirely isolated incident."[34]

A court's characterization of both the legal standard and the conduct at issue appears to significantly shape the analysis, and, correspondingly, the variability of the analyses. In *Turner*, for example, the Seventh Circuit emphasized that if there is touching of an intimate body part, such evidence weighs "most heavily" in determining whether the harassment is actionable.[35] The court additionally stated that the harasser's grabbing of the plaintiff's genitals was "probably severe enough on its own to create a genuine issue of material fact" that the harassment was objectively severe or pervasive.[36] In *LeGrand*, however, the Eighth Circuit characterized the conduct as being "manifestly inappropriate," but composed of only "three isolated incidents, which occurred over a nine-month period," thus rendering the conduct—in the court's view—"not so severe or pervasive as to poison [the plaintiff]'s work environment."[37] The court in *LeGrand* also characterized the evidence as not demonstrating incidents that were "physically violent or overtly threatening."[38]

As circuit precedent is controlling on both the circuit itself and lower courts within the circuit, older circuit precedent—by establishing minimum thresholds for conduct that constitutes actionable harassment—continues to shape recent analyses. More specifically, if circuit courts have held that certain fact patterns, as a matter of law, are insufficient to show the requisite severity or pervasiveness, lower courts in the circuit have accordingly held that fact patterns concerning similarly or less egregious conduct also do not amount to actionable harassment. For example, the Fifth Circuit held in *Shepherd v. Comptroller of Public Accounts of State of Texas* that harassment did not amount to actionable conduct under Title VII, where the harasser made remarks about the plaintiff's breasts and the size of her thighs, simulated looking under her dress, repeatedly stood over her desk and tried to look down her clothing, rubbed her from her shoulder

[30] 707 F.3d 7, 18 (1st Cir. 2013).

[31] 229 F.3d 917, 921 (9th Cir. 2000).

[32] *Id*. at 924-27.

[33] *Id*. at 921.

[34] *Id*. at 924-927.

[35] *Turner*, 595 F.3d at 685-86. *See also Gerald*, 707 F.3d at 18 ("These offensive incidents, which involved sexual propositioning and uninvited touching, can reasonably be viewed as severe; and, in the case of the breast grabbing incident, physically threatening (not to mention criminal).").

[36] *Turner*, 595 F. 3d at 685-86.

[37] *LeGrand*, 394 F.3d at 1102-03.

[38] *Id*. at 1102.

down to her wrist with his hand while standing beside her on several occasions, and motioned for her to sit in his lap when plaintiff arrived late to a meeting, saying "here's your seat."[39] While the court's analysis in *Shepherd* has been subject to criticism by later decisions,[40] the Fifth Circuit and lower courts nonetheless continue to rely on *Shepherd* as controlling authority dictating conduct insufficient to create a hostile work environment in violation of Title VII.[41]

Employer Liability for Harassment

Even when a plaintiff establishes the requisite elements of a prima facie case with respect to harassment—with a commonly contested issue being whether the conduct was sufficiently severe or pervasive to alter the plaintiff's working environment—the plaintiff must also show a basis for holding the employer liable for the harassment.[42] The existing legal standard for evaluating employer liability is based on a framework arising from several Supreme Court decisions: *Meritor Savings Bank v. Vinson*,[43] which held that employers are not always "automatically liable for sexual harassment by their supervisors,"[44] followed by two companion decisions, *Faragher v. City of Boca Raton*[45] and *Burlington Industries, Inc. v. Ellerth*,[46] which further delineated when employers could be held liable for workplace harassment.[47]

Like harassment claims under Title VII, the legal standards for establishing employer liability for workplace harassment are not expressly included or addressed in the statutory text of Title VII.[48] Indeed, the Supreme Court has repeatedly noted that Congress—in amending Title VII after its 1986 *Meritor* decision—has not altered or overruled *Meritor*'s limitation on employer liability for

[39] Shepherd v. Comptroller of Public Accounts of State of Tx., 168 F.3d 871, 872, 875 (5th Cir. 1999).

[40] Royal v. CCC & R Tres Arboles, L.L.C., 736 F.3d 396, 402-03 (5th Cir. 2013) (noting that *Shepherd* has "been called into question by our court" for an analysis that seems to require that pervasive conduct must also be severe to constitute actionable harassment, but nonetheless distinguishing the facts at issue with those in *Shepherd* to hold that the alleged harassment was actionable).

[41] *See, e.g.*, Hockman v. Westward Commc'ns, LLC, 407 F.3d 317, 328-29 (5th Cir. 2004) (holding conduct insufficient to constitute actionable harassment, where conduct included grabbing or brushing against plaintiff's breasts and behind; comparing alleged acts with facts and analysis in *Shepherd*); Barnett v. Boeing Co., 306 F. App'x 875, 879 (5th Cir. 2009) ("The incidents of sexual harassment . . . do not rise to the level required by *Shepherd* and *Hockman*."); Haynes v. Brennan, No. H-14-1759, 2016 WL 2939074, at *3 (S.D. Tex. May 20, 2016) (granting summary judgment to defendant, when plaintiff alleged that harasser touched her thigh, forcibly kissed her forehead, frequented her work station, paid unwanted sexual attention to her, and plaintiff heard that harasser's friend was trying to get her transferred; holding that allegations failed to constitute actionable harassment under Title VII in reliance on *Shepherd*).

[42] Gorzynski v. JetBlue Airways Corp., 596 F.3d 93, 103 (2d Cir. 2010) ("Beyond demonstrating a hostile work environment, a plaintiff must show a basis for imputing the objectionable conduct to the employer. When, as here, the alleged harasser is in a supervisory position over the plaintiff, the objectionable conduct is automatically imputed to the employer.").

[43] 477 U.S. 57, 72 (1986).

[44] *Meritor*, 477 U.S. at 72 (declining to "issue a definitive rule on employer liability," but reasoning that Congress's decision to define employer to include any "agent" of an employer "surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible" and rejecting the court of appeals' holding that employers should always be held strictly liable for sexual harassment by supervisors).

[45] 524 U.S. 775, 780 (1998).

[46] 524 U.S. 742, 747 (1998).

[47] *See generally Suders*, 542 U.S. at 143 (discussing "the framework *Ellerth* and *Faragher* established to govern employer liability for sexual harassment by supervisors").

[48] *Ellerth*, 524 U.S. at 763-64 (discussing the holding in *Meritor* limiting employer liability for workplace harassment, and observing that "Congress has not altered *Meritor*'s rule even though it has made significant amendments to Title VII in the interim").

harassment.[49] As discussed in further detail below, under the Supreme Court's formulation, establishing employer liability for workplace harassment turns significantly on whether the harassing employee was a supervisor.[50]

The *Faragher* and *Ellerth* Decisions

The *Faragher* and *Ellerth* decisions hold that two considerations will be determinative of employer liability: the harasser's status—as the victim's supervisor or co-worker—and whether the harasser's actionable harassment also culminated in a "tangible employment action" [51] (e.g., termination or demotion of the victim). Under this framework,

- if the harasser was the victim's supervisor, *and* the actionable harassment also culminated in a "tangible employment action," the employer will be strictly liable for the harassment;[52]
- if the harasser was the victim's supervisor, and the harassment was actionable but did *not* culminate in a tangible employment action, the employer can avail itself of an affirmative defense to avoid liability altogether.[53]

In fashioning its rule for employer liability, the Court in *Faragher* and *Ellerth* made several observations. First, the Court observed that all workplace harassment is in some sense aided by the employment context wherein "[p]roximity and regular contact may afford a captive pool of potential victims."[54] Moreover, the Court stated that "a supervisor's power and authority invests his or her harassing conduct with a particular threatening character, and in this sense, a supervisor always is aided by the agency relation."[55]

While there "are good reasons for vicarious liability for misuse of supervisory authority," the Court in *Faragher* explained that it was not permitted to recognize that theory unless it could be "squared with *Meritor*'s holding that an employer is not 'automatically' liable for harassment by a supervisor."[56] Indeed, the Court noted that "[t]he decision of Congress to leave *Meritor* intact is conspicuous."[57] Similarly, in *Ellerth*, the Court stated that it was bound—absent congressional

[49] *Id*. *See also Faragher*, 524 U.S. at 804, n.4 (noting it was bound by *Meritor* because of *stare decisis*, but also because Congress's decision not to disturb the holding in *Meritor* was "conspicuous" in light of Congress's expansion of monetary relief in the 1991 amendments to Title VII; on that basis, explaining that the Court must "assume that in expanding employers' potential liability under Title VII, Congress relied on our statements in *Meritor* about the limits of employer liability").

[50] Vance v. Ball State University, 133 S.Ct. 2434, 2439 (2013) (explaining that under Title VII, "an employer's liability for such harassment may depend on the status of the harasser," and discussing the significance of whether the harasser was the victim's co-worker or supervisor).

[51] A "tangible employment action" in the context of a Title VII harassment analysis is a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth*, 524 U.S. at 761.

[52] *Faragher*, 524 U.S. at 807-808 (holding that an employer is strictly liable for actionable harassment by a supervisor, "when the supervisor's harassment culminates in a tangible employment action"). *See also Suders*, 542 U.S. at 144-146 (discussing the analyses, rationales, and holdings in the *Faragher* and *Ellerth* decisions).

[53] *Faragher*, 524 U.S. at 807 (holding that an employer is vicariously liable for actionable harassment by a supervisor, but may assert an affirmative defense to liability or damages, with proof by a preponderance of the evidence, when "no tangible employment action is taken"); *Ellerth*, 524 U.S. at 765 (same).

[54] *Ellerth*, 524 U.S. at 760.

[55] *Id*. at 763.

[56] *Faragher*, 524 U.S. at 804.

[57] *Id.* at 804, n.4.

action overturning *Meritor*—by *Meritor*'s holding that employer liability for harassment was subject to limitation.[58]

In addition, despite the fact that "most workplace tortfeasors are aided in accomplishing their tortious objective by the existence of the agency relation," the Court explained that attaching employer liability on that basis alone was not a result reflected by lower court decisions or enforced by the Equal Employment Opportunity Commission (EEOC),[59] and thus, "something more than the employment relation itself" was required to establish employer liability."[60]

The Court then differentiated between two types of harassment by a supervisor: actionable harassment, and actionable harassment that culminates in a tangible employment decision such as firing the victim.[61] The Court reasoned that when a harassing supervisor "makes a tangible employment decision" against the employee, he or she would not have had been able to inflict such injury "absent the agency relation" provided by the employer, as the employer empowered the harasser to exercise control over others.[62] The Court concluded that if supervisory harassment culminates in a tangible employment action, the supervisor's acts are attributable to the employer for Title VII purposes because tangible employment actions "are the means by which the supervisor brings the official power of the enterprise to bear on subordinates."[63] The Court held that an employer is strictly liable for such supervisory harassment.[64]

If harassment by a supervisor is *not* accompanied by a tangible employment action, the Court stated it was "less obvious" whether the "agency relation" facilitated the individual's harassment.[65] Thus, to "accommodate the agency principles of vicarious liability for harm caused by supervisory power" and to effectuate Title VII's preventative and deterrent purposes, the Court placed a limitation on employer liability in cases in which a supervisor's harassment does not culminate in taking a tangible employment action. [66] In these instances, the Court held that an employer could be vicariously liable for the actionable harassment by a supervisor, but could raise an affirmative defense,[67] often called the *Faragher-Ellerth* defense.[68] This defense requires that the employer establish, by a preponderance of the evidence, both of the following elements to negate liability: (1) "that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior" and (2) "that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise."[69]

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[58] *Ellerth*, 524 U.S. at 763-64.

[59] Leading up to the *Faragher-Ellerth* decisions, the EEOC took the position that "agency principles should be used for guidance" in determining employer liability for the harassment. *See EEOC Policy Guidance on Current Issues of Sexual Harassment* (1990), No. N-915-050, Section No 4(B)(3)(c), 1990 WL 1104701.

[60] *Ellerth*, 524 U.S. at 760.

[61] *Faragher*, 524 U.S. at 807-808; *Ellerth*, 524 U.S. at 765. *See also Suders*, 542 U.S. at 143-146 (discussing this distinction in the *Faragher* and *Ellerth* decisions).

[62] *Ellerth*, 524 U.S. at 761-62.

[63] *Id*. at 762.

[64] *Id*. at 765.

[65] *Id*.

[66] *Id*. at 764-65.

[67] *Id*; *Faragher*, 524 U.S. at 807-808.

[68] *See, e.g.*, *Gorzynski*, 596 F.3d at 103 (discussing availability of "*Faragher/Ellerth* affirmative defense").

[69] *Faragher*, 542 U.S. at 807 (also explaining that it will "normally suffice" to establish the second prong with evidence that the employee failed to use any complaint procedure provided by the employer).

If the harasser was the plaintiff's *co-worker*, circuit courts analyze employer liability under the negligence standard, with the burden of proof on the plaintiff.[70] To meet this standard, the plaintiff must generally show that the employer knew or should have known about the harassment and failed to take effective remedial action.[71]

Application of the *Faragher-Ellerth* Defense

Following the Supreme Court's *Faragher* and *Ellerth* decisions, federal courts of appeals have evaluated the applicability of the defense and whether a defendant has offered evidence sufficient to establish both elements:[72]

1. "that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior" and
2. "that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise."[73]

By establishing both elements, an employer avoids liability for supervisory harassment altogether, regardless of how severe or pervasive the harassment at issue.[74]

With respect to the first prong of the defense—that an employer show it "exercised reasonable care to prevent and correct promptly" the harassment—federal courts consider various factors in that analysis,[75] including the nature of the harassment at issue,[76] the time it took for the employer to respond,[77] whether there was an investigation and what occurred in the investigation,[78]

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[70] *Id*. at 799 (discussing the broad "unanimity of views among the holdings of District Courts and Courts of Appeals" that have "uniformly judg[ed] employer liability for co-worker harassment under a negligence standard"). *Cf. Vance*, 133 S.Ct. at 2439 ("Under Title VII, an employer's liability for such harassment may depend on the status of the harasser. If the harassing employee is the victim's co-worker, the employer is liable only if it was negligent in controlling working conditions.") (citing *Faragher* and *Ellerth*). *But see Suders*, 524 U.S. at 143, n.6 ("*Ellerth* and *Faragher* expressed no view on the employer liability standard for co-worker harassment. Nor do we.").

[71] *See, e.g.*, Reynaga v. Roseburg Forest Products, 847 F.3d 678, 599 (9th Cir. 2017); *Sunbelt Rentals, Inc.*, 521 F.3d at 319 (also explaining that knowledge can be imputed to the employer if a reasonable person would have known about the harassment, and that the remedial action must be "'reasonably calculated to end the harassment'"). *See also* MacCluskey v. Univ. of Conn. Health Center, No. 17-0807, 2017 WL 6463200, at *2 (2d Cir. Dec. 19, 2017) (articulating the test for negligence as "whether (1) the employer 'failed to provide a reasonable avenue for complaint' *or* (2) 'it knew, or in the exercise of reasonable care should have known, about the harassment yet failed to take appropriate remedial action.'" (quoting Duch v. Jakubek, 588 F.3d 757, 762 (2d Cir. 2009))).

[72] *See, e.g.*, Crockett v. Mission Hosp. Inc., 717 F.3d 348, 356-58 (4th Cir. 2013) (as harassment did not result in a tangible employment action, concluding that defendant was able to assert the affirmative defense; then analyzing whether evidence was sufficient to establish the defense).

[73] *Faragher*, 542 U.S. at 807.

[74] *See id*. at 807-08.

[75] *See, e.g.*, Stuart v. Gen. Motors Corp., 217 F.3d 621, 633 (8th Cir. 2000) ("Factors the Court may consider when assessing the reasonableness of [the employer]'s remedial measures include the amount of time elapsed between the notice of harassment, which includes but is not limited to a complaint of sexual harassment, and the remedial action, and the options available to the employer such as employee training sessions, disciplinary action taken against the harasser(s), reprimands in personnel files, and terminations, and whether or not the measures ended the harassment.").

[76] *See* Jackson v. Quanex Corp., 191 F.3d 647, 663 (6th Cir. 1999) (Significantly, a court must judge the appropriateness of a response by the frequency and severity of the alleged harassment.").

[77] *See, e.g.*, Hill v. Am. Gen. Fin., Inc., 218 F.3d 639, 643 (7th Cir. 2000) (employer satisfied corrective prong, when its action after receiving the plaintiff's complaint was "immediate"). *But see Jackson*, 191 F.3d at 664 (stating that "the mere fact of a quick response" to complaints, "without more," is insufficient to satisfy the employer's "burden of proving that its action was a reasonable attempt to prevent and correct the problem").

evidence of an anti-harassment policy,[79] and any other evidence concerning an employer's efforts to prevent and respond to harassment.[80] Though federal appellate courts generally agree that an employer's actions must be "reasonably calculated" to prevent or stop further harassment,[81] courts differ in their application of the type of evidence that is sufficient to satisfy this prong.[82]

For example, when evaluating an employer's response to harassment that included sexual assaults and a rape,[83] the Tenth Circuit cited various features of the investigation that created a triable issue that the employer, a sheriff's office, had failed to satisfy the first prong of the defense.[84] Among other facts, the court stated that the sheriff had assigned the investigation to a detective who was never trained in conducting harassment investigations; this detective was a close friend of the alleged harasser and considered him a mentor; the detective focused the investigation on gathering details about the plaintiff's sex life rather than the allegations of sexual assault and rape,[85] and repeatedly told her she should resign.[86] When the detective informed the sheriff there was a possible rape, the sheriff instructed that the investigation should stop, with no evidence that the department sought to improve its sexual harassment program thereafter.[87] Though the harasser later resigned, the court stated that that fact "alone is not sufficient to avoid vicarious liability."[88]

(...continued)

[78] *See, e.g.*, Jackson v. Cty. of Racine, 474 F.3d 493, 502 (7th Cir. 2007) (in holding that corrective prong was satisfied, stating that the "investigation was thorough and resulted in a significant disciplinary measure" against the harasser); Reed v. MBNA Mktg. Sys., Inc., 333 F.3d 27, 34 (1st Cir. 2003) (holding corrective prong satisfied based on evidence including that the employer began investigating the day that the plaintiff reported her supervisor's conduct, and that the harasser was removed from the workplace almost immediately).

[79] *See, e.g., Hill*, 218 F.3d at 643 ("While an appropriate anti-harassment policy with complaint procedure is not always necessary to sustain the defense, it is a relevant consideration.").

[80] *See, e.g., Brenneman*, 507 F.3d at 1145 (holding that evidence satisfied the "correction" prong, when employer investigated and stopped the harassment, and offered to relocate the plaintiff to a restaurant five miles away; noting that though transferring the victim, and not the harasser, was "not ideal," stating this nonetheless satisfied this element).

[81] *See* Kramer v. Wasatch Cty. Sheriff's Office, 743 F.3d 726, 747 (10th Cir. 2014) (stating that evidence showing an employer's attempt to promptly remediate, "without any showing that such attempts were 'reasonably calculated to end the harassment' and deter future harassers," was insufficient to satisfy defense) (citation omitted); Jackson, 474 F.3d at 502 ("We have said that "[a]n employer's response to alleged instances of employee harassment must be reasonably calculated to *prevent further harassment* under the particular facts and circumstances of the case at the time the allegations are made."); *Jackson,* 191 F.3d at 663 ("Generally, a response is adequate if it is reasonably calculated to end the harassment."). *See also* Hardage v. CBS Broad., Inc., 427 F.3d 1177, 1186 (9th Cir. 2005) (stating that the reasonableness of the remedy depends on "its ability to: (1) 'stop harassment by the person who engaged in harassment;' and (2) 'persuade potential harassers to refrain from unlawful conduct.'") (quoting Nichols v. Azteca Rest. Enter., Inc., 256 F.3d 864, 875 (9th Cir. 2001)).

[82] *See, e.g.*, Weger v. City of Ladue, 500 F.3d 710, 719-20 (8th Cir. 2007) (stating that the distribution of an anti-harassment policy is "not dispositive" of the reasonableness of an employer's prevention efforts under the first prong of defense). *Cf.* Barrett v. Applied Radiant Energy Corp., 240 F.3d 262, 266 (4th Cir. 2001) ("Distribution of an anti-harassment policy provides 'compelling proof' that the company exercised reasonable care in preventing and promptly correcting sexual harassment.") (quoting Lissau v. Southern Food Service, Inc., 159 F.3d 177, 182 (4th Cir.1998)).

[83] *Kramer,* 743 F.3d at 732-34.

[84] *Id*. at 747-49 (examining aspects of the investigation and holding it insufficient to satisfy corrective prong).

[85] *Id*.

[86] *Id*. (stating that "[r]esponses to complaints that encourage the plaintiff to drop the complaint or otherwise penalize the plaintiff certainly do not prove an employer's reasonableness as a matter of law.").

[87] *Id*. at 749 (stating that "'an employer's decision to do nothing on the basis of an inadequate investigation likewise supports a finding that the employer did not take prompt and effective remedial action.'") (quoting *Wilson v. Tulsa Junior Coll.*, 164 F.3d 534, 543 n. 7 (10th Cir.1998)).

[88] *Id*.

In another analysis of an investigation, however, the Eighth Circuit held that an employer *satisfied* the first prong of the affirmative defense,[89] in a case in which the employer's investigation culminated in a finding that the alleged harasser had engaged with the female employees in a "nonsexual" manner,[90] though the behavior included "massaging their shoulders, neck, and upper chest underneath their uniforms," "going under their desks in order to massage their legs," and making comments about the physical appearance of women.[91] In that case, the employer also refused to give the plaintiffs the results of the investigation, but shared this information with the alleged harasser, including the names and statements of the witnesses;[92] and the harasser continued to be a presence in the plaintiffs' work area.[93] Acknowledging "flaws" in the investigation, the court held that other facts established the first prong of the defense, "most significant[ly]" that the harassing behavior stopped the day that one of the plaintiffs reported it to upper management.[94]

With respect to the second prong of the defense—that an employer show a plaintiff's unreasonableness in failing to take advantage of its preventative or corrective opportunities—courts generally examine whether the employer had a procedure for reporting harassment and whether the plaintiff was unreasonable in failing to avail herself/himself of that process.[95] When a plaintiff never reports—or delays reporting—harassment out of fear of retaliation or concern that the official responsible for resolving complaints is unlikely to remedy the harassment, circuit precedent reflects tension in evaluating the plaintiff's reasonableness in such situations.[96]

In analyzing this second prong, for example, the First Circuit held that an employer had *not* established the plaintiff's unreasonableness based on her one-year delay in reporting an assault by her supervisor.[97] The court reasoned that a jury could conclude the plaintiff was reasonable in

[89] *Weger*, 500 F.3d at 723-24.

[90] *Id*. at 716.

[91] *Id*. at 714, n.3.

[92] *Id*. at 716.

[93] *Id*.

[94] *Id*. at 716, 723-24 (also noting that during the investigation, the harasser was only permitted to enter the plaintiffs' work area in the presence of another supervisor and for a work-related purpose, and was temporarily relieved of his direct supervision over the plaintiffs; also stating that after the investigation, the harasser remained the plaintiffs' superior in the department, but was permanently removed from directly supervising them).

[95] *See, e.g., Hardage*, 427 F.3d at 1182, 1188 (in analysis of this prong, holding that plaintiff unreasonably failed to take advantage of "preventative or corrective opportunities"; discussing facts that employer had an anti-harassment policy and complaint procedure of which plaintiff was aware, that plaintiff took six months to report the harassment after it began, and that when plaintiff reported the harassment, he specifically asked the company not to investigate or intervene because he wanted to try and handle the situation himself).

[96] *See, e.g., Kramer*, 743 F.3d at 751 (stating that though a generalized fear of retaliation is insufficient to justify a failure to use internal grievance procedures, if such fear is based on "'concrete reason[s] to apprehend that complaint would be useless or result in affirmative harm to the complainant,'" the plaintiff's reasonableness becomes an issue to be resolved at trial) (quoting *Reed*, 333 F.3d at 35-36). *See also, e.g., Gorzynski*, 596 F.3d at 104-05 (rejecting defendant's argument that plaintiff was unreasonable for failing to report harassment to another manager in addition to her supervisor; rather, holding that evidence created a jury question as to whether plaintiff was reasonable to believe that other avenues for reporting would be futile, where evidence reflected that two other managers had responded to earlier complaints by admonishing the plaintiff and suspending another employee). *But see* Lauderdale v. Texas Dep't of Criminal Justice, 512 F.3d 157, 165 (5th Cir. 2007) ("In most cases, as here, once an employee knows his initial complaint is ineffective, it is unreasonable for him not to file a second complaint, so long as the employer has provided multiple avenues for such a complaint.").

[97] *Reed*, 333 F.3d at 37. *See also id*. at 30-31 (explaining factual context of case, including that around August 1999, plaintiff was sexually assaulted by her supervisor, that she resigned in the fall of 1999 without reporting the assault, returned to work in May 2000 because she needed to earn a higher salary than at her other job, and reported the assault (continued...)

delaying her report, in part because she was a teenager at the time of the assault while her supervisor was twice her age.[98] In its analysis, the court also noted the supervisor's threats that she would be fired if she reported the assault, that both of them would be fired, and that he had influential ties to the owner of the company who had previously acted in his favor in another circumstance involving his rumored involvement with a young woman.[99]

Addressing a case that also involved a one-year time period after which plaintiffs reported harassment by a direct supervisor, the Eighth Circuit held that the employer had *satisfied* a showing that the plaintiffs, both officers in the police department,[100] had acted unreasonably as a matter of law in support of its affirmative defense.[101] In so holding, the court rejected the plaintiffs' arguments that they had credible fears of retaliation and doubted they would receive a fair investigation given the close relationship between the harasser and the police chief.[102] Though the court acknowledged the "'enormous difficulties involved in lodging complaints'" and the heightened psychological burden of requiring victims to report harassment when they also perceive bias in favor of the harasser,[103] the court stated that only "credible" fears of retaliation could excuse their yearlong delay, and in the absence of evidence of "any threat by any Department employee," the plaintiffs' fear of retaliation did not "excuse" their delay.[104]

Application of the Negligence Standard for Co-worker Harassment

Under the *Faragher-Ellerth* paradigm, an employer can avoid liability for harassment committed by one of its supervisors by proving both elements of that affirmative defense, as described above. However, when the alleged harasser is a co-worker, rather than a supervisor, an employer's liability for that harassment hinges on the plaintiff's ability to prove that the employer was negligent in allowing the harassment to persist.[105] "To satisfy that standard, the complainant must show that the employer knew or should have known of the offensive conduct but failed to take appropriate corrective action."[106] This standard may not appear complex or controversial, but its application is heavily fact-dependent and varies from case to case.

To determine whether or not an employer "knew or should have known" of the offensive conduct, courts look at the entirety of the circumstances to determine whether knowledge by the employer can be imputed from the facts. Reporting to management personnel who are designated to receive such complaints will generally count as notice.[107] However, if a complainant reports to someone

(...continued)

and other acts of harassment in August 2000).

[98] *Id*. at 37.

[99] *Id*.

[100] *Weger*, 500 F.3d at 714.

[101] *Id*. at 726.

[102] *Id*. at 725.

[103] *Id*. (quoting Coates v. Sundor Brands, Inc., 164 F.3d 1361, 1366 (11th Cir. 1999)).

[104] *Id*. (additionally stating that "the reasonableness of Plaintiffs' fears of retaliation is further called into question because the Department's antiharassment policy contained an antiretaliation provision").

[105] *Vance*, 133 S. Ct. at 2439.

[106] *Id.* at 2456.

[107] *See, e.g.*, Breda v. Wolf Camera & Video, 222 F.3d 886, 889 (11th Cir. 2000) ("[I]f an employer has a company policy specifically designating the person or persons to whom an employee should report instances of suspected sexual harassment, once the employee complains to the designated person or persons, the employer is deemed to have actual notice of the harassment. "); Williamson v. City of Houston, 148 F.3d 462, 466 (5th Cir 1998) ("The conclusion that the City can be held liable on the basis of Bozeman's knowledge is put beyond doubt by HPD's sexual harassment (continued...)

who is not the designated individual for receiving such complaints, it is less obvious whether an employer should be charged with knowledge. Courts have held that it is not enough that the complainant has told just anyone about the harassment;[108] the enterprise must have been given a "reasonable chance of being able to respond to the information."[109] The organizational structure of the company is relevant in this inquiry, but not decisive.[110] Ultimately, the court will look at whether a complainant "complain[ed] to someone who could reasonably be expected to refer the complaint up the ladder to the employee authorized to act on it."[111]

Regardless of a report, if a manager actually witnesses harassment or similarly inappropriate conduct, it may amount to notice.[112] Further, a company cannot escape liability by adopting a "see no evil, hear no evil" strategy.[113] An employer which lacks reasonable mechanisms or procedures for reporting misconduct, for example, may be charged with constructive knowledge of the co-worker harassment at issue.[114]

Even without evidence of a report to management, or of a manager who witnesses sexual harassment, courts may impute knowledge of the harassment to the employer if there is other evidence from which an employer's knowledge could be inferred. For example, in *Duch v. Jakubek*, the Second Circuit found that a reasonable jury could conclude that a supervisor had notice of sexual harassment in light of the circumstances, including that the plaintiff had sought to change her schedule to avoid working with the harasser; the harasser had engaged in sex-related misconduct in the past; the supervisor had told the harasser to "cut it out and grow up"; and the supervisor had observed that working around the harasser caused the complainant to become emotional and visibly upset.[115] Similarly, in *Hawkins v. Anheuser-Busch, Inc.*, the Sixth Circuit reversed the district court's determination that there was no genuine issue of material fact that a brewery knew or should have known of harassing conduct.[116] There, even though the plaintiff had never reported individual incidents of harassment or cited sexual harassment in her complaints, the court emphasized that she had nonetheless repeatedly complained about her co-worker's "unbearable" behavior and asked for a transfer, and that the harasser had a known history of sexual harassment of other victims.[117] Thus, the question of whether an employer is on notice of harassment is not a mechanical one, but will depend on the evidence.

Beyond establishing actual or constructive knowledge of the harassment, in order to establish negligence, a plaintiff must also show that the employer failed to take prompt and appropriate

(...continued)

policy, which specifically directs those who believe they have been harassed to report it to their supervisors.").

[108] Parkins v. Civil Constructors of Ill., 163 F.3d 1027, 1037 (7th Cir. 1998) (where employee failed to use proper grievance channel for complaint and only told one of the harassers and a dispatcher, there was no knowledge of harassment imputed to the employer).

[109] Young v. Bayer Corp., 123 F.3d 672, 674 (7th Cir. 1997).

[110] Williamson v. City of Houston, 148 F.3d 462, 466 (5th Cir 1998).

[111] *Young*, 123 F.3d at 675. *See also Duch*, 588 F.3d at 763 (a report to a non-supervisory co-worker does not spark employer liability unless "that co-worker has an official or strong de facto duty to act as a conduit to management for complaints about work conditions").

[112] *See* Bonenberger v. Plymouth Twp., 132 F.3d 20, 23 (3d Cir. 1997) (employer knowledge of harassment imputed where direct supervisor witnessed the harassment directly).

[113] Ocheltree v. Scollon Prods., 335 F.3d 325, 334 (4th Cir. 2003).

[114] *Id.*

[115] *Duch*, 588 F.3d at 765.

[116] 517 F.3d 321, 339 (6th Cir. 2008).

[117] *Id.* at 339-40.

corrective action.[118] This does not mean that the employer must take all actions that a plaintiff requests: "all that [the employer is] required to do . . . [is] to take prompt action reasonably calculated to end the harassment and reasonably likely to prevent the conduct from recurring."[119] Employers must take actions which seek to end current harassment and deter future harassment in the given context of that workplace.[120] In *Berry v. Delta Airlines*, for example, the Seventh Circuit concluded that an employer reacted promptly and appropriately to end the harassment, where the employer immediately contacted its local EEOC office, began an investigation, confronted the harasser and later changed his shift to separate him from the victim, and required all local employees to view a sexual harassment training video.[121] These actions stopped future harassment and were sufficient in the court's view, even though the plaintiff argued that Delta should have done more, such as separating her and the harasser at an earlier date, ordering the harasser to leave her alone, or requiring the employees to engage in discussion sessions.[122]

In contrast, courts have held that employer responses were insufficient to remedy the harassment, for example, when an employer advised or counseled the harassers to stop without taking any additional actions or discipline,[123] or involuntarily transferred the plaintiff.[124] Further, even if the employer's actions stop the harassment, that fact alone may be insufficient to show an effective remedial response on the part of the employer. In one Sixth Circuit case, the employer argued that it responded adequately to a plaintiff's allegations of harassment by transferring her to another shift at her request, launching a prompt investigation including interviewing numerous employees and sending the complainant a letter informing her when the investigation was complete and that retaliation would not be tolerated.[125] The appeals court found that these measures were insufficient to justify summary judgment for the employer.[126] Even though the harassment stopped because of the transfer and the employer argued that the evidence revealed in its investigation provided insufficient ground under its collective bargaining agreement on which to terminate the harasser, the court noted that the harasser had a history of sexually inappropriate conduct and a history of lying about it.[127] Under those circumstances, the court concluded that a jury could find that the remedy was insufficient.[128]

[118] *Vance*, 133 S. Ct. at 2439.

[119] Berry v. Delta Airlines, Inc., 260 F.3d 803, 812-13 (7th Cir. 2001). *But see Reynaga*, 847 F.3d at 690 ("[P]rompt action is not enough. The remedial measures must also be effective.").

[120] Fuller v. City of Oakland, 47 F.3d 1522, 1528 (9th Cir. 1995).

[121] *Berry*, 260 F.3d at 813. *See also* Star v. West, 237 F.3d 1036, 1039 (9th Cir. 2001) (employer took sufficient action by counseling harasser, ordering him to leave complainant alone, and transferring him to a different shift); McKenzie v. Illinois Dep't of Transp., 92 F.3d 473, 476 (7th Cir. 1996).

[122] *Berry*, 260 F.3d at 813.

[123] *See, e.g.*, Waltman v. Int'l Paper Co., 875 F.2d 468, 470 (5th Cir. 1989); Loughman v. Malnati Org., Inc., 395 F.3d 404, 407 (7th Cir. 2005); EEOC v. Sunbelt Rentals, 521 F.3d 306, 310 (2008).

[124] Ellison v. Brady, 924 F.2d 72, 75 (9th Cir. 1991). *See also* EEOC, Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors (1999) ("The complainant should not be involuntarily transferred or otherwise burdened.").

[125] *Hawkins*, 517 F.3d at 341-42.

[126] *Id.* at 344.

[127] *Id.* at 344-45.

[128] *Id. See also* EEOC v. Central Wholesalers, 573 F.3d 167, 177-78 (4th Cir. 2009) (employer's response was insufficient to justify summary judgment where employer took no or delayed action in response to some of the employee's complaints even while responding to other complaints).

Disputed Supervisory Status and *Vance v. Ball State University*

Under the *Faragher-Ellerth* paradigm, the harasser's characterization—as a supervisor or co-worker—has significant legal implication.[129]

If the harasser is a supervisor, the *employer* bears one of two outcomes: it is either strictly liable for the harassment or it is liable unless it can establish both elements of an affirmative defense. If the harasser is a co-worker, however, the *plaintiff* has the burden of proof for establishing the prima facie elements of a hostile work environment claim—including objective severity or pervasiveness—*and* the employer's negligence. In other words, if the harasser is a co-worker, the plaintiff bears a heavier burden of proof to establish employer liability, as the employer is neither strictly liable for that harassment nor has to prove an affirmative defense to avoid liability.[130]

Given the legal significance of the harasser's status, parties often dispute the issue, and courts in turn must determine whether the evidence shows that the harasser was a supervisor or co-worker.[131]

Against a backdrop of disagreement among circuit courts concerning the type of evidence indicative of supervisory status,[132] the Supreme Court addressed the issue in its 2013 decision in *Vance v. Ball State University*.[133] Though the *Faragher-Ellerth* decisions held that an employer could be liable for harassment by its supervisors, the Court did not define the meaning of "supervisor" in those cases,[134] and lower courts in turn applied varying interpretations in the absence of a definition.[135] Answering that question left open by the *Faragher-Ellerth* decisions, the Court in *Vance* held, in a 5-4 decision, that a supervisor—for the purpose of establishing employer liability under *Faragher* and *Ellerth*—is one who has the authority to take actions in the workplace such as hiring, firing, making promotion decisions, reassigning to positions "'with significantly different responsibilities,'" or making decisions "'causing a significant change in

[129] *See*, *e.g.*, Howard v. Winter, 466 F.3d 559, 565 (4th Cir. 2006) ("The question of whether McCall was Howard's supervisor or her coworker is of great significance because in a case of harassment by a supervisor 'with immediate (or successively higher) authority over the employee,' an employer is vicariously liable for the harassment, subject to limited affirmative defenses not relevant here.") (quoting *Ellerth*, 524 U.S. at 765); Johnson v. Booker T. Washington Broad. Serv., Inc., 234 F.3d 501, 513 (11th Cir. 2000) (stating that harasser's supervisory status, and whether actions taken against plaintiff were tangible employment actions, are "critical").

[130] *See*, *e.g.*, Curry v. District of Columbia, 195 F.3d 654, 660 (D.C. Cir. 1999) (explaining that "the plaintiff must clear a higher hurdle under the negligence standard, where she bears the burden of establishing her employer's negligence, than under the vicarious liability standard, where the burden shifts to the employer to prove its own reasonableness and the plaintiff's negligence" when asserting the *Faragher-Ellerth* defense).

[131] *See*, *e.g.*, *Howard*, 466 F.3d at 566-67 (analyzing whether evidence demonstrated that harasser was plaintiff's supervisor or co-worker); Wyatt v. Hunt Plywood Co., Inc., 297 F.3d 405, 411 (5th Cir. 2002) (same).

[132] *Vance*, 133 S.Ct. at 2443 ("Under *Ellerth* and *Faragher*, it is obviously important whether an alleged harasser is a 'supervisor' or merely a co-worker, and the lower courts have disagreed about the meaning of the concept of a supervisor in this context.").

[133] *Id.*

[134] *Id*. at 2446-47 (explaining that neither *Faragher* nor *Ellerth* presented "the question of the degree of authority that an employee must have in order to be classified as a supervisor").

[135] *Cf. Howard*, 466 F.3d at 566 (holding that harasser was not plaintiff's supervisor, as harasser lacked the authority to fire, promote, demote, or reassign the plaintiff, which the court viewed as the "most powerful indication of supervisory status"); Mack v. Otis Elevator Co., 326 F.3d 116, 120, 126-27 (2d Cir. 2003) (holding that harasser was supervisor, though it was undisputed that he *lacked* the authority to hire, fire, demote, promote, transfer, or discipline the plaintiff, where harasser was the "mechanic in charge" who assigned and scheduled the plaintiff's work and could enforce safety practices and procedures; framing the primary issue as being "whether the authority given by the employer to the employee enabled or materially augmented the ability of the latter to create a hostile work environment for his or her subordinates.").

benefits.'"[136] By defining a supervisor solely in those terms, the Court expressly rejected a definition based on whether the alleged harasser had authority to direct the victim's daily work, thereby narrowing the definition of supervisor that some lower courts had previously applied.[137]

In its analysis, the Court noted that a plain language interpretation of the term "supervisor" was not an applicable approach, as "'[s]upervisor' is not a term used by Congress in Title VII."[138] Instead, because that term was adopted by the Court in *Faragher* and *Ellerth* to identify when harassment is imputable to the employer, the Court explained that "the way to understand the meaning of the term 'supervisor' for present purposes is to consider the interpretation that best fits within the highly structured framework that those cases adopted."[139]

Accordingly, turning to its analyses in *Faragher* and *Ellerth*, the Court in *Vance* stated that those decisions "dr[ew] a sharp line between co-workers and supervisors," and concluded that the "strong implication" from language in *Ellerth* concerning supervisors and tangible employment actions was that the authority to take such actions "is the defining characteristic of a supervisor."[140] In the Court's view, its definition of supervisor—one empowered by the employer to take tangible employment actions—is a clear, readily workable standard that will, in "a great many cases," be known to the litigants even before litigation has commenced and, if disputed, would be capable of resolution at summary judgment.[141]

The Court contrasted the clarity of its adopted standard with the "vagueness" of the standard proposed by the government as *amicus curiae* in *Vance*, which urged the Court to adopt the EEOC's definition[142] of supervisor—a standard that would analyze whether the harasser had authority "'of sufficient magnitude so as to assist [him] explicitly or implicitly in carrying out the harassment.'"[143] Addressing the EEOC's Enforcement Guidance, which described how to apply its definition of supervisor, the Court stated that it "read the EEOC Guidance as saying that the number (and perhaps the importance) of the tasks in question is a factor to be considered in determining whether an employee qualifies as a supervisor," and concluded that such a standard was one of "remarkable ambiguity."[144] By way of example, the Court pointed to the government's

[136] *Id*. at 2443. It should be noted that though the facts in *Vance* concerned a Title VII claim alleging race-based harassment, the holding in *Vance* applies to all Title VII *harassment* claims. *See EEOC Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*, No. 915.002, Section II (June 18, 1999) ("The rule in *Ellerth* and *Faragher* regarding vicarious liability applies to harassment by supervisors based on race, color, sex (whether or not of a sexual nature), religion, national origin, protected activity, age, or disability. Thus, employers should establish anti-harassment policies and complaint procedures covering *all* forms of unlawful harassment."). As a general matter, courts apply the same legal standards for analyzing actionable harassment under Title VII, whether that be for harassment based on race, sex, national origin, or religion. *See, e.g.*, *Central Wholesalers*, 573 F.3d at 174-77 (analyzing Title VII harassment claims based on race and sex); *WC&M Enterprises, Inc*., 496 F.3d at 399-402 (analyzing Title VII harassment claims based on religion and national origin).

[137] *Id*. ("We reject the nebulous definition of a 'supervisor' advocated in the EEOC Guidance and substantially adopted by several courts of appeals.").

[138] *Vance*, 133 S.Ct. at 2446.

[139] *Id*.

[140] *Id*. at 2448.

[141] *Id*. at 2449.

[142] *Id*. at 2455 (Ginsburg, J., dissenting) (setting forth the EEOC's two-pronged definition of supervisor as follows: "(1) an individual authorized 'to undertake or recommend tangible employment decisions affecting the employee,' including 'hiring, firing, promoting, demoting, and reassigning the employee'; *or* (2) an individual authorized 'to direct the employee's daily work activities.'").

[143] *Id*. at 2449 (citing *EEOC Guidance*).

[144] *Id*. at 2450.

answers at oral argument, during which the government attorney was unable "to provide a definitive answer" to the question of whether a harasser who had the authority to direct a victim to clean toilets for a year would amount to a supervisor.[145] Applying the EEOC's standard, in the Court's view, "would present daunting problems for the lower federal courts and for juries."[146]

Addressing the employee's contention that supervisory status based on the ability to take tangible employment actions would encourage employers to concentrate such authority in a few individuals to avoid liability, the Court stated that an employer would still be subject to liability if its negligence led to the hostile work environment.[147] The Court also noted that even if an employer concentrated such authority in a few individuals, those individuals would in turn "likely rely on other workers who actually interact with the affected employee," and in those circumstances, the employer could "be held to have effectively delegated the power to take tangible employment actions to the employees on whose recommendations it relies."[148]

The Court also described the negligence standard as providing sufficient protection for employees who were harassed by an individual who could assign them unpleasant tasks or alter their work environment.[149] Such victims, the Court stated, could "prevail simply by showing that the employer was negligent in permitting this harassment to occur," adding that the jury should be instructed that the "nature and degree" of the harasser's authority was an "important factor to be considered in determining whether the employer was negligent."[150]

The Dissent in Vance

The Court's decision drew a lengthy dissent,[151] which described the majority opinion as "[e]xhibiting a remarkable resistance to the thrust of our prior decisions, workplace realities, and the EEOC's Guidance."[152] The definition adopted by the Court, the dissent contended, marked a shift in "a decidedly employer-friendly direction," would "leave many harassment victims without an effective remedy,"[153] and "ignores the conditions under which members of the work force labor, and disserves the objective of Title VII to prevent discrimination from infecting the Nation's workplaces."[154]

With respect to the EEOC Guidance, the dissent explained that the EEOC had defined supervisor in the following way:

> (1) an individual authorized "to undertake or recommend tangible employment decisions affecting the employee," including "hiring, firing, promoting, demoting, and reassigning the employee"; *or*
>
> (2) an individual authorized "to direct the employee's daily work activities."[155]

[145] *Id*.

[146] *Id*.

[147] *Id*. at 2452.

[148] *Id*.

[149] *Id*. at 2451.

[150] *Id*.

[151] The dissent was written by Justice Ginsburg and joined by Justices Breyer, Sotomayor, and Kagan.

[152] *Id*. at 2462 (Ginsburg, J., dissenting).

[153] *Id*. at 2463 (Ginsburg, J., dissenting).

[154] *Id*. at 2455 (Ginsburg, J., dissenting).

[155] *Id*.

In the dissent's view, the EEOC's definition was "powerfully persuasive,"[156] and the application of that standard would be fact-specific: "an employee with authority to increase another's workload or assign undesirable tasks" could constitute a supervisor because "those powers can enable harassment," while "an employee 'who directs only a limited number of tasks or assignments' ordinarily would not qualify as a supervisor, for her harassing conduct is not likely to be aided materially by the agency relationship."[157]

The dissent discussed several fact patterns from Title VII cases to illustrate its contention that the Court's holding would operate to exclude as supervisors those harassers who used their status to inflict actionable harassment, but lacked the ability to hire or fire the victims.[158] In one such example, the dissent pointed to a case[159] involving a newly hired female truck driver who was required to take a 28-day, on-the-road truck driving program as a trainee.[160] For that training, she was paired with a male "lead driver," who controlled her work environment for the duration of the trip but lacked the authority to take tangible employment actions.[161] Over the course of her on-the-road trip, her first lead driver subjected her to sexually vulgar remarks, including comments about her breast size, while her second lead driver "forced her into unwanted sex," which she submitted to because she thought it was necessary to gain a passing grade for the training.[162] In such a case, the dissent contended, the harassers were "vested with authority to control the conditions of a subordinate's daily work life" and used their position to aid in harassing the subordinate, yet would not constitute a supervisor under the Court's adopted definition.[163]

Responding to the Court's assertion that its standard was one that could be "readily applied,"[164] the dissent contended there was "reason to doubt just how 'clear' and 'workable'" its definition was.[165] As a tangible employment action includes the ability to reassign an employee to significantly different responsibilities, for example, the dissent pointed out such a definition invites questions concerning what constitutes "significantly different responsibilities" and whether any economic consequence could render a reassignment a tangible employment action.[166] The dissent also pointed to the Court's statements concerning "other workers" whom a decisionmaker relies on for recommendations concerning tangible employment actions, and under what circumstances such workers could constitute supervisors for vicarious liability purposes under the new standard.[167] Moreover, the dissent asserted, the Court has previously emphasized

[156] *Id*. at 2462 (Ginsburg, J., dissenting).

[157] *Id*. at 2461-62 (Ginsburg, J., dissenting).

[158] *Id*. at 2459-60 (Ginsburg, J., dissenting).

[159] *Id*. at 2460 (Ginsburg, J., dissenting) (discussing and citing *EEOC v. CRST Van Expedited, Inc*., 679 F.3d 657, 665-666, 684-685 (8th Cir. 2012)).

[160] *Id*.

[161] *Id*.

[162] *Id*.

[163] *Id*.

[164] *See id*. at 2449 ("The interpretation of the concept of a supervisor that we adopt today is one that can be readily applied.").

[165] *Id*. at 2462 (Ginsburg, J., dissenting).

[166] *Id*.

[167] *Id*.

the importance of fact-specific analyses in the Title VII context, and its search for a definition "capable of instant application" was inconsistent with that approach.[168]

As for the negligence standard,[169] the dissent stated that it "scarcely affords the protection" given by the *Faragher-Ellerth* framework to harassment victims, as an employer is negligent with respect to harassment "only if it knew or should have known of the conduct but failed to take appropriate corrective action," and even where a harasser has a reputation for such behavior, a complaint may not reach management to satisfy actual or constructive notice.[170] In addition, the dissent stated that the plaintiff bears the burden of proving negligence, and requiring the plaintiff to bear that burden created a "steeper substantive and procedural hill to climb" for victims.[171] The dissent concluded by calling upon Congress to "correct the error into which this Court has fallen, and to restore the robust protections against workplace harassment the Court weakens today."[172]

Circuit Analyses Post-*Vance*

Since *Vance*, federal courts of appeals have generally applied the *Vance* standard to require evidence that the alleged harasser was authorized to take tangible employment actions to constitute a supervisor, even if evidence reflects the harasser exercised other authority over the plaintiff.[173] In other words, where the alleged harasser directed or assigned the victim's work, but lacked the authority to make decisions such as hiring or firing, courts have held that the individual was *not* a supervisor.[174]

There is disagreement, however, among courts of appeals concerning *Vance*'s application to fact patterns involving delegated authority, where an employer relies on a harasser's recommendations to take actions relating to the plaintiff and other employees. For example, in *Kramer v. Wasatch County Sheriff's Office*,[175] the Tenth Circuit held that a sergeant constituted the plaintiff's supervisor, as evidence reflected that the defendant relied on recommendations from sergeants like him to make decisions regarding firing, promotion, demotion, reassignment, and discipline, and where the evidence also showed that the sergeant wrote the plaintiff's performance evaluations. The Sixth Circuit in *EEOC v. AutoZone, Inc.*,[176] however, held that the alleged harasser, a store manager, was *not* the supervisor of his harassment victims, who were employees

[168] *Id*. at 2463 (Ginsburg, J., dissenting).

[169] When analyzing harassment committed by the plaintiff's co-worker, lower courts require the plaintiff to show that the employer knew or should have known about the harassment and took insufficient action in responding to it. *See supra* section "Application of the Negligence Standard for Co-worker Harassment," pp. 13-15. *See also Curry*, 195 F.3d at 660 (explaining that "the plaintiff must clear a higher hurdle under the negligence standard, where she bears the burden of establishing her employer's negligence").

[170] *Id*. at 2463-64 (Ginsburg, J., dissenting).

[171] *Id*. at 2464 (Ginsburg, J., dissenting).

[172] *Id*. at 2466 (Ginsburg, J., dissenting).

[173] *See, e.g.*, *Reynaga*, 847 F.3d at 689 (harasser, who was lead millwright, was not plaintiff's supervisor, despite having authority to direct the work of and assign daily tasks to other millwrights like plaintiff each day; record reflected that lead millwrights did not having hiring, firing, or disciplinary authority); Velazquez v. Developers Diversified Realty Corp., 753 F.3d 265, 272-73 (1st Cir. 2014) (harasser was not plaintiff's supervisor, despite having certain responsibility to direct his work, as record supported conclusion that harasser lacked ability to fire or discipline plaintiff).

[174] *Supra* note 173. *See also EEOC v. AutoZone, Inc.*, 692 F. App'x 280, 283 (6th Cir. 2017) ("Townsel's ability to direct the victims' work at the store and his title as store manager do not make him the victims' supervisor for purposes of Title VII"; stating that harasser "could not fire, demote, promote, or transfer any employees").

[175] 743 F.3d 726, 740-41 (10th Cir. 2014).

[176] 692 F. App'x 280, 283 (6th Cir. 2017).

at the store he managed.[177] Though the harasser could initiate disciplinary proceedings, hire hourly employees, and make recommendations to the district manager concerning employees' demotions or promotions, the court held he was not the victims' supervisor under *Vance* because he did not have the authority to "fire, demote, promote, or transfer any employees."[178] With respect to delegated authority, the court concluded that this was not a case in which the employer had delegated the power to take tangible employment actions by relying on the harasser's recommendations, because the harasser's "ability to influence [the decisionmaker] does not suffice to turn [him] into his victims' supervisor."[179] In so concluding, the court stated that the employer had "not blindly delegate[d] his responsibilities to [the harasser] or 'merely signed the paperwork'" on the harasser's recommendations.[180] Moreover, though there was evidence that the harasser could hire hourly employees, the court concluded that this was immaterial to the analysis of whether he constituted the victims' supervisor, as he "could not and did not hire the employees he harassed, and that's what matters under *Vance*."[181]

In addition, at least one court of appeals has held that a harasser amounted to a supervisor under *Vance*, despite the absence of authority to take actions such as firing, because the individual had the authority to make decisions affecting an employee's pay and hours.[182] Another circuit has recognized "apparent" authority—that is, employees, including the plaintiff, reasonably believing that the harasser was a supervisor—as a basis under its own precedent for attaching supervisory status to the harasser for Title VII harassment purposes.[183]

[177] *Id*. at 281, 283.

[178] *Id*. at 283-84.

[179] *Id*. at 283. *See also* Morrow v. Kroger Limited P'ship I, 681 F. App'x 377, 380-81 (5th Cir. 2017) (harasser was not plaintiff's supervisor, though he was responsible for scheduling employees and completing employee performance evaluations, and was consulted about hiring decisions; stating that this evidence did not show harasser "could cause a tangible employment action as is required under *Vance*").

[180] *AutoZone*, 692 F. App'x at 283 (citing *Vance*, 133 S.Ct. at 2446). The Sixth Circuit's citation to *Vance* regarding "merely sign[ing] the paperwork" is to the following excerpt in *Vance*: "In Ellerth, it was clear that the alleged harasser was a supervisor under any definition of the term: He hired his victim, and he promoted her (subject only to the ministerial approval of his supervisor, who merely signed the paperwork)." 133 S.Ct. at 2446. Importantly, the Court in *Vance* here was not discussing signing paperwork in the context of assessing supervisory status based on delegated authority, but rather was discussing the facts in *Faragher* and *Ellerth* to explain that in those cases, the "Court simply was not presented with the question of the degree of authority that an employee must have in order to be classified as a supervisor." *Id*. at 2446-47.

[181] *AutoZone*, 692 F. App'x at 284 (citing 133 S.Ct. at 2439). It is important to note that *Vance* did not expressly address the issue of whether the authority to hire or fire—that is, the authority that renders an individual a supervisor—always requires that the individual be able to exercise that power with respect to the plaintiff; rather, the Court in *Vance* noted in its discussion of the facts that the parties agreed the alleged harasser was not authorized to hire, fire, demote, promote, transfer, or discipline the plaintiff. *Vance*, 133 S.Ct. at 2439.

[182] Moody v. Atlantic City Bd. of Educ., 870 F.3d 206, 216-17 (3rd Cir. 2017) (custodial foreman was plaintiff's supervisor under *Vance*, where he set hours for substitute custodians like plaintiff and thus "had the authority to cause a significant change in [plaintiff]'s benefits by assigning her no hours, thereby eliminating her take-home pay").

[183] *Kramer*, 743 F.3d at 742-43 (stating that a harasser could still qualify as a supervisor "under apparent authority principles," in which the employer gives the appearance that it has given a second party power to act on its behalf, and which causes a third party to "reasonably and prudently" believe that the second party has such power).

Other Sexual Harassment Prohibited Under Title VII

Quid Pro Quo Harassment

Though Title VII sexual harassment claims are often raised as "hostile work environment" claims, a Title VII violation can also be established with evidence of *quid pro quo* harassment[184]—that is, evidence that a supervisor took a "tangible employment action" against an employee (such as firing the employee or denying her a promotion) [185] for refusing to submit to the supervisor's sexual demands.[186] Though some federal courts of appeals require a plaintiff to show a tangible employment action resulting from his or her refusal to submit to demands for sexual conduct,[187] other circuit courts have described the requisite evidence for establishing a *quid pro quo* claim as either evidence of a tangible employment action *or* that an employee's submission to unwelcome advances was an express or implied condition for receiving job benefits.[188]

[184] *Ellerth*, 524 U.S. at 752 (as an example of *quid pro quo* harassment, explaining that such claims may concern allegations that "an employer demanded sexual favors from an employee in return for a job benefit," which would constitute "explicit" sex discrimination in the terms and conditions of employment; also stating that in its *Meritor* decision, it "distinguished between *quid pro quo* claims and hostile environment claims, and said both were cognizable under Title VII, though the latter requires harassment that is severe or pervasive. The principal significance of the distinction is to instruct that Title VII is violated by either explicit or constructive alterations in the terms or conditions of employment and to explain the latter must be severe or pervasive.") (citing *Meritor*, 477 U.S. at 65). *See also* Jones v. Needham, 856 F.3d 1284, 1291 (10th Cir. 2017) (explaining that the terms *quid pro quo* and "hostile work environment" are "shorthand descriptors to delineate different ways in which sexual harassment can occur.")

[185] "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth*, 524 U.S. at 761. Federal courts of appeals use the *Ellerth* definition in evaluating *quid pro quo* claims. *See, e.g.*, La Day v. Catalyst Technology, Inc., 302 F.3d 474, 482 (5th Cir. 2002) (analyzing *quid pro quo* claim and applying the *Ellerth* definition of "tangible employment action" to plaintiff's claim alleging he was denied a promotion for refusing his supervisor's sexual advances). *See also*, *e.g.*, Quantock v. Shared Marketing Services, Inc., 312 F.3d 899, 902, 903, n.1 (7th Cir. 2002) (noting that it would not disturb the lower court's *dismissal* of plaintiff's *quid pro quo* claim, as plaintiff's transfer one week after refusing her supervisor's repeated sexual propositions was a temporary change in her job responsibilities rather than a "'significant diminishment' of material responsibilities," and thus did not constitute a tangible employment action).

[186] *See*, *e.g.*, Hulsey, 367 F.3d at 1245, n.4, 1247 (11th Cir. 2004) (addressing Title VII *quid pro quo* claim in which plaintiff, a waitress, alleged that her supervisor fired her for refusing to submit to his sexual advances; also noting that *quid pro quo* is a term courts frequently used, prior to the Supreme Court's *Ellerth* decision, to refer to claims "where a benefit of employment was tied to a demand for sexual favors"); Hernandez-Loring v. Universidad Metropolitana, 233 F.3d 49, 50, 52-54 (1st Cir. 2000) (plaintiff alleged that she was denied tenure and promotion to full professor for refusing sexual advances from her supervisor, the head of the committee responsible for tenure recommendations; holding that district court erred in granting summary judgment on plaintiff's *quid pro quo* claim).

[187] *See*, *e.g.*, Pinkerton v. Colorado Dep't of Transp., 563 F.3d 1052, 1059-60 (10th Cir. 2009) (stating that to prevail on *quid pro quo* claim, plaintiff "must show that a reasonable jury could find [that her supervisor] conditioned concrete employment benefits on her submission to sexual conduct and had her fired when she did not comply"); La Day v. Catalyst Tech., Inc., 302 F.3d 474, 481 (5th Cir. 2002) (to establish claim, "[t]he plaintiff must show that he suffered a 'tangible employment action' that 'resulted from his acceptance or rejection of his supervisor's alleged sexual harassment.'") (quoting Casiano v. AT&T Corp., 213 F.3d 278, 283 (5th Cir. 2000); *Hernandez-Loring*, 233 F.3d at 52 ("Under Title VII, quid pro quo sexual harassment can be shown where a supervisor uses employer processes to punish a subordinate for refusing to comply with sexual demands.").

[188] *See*, *e.g.*, Cram v. Lamson & Sessions Co., 49 F.3d 466, 473 (8th Cir. 1995) (among prima facie elements for establishing a Title VII *quid pro quo* claim, requiring evidence of either a refusal that results in a tangible job detriment or submission as an implied or express condition of receiving job benefits); Highlander v. K.F.C. Nat'l Mgmt. Co., 805 F.2d 644, 648 (6th Cir. 1986) (same). *See also* Molnar v. Booth, 229 F.3d 593, 602-603 (7th Cir. 2000) ("classic" *quid* (continued...)

If evidence shows that a tangible employment action occurred, a plaintiff need not also establish that the harassment was sufficiently "severe or pervasive" to alter the conditions of her employment;[189] in other words, the legal standard applied to hostile work environment claims does *not* apply to *quid pro quo* claims. As the Supreme Court explained in *Ellerth*, the tangible employment action resulting from an employee's refusal to submit to a supervisor's sexual demands *itself* explicitly alters the terms and conditions of the plaintiff's employment.[190] Relatedly, in light of the Supreme Court's *Faragher* and *Ellerth* decisions holding that an employer is strictly liable for supervisory harassment that results in a tangible employment action, federal courts generally hold that an employer is strictly liable for *quid pro quo* harassment.[191] In the absence of evidence of a tangible employment action, however, courts will analyze the claim as alleging a "hostile work environment,"[192] and will thus, in that analysis, require a showing that the harassment was "severe or pervasive" enough to constitute a Title VII violation.

Though *quid pro quo* cases often involve factual allegations that a supervisor took a tangible employment action to punish an employee for *refusing* to engage in sexual conduct, at least two federal courts of appeals—the Second and Ninth Circuit Courts of Appeals—have expressly held that when a supervisor implicitly[193] or expressly[194] communicates that an employee's submission to sexual conduct is a necessary condition for continued employment, and a plaintiff *submits* to such requests, that supervisor's conduct constitutes a tangible employment action and triggers an employer's strict liability for that harassment.[195]

(...continued)

pro quo jury instruction explained that such harassment "occurs when a supervisor uses his supervisory authority either by making submission to requests for sexual favors a term or condition of the individual's employment, or by making submission or rejection the basis for decisions affecting the individual.").

[189] *See, e.g.*, Henthorn v. Capitol Commc'ns, Inc. 359 F.3d 1021, 1027 (8th Cir. 2004) ("A plaintiff in that situation need not prove that the offensive conduct is severe or pervasive because any carried-out threat is itself deemed an actionable change in the terms or conditions of employment.") (citing Ellerth, 524 U.S. at 753-54).

[190] *Ellerth*, 524 U.S. at 753-54 ("When a plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII").

[191] *Hulsey*, 367 F.3d at 1245 (explaining that when an employee's refusal to submit to a supervisor's sexual demands results in a tangible employment action taken against her, an employer is liable under Title VII) (citing *Ellerth*, 524 U.S. at 765); Wyatt v. Hunt Plywood Co., Inc., 297 F.3d 405, 409 (5th Cir. 2002) ("In a quid pro quo suit, proof that a tangible employment action resulted from a supervisor's sexual harassment renders the employer vicariously liable, and no affirmative defense can be asserted."); *Molnar*, 229 F.3d at 602-603 (instruction given to jury was a "classic" *quid pro quo* instruction, where jury was instructed that the employer "was strictly liable for *quid pro quo* harassment").

[192] *See, e.g., La Day*, 302 F.3d at 482-83 (concluding that plaintiff failed to establish a *quid pro quo* claim given the absence of evidence that he was denied a promotion for refusing to submit to his supervisor's sexual advances; explaining that "[i]f the plaintiff fails to provide sufficient evidence of *quid pro quo* harassment, he must prove the existence of hostile environment harassment," and proceeding to analyze whether the plaintiff's allegations were sufficient to establish a "hostile work environment" claim).

[193] Holly D. v. Cal. Inst. of Tech., 339 F.3d 1158, 1162-64 (9th Cir. 2003) (plaintiff, a professor's assistant, alleged that she was forced to engage in sexual intercourse with her supervisor, and that "there was an implication that her continued employment depended on her complying with the professor's unwelcome sexual advances"; for example, she alleged that when she initially rebuffed his sexual behavior and advances, her supervisor gave her a negative performance evaluation and was "'supercritical'" of her work, but thereafter when she submitted to his sexual advances, she received an evaluation that was "excellent").

[194] Jin v. Metro. Life Ins. Co., 310 F.3d 84, 88-89 (2d Cir. 2002) (evidence at trial showed that supervisor repeatedly threatened to fire plaintiff if she did not accede to his sexual demands).

[195] *Holly D.*, 339 F.3d at 1167-1173 (9th Cir. 2003) (holding that a tangible employment action "occurs when the supervisor threatens the employee with discharge and, in order to avoid the threatened action, the employee complies with the supervisor's demands"; explaining the rationale for its holding, including that such conduct "directly involves (continued...)

The Second Circuit reached the issue in *Jin v. Metropolitan Life Insurance Co*.,[196] a case involving trial evidence that the plaintiff's supervisor required her to come to his locked office once a week, forced her to perform sexual acts at these meetings, and repeatedly threatened to fire her if she did not submit to the acts.[197] Stating that a tangible employment action occurs when a harasser uses the plaintiff's submission to sexual acts as the basis for her continued employment,[198] the court explained that the harasser's use of supervisory authority to require the plaintiff's submission was attributable to the employer for liability purposes because the harasser "brought 'the official power of the enterprise to bear' on [the plaintiff] by explicitly threatening to fire her if she did not submit and then allowing her to retain her job based on her submission."[199] The court concluded that holding an employer strictly liable "when a supervisor bases decisions affecting the terms and conditions of a subordinate's employment on the submission to sexual demands" was consistent with the Supreme Court's *Faragher* and *Ellerth* decisions.[200]

The Supreme Court has not addressed this issue.[201] Other courts of appeals have noted the possibility of such submission-based *quid pro quo* claims under Title VII, but without expressly holding that such claims are cognizable or whether an employer would be strictly liable for such conduct by a supervisor.[202]

(...continued)

the supervisor's ability to impose upon the employee the ultimate employment penalty—discharge—or to confer on her the ultimate employment benefit—the retention of her job."); *Jin*, 310 F.3d at 98 (reaffirming earlier Second Circuit precedent holding that an employer is strictly liable "when a supervisor bases decisions affecting the terms and conditions of a subordinate's employment on the submission to sexual demands").

[196] 310 F.3d 84, 98-99 (2d Cir. 2002).

[197] *Holly D.*, 339 F.3d at 88-89.

[198] *Jin*, 310 F.3d at 97.

[199] *Id*. at 98 (quoting *Ellerth*, 524 U.S. at 762).

[200] *Id*. *See also Holly D*., 339 F.3d at 1168-69 (explaining how its holding comports with the Supreme Court's *Faragher* and *Ellerth* decisions, as the rationale in those cases for strict liability is based on a "supervisor's exercise of [] authority to make critical employment decisions on behalf of his employer" when harassing an employee, and that this same rationale "holds true" in submission cases because a supervisor has told the plaintiff he will fire her if she refuses to comply with his demands and thereby coerces sexual acts by using the authority given to him by the employer).

[201] The Court's *Faragher* and *Ellerth* decisions did not concern Title VII claims asserting a submission theory of liability for harassment by a supervisor, but rather, allegations of harassment by supervisors, absent facts that the plaintiff submitted to any demands for sex or that the plaintiff was subject to a tangible employment action for refusing to accede to such demands. *See Faragher*, 524 U.S. at 780-83 (plaintiff alleged her two supervisors repeatedly subjected her and other female lifeguards to unwanted and offensive touching, including touching her buttocks, and made lewd sexual remarks during her employment; plaintiff eventually resigned); *Ellerth*, 524 U.S. at 747 (stating the legal issue as whether, under Title VII, "an employee who refuses the unwelcome and threatening advances of a supervisor, yet suffers no adverse, tangible job consequences, can recover against the employer without showing the employer is negligent or otherwise at fault for the supervisor's actions"). Meanwhile, though the plaintiff in *Meritor* alleged that during the course of her employment, her supervisor's harassment included repeated sexual demands which she submitted to "out of what she described as fear of losing her job," the plaintiff raised her claim as one alleging constant subjection to sexual harassment, which the Court construed and analyzed as alleging a hostile or abusive working environment. *Meritor*, 477 U.S. at 60, 65-67. *See also*, *Holly D*., 339 F.3d at 1167-68 (discussing the Supreme Court decisions in *Meritor*, *Faragher*, and *Ellerth* and the facts and claims at issue in those cases; stating that the "Supreme Court has not yet resolved the question of how the successful coercion of sex by a supervisor who has brought to bear the weight of the business enterprise and thereby compelled an unwilling employee to submit to his sexual demands fits into the *Faragher/Ellerth* dichotomy."); *Jin*, 310 F.3d at 96-97 (explaining that neither the Supreme Court's decisions in *Faragher* nor *Ellerth* involved allegations of coerced submission).

[202] Dulaney v. Packaging Corp. of Am., 673 F.3d 323, 329 n. 6 (4th Cir. 2012) (noting "submission theory of liability," but stating that it need not address that issue as it concluded that district court's grant of summary judgment on plaintiff's claim was inappropriate on other grounds); Lutkewitte v. Gonzales, 436 F.3d 248, 254 (D.C. Cir. 2006) (continued...)

Constructive Discharge

Rather than firing an employee, employers may compel employees to resign, for example, by creating intolerable working conditions. This scenario is generally referred to as a "constructive discharge."[203] In its 2004 decision *Pennsylvania State Police v. Suders*, the Supreme Court recognized the viability of a constructive discharge claim under Title VII in a case involving a female former employee who sued her employer, the state police, and alleged sexual harassment by her supervisors so intolerable that she was forced to resign.[204] The allegations in *Suders* included that the plaintiff's supervisors brought up inappropriate subjects, routinely grabbed their genitals, belittled and intimidated her, and had her wrongly arrested for the theft of a set of job-required examinations.[205] The questions presented to the Supreme Court were (1) whether the plaintiff could bring a claim for constructive discharge in the first instance; and (2) if constructive discharge was a viable Title VII claim, whether a defendant could raise the *Ellerth/Faragher* affirmative defense.[206]

On the first question, the Court held that constructive discharge in sexual harassment cases was a valid claim, and could be characterized as an "aggravated case" of sexual harassment or a hostile work environment.[207] A plaintiff bringing a constructive discharge claim must "show working conditions so intolerable that a reasonable person would have felt compelled to resign."[208] The claim is of the "same genre" as hostile work environment claims generally, but is a "'worse case' harassment scenario, harassment ratcheted up to the breaking point."[209] As with the "severe or pervasive" standard, the application of this standard depends on the facts of each case.[210] The Court held that the plaintiff in *Suders* had presented sufficient evidence to raise genuine issues of material facts on her claim of constructive discharge.[211]

(...continued)

(explaining that the "Supreme Court has not addressed whether an employer can be held strictly liable when an employee submits to her supervisor's sexual demands because she reasonably believes that her benefits or continued employment are conditioned upon her acquiescence," and stating that it need not decide the legal question given its resolution of the case on other grounds). *See also* Newton v. Cadwell Labs., 156 F.3d 880, 883 (8th Cir. 1998) (agreeing with district court that plaintiff had not suffered a tangible employment action for rejecting supervisor's advances after consensual affair had ended; noting that plaintiff admitted that her supervisor "never conditioned her continued employment on submission to [his] sexual advances").

[203] Black's Law Dictionary (7th ed. 1999) (defining constructive discharge as "a termination of employment brought about by making the employee's working conditions so intolerable that the employee feels compelled to leave").

[204] 542 U.S. 129, 133 (2004).

[205] *Id.* at 135-136.

[206] *Id*. at 139. As explained above, the *Ellerth/Faragher* defense represents a complete defense to liability where the defendant can establish it, so its applicability to constructive discharge may be significant.

[207] *Id.* at 146-47.

[208] *Id.* at 147.

[209] *Id.* at 147-48.

[210] *See supra* section "Federal Courts' Application of the *Harris* Factors," pp. 3-7. *See also* Mandel v. M&Q Packaging Corp., 706 F.3d 157, 170 (3d Cir. 2013) ("In determining whether an employee was forced to resign, we consider a number of factors, including whether the employee was threatened with discharge, encouraged to resign, demoted, subject to reduced pay or benefits, involuntarily transferred to a less desirable position, subject to altered job responsibilities, or given unsatisfactory job evaluations."); Easterling v. Sch. Bd. of Concordia Parish, 196 F. App'x 251, 253 (5th Cir. 2006); Plautz v. Potter, 156 F. App'x 812, 818 (6th Cir. 2005).

[211] *Suders*, 542 U.S. at 152.

Federal courts, applying *Suders*, generally agree that the conduct must be worse than that which would suffice to show "severe or pervasive" harassment.[212] In other words, if a plaintiff cannot show actionable harassment, the plaintiff's constructive discharge claim must fail as well.[213] Relatedly, it is possible to establish "severe or pervasive" harassment without reaching the level necessary to show a constructive discharge.

The second question before the Court in *Suders* was whether an employer could ever raise the *Faragher-Ellerth* affirmative defense to a constructive discharge claim. Drawing from the reasoning of its *Faragher* and *Ellerth* decisions, the Court concluded that the availability of the defense turns on whether any "official act" underlay the constructive discharge. An employer *cannot* avail itself of the defense, the Court held, "if the plaintiff quits in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation, for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions."[214]

This conclusion, however, opened the door to a new question: When is a constructive discharge the result of an "official act"? In addition to defining an "official act" as "an employer-sanctioned adverse action officially changing [the plaintiff's] employment status or situation,"[215] the Court discussed two lower court examples to illustrate the concept. First, the Court cited *Reed v. MBNA Marketing Systems, Inc.*, a case wherein the plaintiff raised a constructive discharge claim based on a supervisor's sexual comments and sexual assault. The Court agreed with the First Circuit that there was no "official act" here; the supervisor's conduct was "exceedingly unofficial and involved no direct exercise of company authority."[216] As a result, the defendant could raise the affirmative defense.[217] By way of contrast, the Court also discussed *Robinson v. Sappington*. In that case, after the plaintiff complained about sexual harassment by a judge for whom she worked, the presiding judge had her transferred to another judge who did not want her on staff.[218] The Court agreed with the Seventh Circuit that this "official act" of transferring the plaintiff precluded the defendant from raising the *Faragher-Ellerth* defense.[219]

Since *Suders*, lower courts have construed an "official act" to require a showing that some supervisor made a formal change in the employee's status. In *Whitten v. Fred's, Inc.*, for example, the Fourth Circuit addressed a sexual harassment claim in which the plaintiff's direct supervisor had, over the course of two days, repeatedly called her names, threatened her, pressed his genitals against her back as he walked by, and ordered her to stay late and clean the store in retaliation for her complaints.[220] After she complained to her supervisor's supervisor, he told her that she was

[212] *See, e.g.*, Porter v. Erie Foods Int'l, Inc., 576 F.3d 629, 640 (7th Cir. 2009) (finding no constructive discharge where employee was subject to race-based harassment; noting that "working conditions for constructive discharge must be even more egregious than those that would support a finding of a hostile work environment"); Fischer v. Forestwood Corp., 525 F.3d 972, 981 (10th Cir. 2008) (no constructive discharge where employee alleged he was heckled at work and was subject to anonymous messages criticizing him regarding his religion).

[213] *See, e.g.*, Fincher v. Depository Trust & Clearing Corp., 604 F.3d 712, 725 (2d Cir. 2010) ("Because [plaintiff] failed to establish a hostile work environment, her claim of constructive discharge also fails.").

[214] *Suders*, 542 U.S. at 134.

[215] *Id.* at 148.

[216] *Id.* at 150 (quoting Reed v. MBNA Marketing Systems, Inc., 333 F.3d 27, 33 (1st Cir. 2003)).

[217] *Id.*

[218] *Id.* (citing Robinson v. Sappington, 351 F.3d 317, 333-36 (7th Cir. 2003)).

[219] *Id.*

[220] Whitten v. Fred's, Inc., 601 F.3d 231, 236-37 (4th Cir. 2010).

overreacting and she should continue as if nothing had happened.[221] The Fourth Circuit concluded that neither the actions of the plaintiff's supervisor nor the supervisor's supervisor amounted to an "official act."[222] The only action on the part of the supervisor's supervisor was a failure-to-act—he "did nothing to change [the plaintiff's] employment status."[223]

With respect to damages available to a plaintiff who prevails on a constructive discharge claim, the Court stated in *Suders* that "a prevailing constructive discharge plaintiff is entitled to all damages available for formal discharge. The plaintiff may recover post-resignation damages, including both backpay, and in fitting circumstances, frontpay."[224]

Same Sex Harassment

Not every claim of workplace harassment is cognizable under Title VII. As harassment claims arise out of Title VII's antidiscrimination provision, harassment under Title VII must be "because of [an] individual's race, color, religion, sex, or national origin."[225] Plaintiffs can therefore occasionally face a challenge to show that an offered instance of harassment was "because of" the plaintiff's protected characteristic. This situation is especially frequent in cases where the harasser and the victim share the same sex. In its 1998 decision *Oncale v. Sundowner Offshore Services, Inc.*, the Supreme Court held that Title VII claims alleging harassment by a member of the same sex are viable so long as the evidence shows that such harassment "meets the statutory requirements" [226]—that is, that the harassment occurred "because of [an] individual's race, color, religion, sex, or national origin."[227]

In *Oncale*, the Supreme Court addressed a hostile work environment claim brought by a male plaintiff, a member of an all-male oil rig crew, who alleged harassment by his co-worker and two supervisory personnel.[228] The defendants and amici argued that harassment between members of the same sex should be excluded categorically from Title VII liability, on the theory that recognizing liability for same-sex harassment would "transform Title VII into a general civility code for the American workplace."[229] The Court disagreed, concluding that the text of Title VII mandated liability where discrimination was "because of . . . sex," and held that "nothing in Title VII necessarily bars a claim of [sex discrimination] merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex."[230] As the Court stated, "[t]he critical issue . . . is whether members of one sex are exposed to

[221] *Id.* at 237.

[222] *Id.* at 249-50.

[223] *Id.* at 250.

[224] *Suders*, 542 U.S. at 147, n.8.

[225] 42 U.S.C. § 2000e-2(a)(1) ("It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.").

[226] 523 U.S. 75, 80 (1998).

[227] 42 U.S.C. § 2000e-2(a)(1) ("It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.").

[228] *Oncale*, 523 U.S. at 77.

[229] *Id.* at 80.

[230] *Id*. at 79.

disadvantageous terms or conditions of employment to which members of the other sex are not exposed."[231]

Although the Court recognized the viability of Title VII claims alleging same-sex harassment in *Oncale*, it stated that such cases face a distinctive challenge: the plaintiff must provide evidence that the harassment occurred *because* of the plaintiff's sex. In the typical sexual harassment case, the Court explained there is little difficulty in proving that the harassment took place "because of [an] individual's . . . sex" because "the challenged conduct typically involves explicit or implicit proposals of sexual activity; it is reasonable to assume those proposals would not have been made to someone of the same sex."[232] In same-sex harassment claims, the Court suggested three "routes" by which a plaintiff could prove that the harassing conduct was because of the plaintiff's sex: (1) "credible evidence" that the harasser was homosexual or motivated by sexual desire; (2) evidence that the harasser used "sex-specific and derogatory terms" reflecting the harasser's general hostility toward individuals of a particular sex; or (3) comparative evidence about how a harasser treats members of both sexes to show a hostility toward one sex or the other.[233] Lower courts have generally held that the three methods suggested in *Oncale* are not exclusive, allowing plaintiffs some flexibility in showing that harassment was because of sex.[234]

The Court in *Oncale* further explained that, much like the analysis of whether harassment is objectively "severe or pervasive," evaluating whether same-sex harassment occurred because of the plaintiff's sex turns on a "careful consideration of the social context in which particular behavior occurs."[235] As the "real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships," the Court stated 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."[236]

The *Oncale* routes provide important guidelines to lower courts, despite being non-exclusive. The first and the third evidentiary routes suggested in *Oncale* appear to be the most common routes pursued by plaintiffs seeking to establish that same-sex harassment occurred because of the victim's sex.[237] One commentator, looking at 105 different same-sex harassment cases, found that 40 used the first evidentiary route, while 25 utilized the third route.[238] In four cases, the plaintiff relied on the second, "general hostility" route, and this scholar was unable to identify a single

[231] *Id*. at 80.

[232] *Id*.

[233] *Id.*

[234] EEOC v. Boh Bros. Constr. Co., LLC, 731 F.3d 444, 455 (5th Cir. 2013) ("Every circuit to squarely consider the issue has held that the *Oncale* categories are illustrative, not exhaustive, in nature.") (citing cases). *See also* Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 264 (3d Cir. 2001) ("Based on the facts of a particular case and the creativity of the parties, other ways in which to prove that harassment occurred because of sex may be available.") (citing Shepherd v. Slater Steels Corp., 168 F.3d 998, 1009 (7th Cir. 1999)).

[235] *Oncale*, 523 U.S. at 81 (stating, by way of example, that "[a] professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field—even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office").

[236] *Id*. at 81-82.

[237] Clare Diefenbach, *Same-Sex Sexual Harassment after* Oncale*: Meeting the Because of...Sex Requirement*, 22 BERK. J. OF GENDER, L. & JUSTICE 42, 49 n.58 (2013).

[238] *Id.* Other cases applied multiple routes or did not apply any specific *Oncale* route.

case that obtained a trial verdict under this route, likely because plaintiffs who might otherwise use this route instead rely on evidence of differential treatment.[239]

Some cases help show how these evidentiary routes are applied in practice. For example, in *Cherry v. Shaw Coastal*, the Fifth Circuit addressed a case involving the first *Oncale* route—evidence of homosexuality or sexual desire—in which the plaintiff, a male employee, alleged that he was subjected to a series of harassing comments and behavior from his supervisor, including receiving text messages evidencing suggesting sexual attraction, as well as being inappropriately touched.[240] In these circumstances, the court found "more than sufficient evidence to support the conclusion" that the supervisor's conduct was "sexual in nature."[241] The third *Oncale* route—evidence that the harasser treated members of one sex differently from another—was at issue in *Chavez v. Thomas & Betts Corp.*, where the Tenth Circuit affirmed a jury verdict finding actionable sexual harassment.[242] In that case, the plaintiff, a woman, alleged that her female supervisor had harassed her by "target[ing] her as a woman and repeatedly humiliat[ing] her in front of men in the workplace" by making humiliating comments about her "body parts" and exposing her underwear to her co-workers, without engaging in any similarly abusive conduct toward men in the workplace.[243] The court concluded that this differential treatment was enough for a reasonable jury to conclude that the plaintiff was harassed because of her sex.[244]

Difficulty may arise, however, when the plaintiff's evidence does not clearly demonstrate either sexual desire or differential treatment, though the harassment is nonetheless sexualized in nature. In one such case, the Sixth Circuit affirmed the grant of summary judgment for the defendant where the plaintiff, a woman, alleged that her female supervisor called herself the "bitch in charge," exposed her breasts, made a vulgar comment and gesture toward the plaintiff's breasts, and repeatedly suggested that the plaintiff did not wear underwear.[245] While the court acknowledged that the conduct was "unacceptable in a work environment," it concluded that the plaintiff had failed to show that the conduct was motivated by her sex, either in terms of the supervisor's general hostility toward women or the supervisor's sexual desire.[246] Courts have distinguished between sexualized bullying by members of the same sex—which has been held to be insufficient for showing actionable harassment under Title VII—and harassment "because of" sex.[247] Nonetheless, the line between these two remains unclear.

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[239] *Id.* at 70.

[240] Cherry v. Shaw Coastal, Inc., 668 F.3d 182, 187-88 (5th Cir. 2012).

[241] *Id. See also* Johnson v. Dollar Gen. Corp., 104 F.E.P. 532 (E.D. Tenn. 2008) (holding that where supervisor made sexually explicit comments, touched plaintiff, and said he was "every gay person's dream" there was sufficient evidence for a jury to find that the harassment was motivated by sexual desire and because of the plaintiff's sex).

[242] 396 F.3d 1088, 1093-94 (10th Cir. 2005).

[243] *Id.* at 1098.

[244] *Id.*

[245] Wade v. Automation Pers. Servs., 612 F. App'x 291, 294 (6th Cir. 2015).

[246] *Id.* at 297-98 (stating that the plaintiff had only offered "conclusory allegations and unsupported speculation" to support her claim that the harassment was based on her sex). The court held as such, notwithstanding the allegation that the supervisor had said at one point that if she "were a lesbian, she would date her lesbian friend." *Id.* at 296. The court found this evidence insufficient to demonstrate that the supervisor had acted out of sexual desire. *Id.*

[247] *See* Lord v. High Voltage Software, Inc., 839 F.3d 556, 559 (7th Cir. 2016) (finding insufficient evidence that harassment was because of sex, where a male plaintiff claimed his male co-workers harassed him by making comments with sexual connotations about the plaintiff and a female co-worker, and by unwanted physical contact between his legs or on his buttocks on four separate occasions); Betz v. Temple Health Sys., 659 F. App'x 137, 145 (3d Cir. 2016) (affirming district court's grant of a motion to dismiss for failure to state a claim on same-sex sexual harassment claim where female plaintiff alleged work environment was sexually offensive, as other female nurses would "regularly (continued...)

Some same-sex harassment cases, beyond using the routes suggested in *Oncale*, have succeeded by showing that the plaintiff was harassed for failing to conform to gender stereotypes. In *Price Waterhouse v. Hopkins*, a case involving a woman who argued that she was denied partnership at Price Waterhouse because she was insufficiently feminine, the Supreme Court, in a plurality opinion that has generally been accepted by lower courts, held that sex discrimination under Title VII could occur when an employer discriminates on the basis of the employee's failure to fit within a sex-based stereotype.[248] Combining the reasoning of that case with *Oncale*, some courts have concluded that harassment on the basis of sex can occur where the plaintiff can show that the harassment resulted from a failure to conform to sex-based stereotypes. For example, in *EEOC v. Boh Bros. Constr. Co., LLC*, a same-sex harassment case involving a male supervisor and a male plaintiff at a construction site, the Fifth Circuit held that the evidence was sufficient to demonstrate that the alleged harassment was because of the victim's "sex," based on the plaintiff's non-conformity to male sex stereotypes.[249] There, the plaintiff provided evidence that the supervisor thought the victim was not a "manly-enough man" and that he used a number of feminine sex-based epithets to refer to the plaintiff.[250] While such sex-stereotyping claims may involve facts that could form the basis for claims of discrimination or harassment based on sexual orientation,[251] courts are divided on whether sexual orientation discrimination *per se* is protected under Title VII as "discrimination on the basis of sex."[252] Nonetheless, courts that do not recognize sexual orientation discrimination under Title VII may permit such claims to proceed when the plaintiff shows sex-stereotyping as the basis for the harassment.[253]

(...continued)

'joke' with each other by licking, groping, making lewd gestures, or pretending to grope each other's breasts and genitals").

[248] 490 U.S. 228, 241-42 (1989) (plurality opinion).

[249] *Boh Bros.*, 731 F.3d at 459-460.

[250] *Id.* at 457. *See also* Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285, 291(3d Cir. 2009) (holding that plaintiff's "sex stereotyping" claim survives summary judgment, where plaintiff was harassed for his "effeminate" traits and called nicknames like "Rosebud"); Nichols v. Azteca Restaurant Enter., Inc., 256 F.3d 864, 874 (9th Cir. 2001) (holding that verbal abuse of plaintiff that accused him of "walking and carrying his tray 'like a woman" was valid claim under Title VII).

[251] *Prowel*, 579 F.3d at 291.

[252] *Compare* Evans v. Ga Reg'l Hosp., 850 F.3d 1248 (11th Cir. 2017) (holding that Title VII does not cover sexual orientation or "gender non-conformity" discrimination) (citing cases from other circuits) *cert denied* 138 S. Ct. 557 (2017); and *Prowel*, 579 F.3d at 291-92 (while district court correctly noted that record was replete with evidence of harassment based on sexual orientation, which did not violate Title VII, record also contained evidence of harassment based on plaintiff's failure to conform to gender stereotypes, which is a valid claim under Title VII), *with* Hively v. Ivy Tech Cmty. College of Ind., 853 F.3d 339, 351 (7th Cir. 2017) (en banc) (concluding that "the common-sense reality [is] that [it is] actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex"); and Zarda v. Altitude Express, No. 15-3775, 2018 U.S. App. LEXIS 4608, at *27 - *28 (2d. Cir. Feb. 26, 2018) (en banc) (holding that "sexual orientation discrimination constitutes a form of discrimination 'because of . . . sex,' in violation of Title VII.")

[253] *See*, *e.g.*, Ellingsworth v. Hartford Fire Ins. Co., 247 F. Supp. 3d 546, 554 (E.D.P.A. 2017) (allowing female plaintiff's sexual harassment claim to go forward when plaintiff's complaint stated that plaintiff's female supervisor harassed her because of her dress and appearance; the fact that the supervisor had prejudice against same-sex orientation did not affect plaintiff's claim that she was discriminated against for failing to "conform to a traditionally feminine demeanor and appearance").

Sexual Harassment and Retaliation Under Title VII

Title VII's anti-retaliation provision makes it unlawful for an employer to discriminate against an employee "because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."[254] In other words, an employer may not retaliate against an employee because he or she reported an employment practice made unlawful by Title VII.[255] Because federal courts interpret Title VII to prohibit sexual harassment, employees who report such harassment in the workplace may be protected from unlawful retaliation—such as termination or demotion—for making that report.[256]

To establish a Title VII retaliation claim, a plaintiff must show, as an initial matter, that she engaged in "protected activity,"[257] such as reporting discriminatory conduct to a manager or human resources office[258]—often categorized as protected *opposition*—and/or filing an EEOC charge[259] or participating in a Title VII proceeding,[260]often categorized as protected *participation*.

[254] 42 U.S.C. 2000e-3(a). The statute identifies two types of employee conduct against which an employer cannot retaliate: an employee's opposition to an unlawful employment practice under Title VII and an employee's participation "in any manner" in an investigation, proceeding, or hearing under Title VII. *See id*. *See generally*, Crawford v. Metro. Gov't of Nashville and Davidson Cty., Tenn., 555 U.S. 271, 274 (2009) (explaining that Title VII's anti-retaliation provision has two clauses known as the opposition clause and participation clause) (citing 42 U.S.C. § 2000e-3(a)).

[255] *See id*.; *Crawford*, 555 U.S. at 273 ("Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.* (2000 ed. and Supp. V), forbids retaliation by employers against employees who report workplace race or gender discrimination."). *See also* 42 U.S.C. 2000e-2(a) (making it unlawful for an employer to "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").

[256] *See*, *e.g.*, Foster v. Univ. of Maryland-Eastern Shore, 787 F.3d 243, 254 (4th Cir. 2015) (holding that evidence would allow reasonable jury to conclude that the defendant fired the plaintiff in retaliation for reporting that she had been sexually harassed, and for her subsequent complaints of ongoing retaliation thereafter); Maygar v. Saint Joseph Reg'l Med. Ctr., 544 F.3d 766, 773-74 (7th Cir. 2008) (holding that evidence established a prima facie case and created a triable issue that employer restructured plaintiff's job and ultimately fired her in retaliation for reporting harassment by her co-worker, and for reporting concern about how the hospital was addressing her harassment complaint).

[257] *See*, *e.g*., Kelly v. Howard I. Shapiro & Assocs. Consulting Eng'rs, P.C., 716 F.3d 10, 14 (2d Cir. 2013) (elements of prima facie case include evidence: that the plaintiff engaged in protected activity, the employer was aware of that activity, the employee suffered a materially adverse action, and causation between the protected activity and that adverse action); Collazo v. Bristol-Myers Squibb Mfg., Inc., 617 F.3d 39, 46 (1st Cir. 2010) (listing prima facie elements as: engaging in protected activity, suffering an adverse employment action, and showing the adverse action was causally connected to the protected activity).

[258] *See* Hertz v. Luzenac Am., Inc., 370 F.3d 1014, 1015-16 (10th Cir. 2004) ("Protected opposition can range from filing formal charges to voicing informal complaints to superiors."). *See generally Crawford*, 555 U.S. at 276-278 (discussing definitions of "oppose" and describing examples; also explaining that reasonable jurors could conclude that plaintiff's report was in opposition to the harasser's conduct "if for no other reason than the point argued by the Government and explained by an EEOC guideline: 'When an employee communicates to her employer a belief that the employer has engaged in . . . a form of employment discrimination, that communication' virtually always 'constitutes the employee's *opposition* to the activity.'") (quoting Brief for United States as *Amicus Curiae* 9 (citing 2 EEOC Compliance Manual §§ 8–II–B(1), (2), p. 614:0003 (Mar.2003)).

[259] *See*, *e.g.*, Greengrass v. Int'l Monetary Sys. Ltd., 776 F.3d 481, 485 (7th Cir. 2015) (describing filing an EEOC charge as "'the most obvious form of statutorily protected activity.'") (quoting Silverman v. Bd. of Educ. of City of Chicago, 637 F.3d 729, 740 (7th Cir.2011)).

[260] *See*, *e.g.*, Merritt v. Dillard Paper Co., 120 F.3d 1181, 1186 (11th Cir. 1997) (holding that plaintiff, by giving deposition testimony in a Title VII proceeding, engaged in protected participation under Title VII).

Reporting Sexual Harassment

When a plaintiff's report of sexual harassment takes the form of protected *opposition*, federal courts of appeals also require that the plaintiff show a "good faith" or objectively "reasonable" belief that the conduct she reported was unlawful under Title VII for that opposition to constitute protected activity.[261] Sometimes referred to as the "reasonable belief" standard,[262] courts will dismiss retaliation claims on the basis that the employee was unreasonable for believing the conduct she reported was harassment in the first instance,[263] even if evidence reflects that the plaintiff was fired shortly after making that report.[264] Courts have applied this "reasonable belief" test to a range of reports concerning harassment, including when an employee reports being the victim of harassment,[265] when an employee reports observing harassment toward another employee,[266] and when an employee supports another employee in reporting sexual harassment.[267]

[261] EEOC v. Rite Way Service, Inc., 819 F.3d 235, 237 (5th Cir. 2016) ("It has long been the law in this and other circuits that a plaintiff contending that she was retaliated against for proactively reporting employment discrimination need not show that the discrimination rose to the level of a Title VII violation, but must at least show a reasonable belief that it did."); Westendorf v. West Coast Contractors of Nevada, Inc., 712 F.3d 417, 422 (9th Cir. 2013) (stating that "[a]n employee engages in protected activity when she opposes an employment practice that either violates Title VII or that the employee reasonably believes violates that law."); *Maygar*, 544 F.3d at 771 (for plaintiff to prevail on her retaliation claim, she "need not prove that the underlying conduct she perceived as sexual harassment actually was serious enough to constitute a Title VII violation. Instead, she need only show that, when instituting her grievance, she had a 'sincere and reasonable belief' that she was opposing an unlawful practice.") (quoting Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc., 224 F.3d 701, 706–07 (7th Cir.2000)); *Kelly*, 716 F.3d at 14 (explaining that an employee's complaint may constitute protected opposition so long as the employee had "'a good faith, reasonable belief that [she] was opposing an employment practice made unlawful by Title VII'") (quoting McMenemy v. City of Rochester, 241 F.3d 279, 285 (2d Cir.2001)).

[262] *See*, *e.g.*, *Rite Way*, 819 F.3d at 242 (stating that "the reasonable belief standard recognizes there is some zone of conduct that falls short of an actual violation but could be reasonably perceived to violate Title VII").

[263] *See*, *e.g.*, Greene v. A. Duie Pyle, Inc., 170 F. App'x 853, 56 (4th Cir. 2006) (dismissing retaliation claim on the basis that plaintiff lacked objectively reasonable belief that employer was violating Title VII by permitting sexually explicit material in the workplace; describing plaintiff's testimony as "boil[ing] down to a few observations of lewd magazines and inappropriate jokes or drawings" in the workplace). Though outside the scope of this report, it should be noted that courts have held that the posting of explicit or derogatory images in the workplace may support or establish a Title VII harassment claim. *See*, *e.g.*, Harris v. Mayor and City Council of Baltimore, 429 F. App'x 195, 202 (4th Cir. 2011) (holding that reasonable jury could conclude that plaintiff was subjected to severe or pervasive harassment based on evidence of "profane" language and that "sexually explicit pictures of scantily clad or naked women were located throughout" the workplace, which plaintiff was exposed to on a daily basis).

[264] *See*, *e.g.*, *Greene*, 170 F. App'x at 855-56 (though plaintiff was fired at meeting in which he reported what he viewed as sexually offensive material in the workplace, and supervisor accused him of "'trying to cause trouble'" right before firing plaintiff, holding that retaliatory termination claim failed because plaintiff was unreasonable in believing that employer was acting unlawfully by permitting such material in the workplace).

[265] See, e.g., *Westendorf*, 712 F.3d at 422 (applying reasonable belief test to report of employee who believed she had been subjected to actionable sexual harassment).

[266] *See*, *e.g.*, *Rite Way*, 819 F.3d at 240-242 (concluding that the objectively reasonable belief test applies to a report made by an employee who witnessed what she believed to be unlawful sexual harassment, and who made that report in the course of her employer's internal sexual harassment investigation).

[267] *Collazo*, 617 F.3d at 43-44; 47-48 (applying reasonable belief test to plaintiff's acts of support to another employee who had told him she was being sexually harassed; among other acts, plaintiff arranged a meeting between victim and human resources to report the harassing behavior, attended that meeting with the victim, and attended a follow-up meeting with victim and human resources).

Reasonableness in Reporting Harassment

In determining whether the plaintiff was reasonable, federal courts often cite the "severe or pervasive" standard that applies to a Title VII hostile work environment claim to evaluate whether the harassing conduct the plaintiff reported was "close enough" to an actual Title VII violation to show the plaintiff's reasonableness in reporting that conduct.[268] Thus, a court's "reasonableness" determination in a Title VII *retaliation* claim can rely significantly on its precedent dictating what type of conduct it has held to be sufficiently "severe or pervasive" to constitute sexual harassment in a Title VII *discrimination* claim.[269]

In one Title VII retaliation case, for example, the Seventh Circuit held that the plaintiff was objectively reasonable in believing the conduct she reported to her supervisor was harassment, when she reported that her male co-worker, unwelcome and unsolicited, sat on her lap and whispered into her ear about her appearance.[270] The court explained that its hostile work environment precedent "has often recognized in the past that unwanted physical contact falls on the more severe side for purposes of sexual harassment," that the reported conduct was "the type of occurrence that, if it happened often enough, could constitute sexual harassment," and that the plaintiff was thus reasonable in believing that conduct to be unlawful.[271]

By contrast, the Eleventh Circuit held that evidence did *not* show that the plaintiff was objectively reasonable in believing the conduct she experienced was unlawful harassment. In this instance, her supervisor commented on her breasts and breast size on more than one occasion, including laughing as he told her "'you just look like you're going to burst'" out of a new shirt she was wearing, and telling her that there were no aprons big enough to accommodate her breasts.[272] The court concluded that "the conduct [plaintiff] described is insufficient to support an objectively reasonable belief that [her manager] was engaging in an unlawful employment practice," and appeared to view the conduct as "simple teasing."[273]

Clark County School District v. Breeden

When a court characterizes the reported harassing conduct as a "single incident," such retaliation claims may be particularly vulnerable to dismissal.[274] In those analyses, courts often cite to the

[268] *See, e.g.*, Summa v. Hofstra Univ., 708 F.3d 115, 126 (2d Cir. 2013) (plaintiff satisfied showing of objective reasonableness, as the conduct she reported "was close enough in severity" to conduct the court has previously held to constitute unlawful sexual harassment); Clover v. Total Sys. Servs., Inc., 176 F.3d 1346, 1351 (11th Cir. 1999) (an employee's objective reasonableness "must be measured against existing substantive law," and referring to "severe or pervasive" standard). *See also, e.g.*, Tatt v. Atlanta Gas Light Co., 138 F. App'x 145, 147-48 (11th Cir. 2005) (where plaintiff reported conduct that her male co-worker weekly pretended to unzip his pants and urinate on the office paperwork, evaluating that alleged conduct in light of its hostile work environment precedent; holding that plaintiff did not hold objectively reasonable belief, as co-worker's "acts were not close to being the kind of severe or pervasive conduct that constitutes actionable sexual harassment.").

[269] *See id. But see* Montell v. Diversified Clinical Servs., Inc., 757 F.3d 497, 504-05 (6th Cir. 2014) (making determination of plaintiff's objective reasonableness without reference to its hostile work environment precedent; rather, reasoning that because comments directed at plaintiff were sexual in nature, and were made by her supervisor, such facts supported the conclusion that plaintiff had a good faith, reasonable belief that she was reporting unlawful sexual harassment).

[270] *Maygar*, 544 F.3d at 768, 771-72.

[271] *Id*.

[272] Henderson v. Waffle House, Inc., 238 F. App'x 499, 502-03 (11th Cir. 2007).

[273] *Id*. at 503 (citing *Faragher*, 524 U.S. at 788).

[274] *See, e.g.*, *id*.; Satterwhite v. City of Houston, 602 F. App'x 585, 588-89 (5th Cir. 2015) (holding that plaintiff lacked objectively reasonable belief to show he engaged in protected opposition; stating that the plaintiff "acknowledges that (continued...)

Supreme Court's 2001 per curiam decision in *Clark County School District v. Breeden*[275] to support its holdings,[276] characterizing *Breeden* as "holding that a plaintiff did not engage in protected activity because 'no reasonable person could have believed that' a single, non-serious incident 'violated Title VII's standard.'"[277]

In *Breeden*, the Court addressed a Title VII retaliation claim and held that the conduct the plaintiff reported did not show objective reasonableness.[278] There, the plaintiff met with her male co-worker and male supervisor to review the psychological evaluation reports of several job applicants.[279] One job applicant had written that he had once said to a co-worker, "'I hear making love to you is like making love to the Grand Canyon.'"[280] The plaintiff's supervisor read the comment out loud and told the plaintiff he did not know what the comment meant, to which the plaintiff's male co-worker responded by saying he would explain it later, and both men chuckled.[281]

In holding that the plaintiff was *not* objectively reasonable in believing this exchange to be unlawful harassment, the Court explained that the plaintiff's job "required her to review the sexually explicit statement in the course of screening job applicants," cited the district court record reflecting that the plaintiff was not bothered or upset by reading the statement in the file, and stated that the supervisor's question about the statement and the co-worker's response about the statement were, "at worst an 'isolated inciden[t]' that cannot remotely be considered 'extremely serious,' as our cases require."[282] In that context, the Court stated that "[n]o reasonable person could have believed that the single incident recounted above violated Title VII's standard."[283] Importantly, though the Court analyzed a plaintiff's objective reasonableness in *Breeden*, the Court did not "rule on the propriety" of the reasonable belief test itself.[284]

Though some courts of appeals have construed *Breeden* to render a complaint of an "isolated incident" objectively unreasonable,[285] other courts of appeals have held that a plaintiff's objective reasonableness can be established by the reporting of an "isolated incident" if the incident

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[the] comment was a single and isolated incident. He could not have reasonably believed that this incident was actionable under Title VII, and therefore, it 'cannot give rise to protected activity.'"); Theriault v. Dollar Gen., 336 F. App'x 172, 174 (3rd Cir. 2009) ("Here, Theriault did not engage in protected activity because she complained only of a single incident that no reasonable person could have believed violated Title VII.").

[275] 532 U.S. 268, 269 (2001).

[276] *See Satterwhite*, 602 F. App'x at 588, n.12 (citing *Breeden*, 532 U.S. at 271); *Theriault*, 336 F. App'x at 174 (citing *Breeden*, 532 U.S. at 269-70).

[277] *Theriault*, 336 F. App'x at 174-75 (parenthetically describing the holding in *Breeden*) (citing 532 U.S. at 269-70). *See also Satterwhite*, 602 F. App'x at 588, n.12 (parenthetically describing *Breeden* as "dismissing a retaliation claim because '[n]o reasonable person could have believed that the single incident recounted above violated Title VII's standard.'").

[278] *Breeden*, 532 U.S. at 271.

[279] *Id*. at 269.

[280] *Id*.

[281] *Id*.

[282] *Id*. at 271 (quoting *Faragher*, 524 U.S. at 788).

[283] *Id*. at 271.

[284] *Id*. at 270 (referring to Ninth Circuit precedent applying the reasonable belief standard, stating "We have no occasion to rule on the propriety of this interpretation, because even assuming it is correct, no one could reasonably believe that the incident recounted above violated Title VII.").

[285] *See supra* notes 275-277.

concerns humiliating or physically threatening conduct,[286] or instead have focused the analysis on the circumstances and context of the plaintiff's report rather than the number of incidents that were reported.[287] In *Montell v. Diversified Clinical Services, Inc*., for example, the Sixth Circuit rejected the defendant's argument that the plaintiff could not have reasonably believed that her supervisor's "few comments" could be unlawful sexual harassment.[288] Stating that that "argument [could] be quickly dispatched," the court explained that the plaintiff could have had an objectively reasonable belief that her supervisor was engaging in unlawful sexual harassment when she reported to the human resources department that he told her he was turned on by a woman in a red dress and heels, while the plaintiff was wearing a red dress and heels.[289] The court reasoned that the comment was sexual in nature and came from a supervisor directed at his subordinate, and noted that the supervisor had prefaced his comment by telling her she could get him in trouble with the human resources department for making the comment.[290] The court concluded that the evidence was sufficient to show she could have had an objectively reasonable belief, and that whether she did in fact have such a belief, "a question of credibility, must be left to a jury."[291]

Reporting Harassment in an Employer's Internal Investigation

As previously discussed, Title VII's anti-retaliation provision has two clauses, often referred to as the "opposition" and "participation" clauses.[292] Significantly, a number of federal courts of appeals, when interpreting the *participation* clause of Title VII's anti-retaliation provision, have held that an employee's participation in an employer's internal investigation does not constitute protected activity under that clause.[293] Though the Supreme Court has not addressed whether an

[286] Boyer-Liberto v. Fontainebleau Corp., 786 F.3d 264, 284 (4th Cir. 2015) (en banc) ("In sum, under the standard that we adopt today with guidance from the Supreme Court, an employee is protected from retaliation for opposing an isolated incident of harassment when she reasonably believes that a hostile work environment is in progress, with no requirement for additional evidence that a plan is in motion to create such an environment or that such an environment is likely to occur. The employee will have a reasonable belief that a hostile environment is occurring if the isolated incident is physically threatening or humiliating.").

[287] *See*, *e.g.*, *Rite Way*, 819 F.3d at 243-44 (stating that "opposition clause claims grounded in isolated comments are not always doomed to summary judgment" and holding that employee was objectively reasonable in believing conduct she reported was unlawful harassment, when employee reported that her supervisor looked at and commented on the buttocks of a female subordinate; noting that the conduct was from a supervisor to a subordinate and taking into account "the context in which the comment was made," including that the employee who made the report had seen the same supervisor, a week earlier, pretend to slap the behind of the same female subordinate); *Montell*, 757 F.3d at 504 (plaintiff could have had an objectively reasonable belief when reporting her supervisor's comment to her that he was turned on by a woman in a red dress and heels while plaintiff was wearing a red dress and heels, as comment was sexual in nature and directed at a subordinate).

[288] *Montell*, 757 F.3d at 504.

[289] *Id*.

[290] *Id*. at 504-05 (also citing evidence that when the plaintiff reported the comment, human resources investigated to determine whether the comments were made).

[291] *Id*. at 505.

[292] *See supra* note 255.

[293] *See*, *e.g.*, Townsend v. Benjamin Enters., Inc., 679 F.3d 41, 49 (2d Cir. 2012) ("Every Court of Appeals to have considered this issue squarely has held that participation in an internal employer investigation not connected with a formal EEOC proceeding does not qualify as protected activity under the participation clause."); Hatmaker v. Mem'l Med. Ctr., 619 F.3d 741, 747 (7th Cir. 2010) (holding that an employee's participation in a "purely internal investigation" does not constitute an investigation, proceeding, or hearing within the meaning of Title VII's participation clause, but taking no position on "whether participation in an internal investigation begun *after* a charge is filed with the EEOC should be treated" as protected participation).

employee's disclosures in an internal harassment investigation constitute protected *participation* under Title VII, the Court has expressly held that an employee's report of sexual harassment made in the context of an employer's internal investigation may constitute protected *opposition*.[294]

Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee

The Supreme Court, in its 2009 decision *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, held that an employee who reports "discrimination not on her own initiative, but in answering questions during an employer's internal investigation," may be protected under the opposition clause of Title VII's anti-retaliation provision.[295] In that case, the Court addressed a Title VII retaliation claim in which the plaintiff claimed she was fired in retaliation for reporting harassment in the course of her employer's internal investigation into allegations about a male manager.[296] The plaintiff—in response to questions from a human resources officer about whether she had ever witnessed "'inappropriate behavior'" by the male manager—described several instances of his sexually harassing behavior, including that he would "grab[] his crotch" when speaking to her, repeatedly "'put his crotch up to [her] window," and on one occasion, came into her office and pulled her head towards his crotch.[297]

In holding that the plaintiff's responses to her employer's inquiry constituted protected opposition, the Supreme Court discussed dictionary definitions of the term "opposed" in the absence of a definition in the statute. The Court explained that the term means to "resist or antagonize," among other meanings,[298] and that opposition can also entail taking a stand against a practice in other ways besides "'instigating'" action.[299] In light of the various definitions of "oppose," the Court concluded that the plaintiff's report of harassing behavior was opposition "if for no other reason than the point argued by the Government and explained by an EEOC guideline: 'When an employee communicates to her employer a belief that the employer has engaged in . . . a form of employment discrimination, that communication' virtually always 'constitutes the employee's *opposition* to the activity.'"[300] Though there may be exceptions, the Court stated, such as an employee's description of a supervisor's racist joke as hilarious, such reports "will be eccentric cases, and this is not one of them."[301]

The Court further reasoned that nothing in the statute requires "a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question."[302] Moreover, the Court observed that "[i]f it were clear law that an employee who reported discrimination in answering

[294] *Crawford*, 555 U.S. at 276, 280 (also explaining that because the plaintiff's conduct "is covered by the opposition clause, we do not reach her argument that the Sixth Circuit misread the participation clause as well.").

[295] *Id*. at 273, 280.

[296] *Id*. at 273-74.

[297] *Id*. at 274.

[298] *Id*. at 276 (quoting Webster's New International Dictionary 1710 (2d ed.1957)).

[299] *Id*. at 277 (as an example of taking no action beyond disclosing a position, stating that people were known to "'oppose'" slavery).

[300] *Id*. (quoting the government's *amicus curiae* brief citing 2 EEOC Compliance Manual §§ 8–II–B(1), (2), p. 614:0003 (Mar.2003)).

[301] *Id*. at 276-77.

[302] *Id*. at 278.

an employer's questions could be penalized with no remedy, prudent employees would have a good reason to keep quiet about Title VII offenses against themselves or against others."[303]

Finally, the Court described the "catch-22" that would result in holding otherwise: "[i]f the employee reported discrimination in response to the enquiries, the employer might well be free to penalize her for speaking up. But if she kept quiet about the discrimination and later filed a Title VII claim, the employer might well escape liability" by asserting the *Faragher-Ellerth* affirmative defense and arguing that "'the plaintiff employee unreasonably failed to take advantage of . . . preventive or corrective opportunities provided by the employer.'"[304] The Court stated, "[n]othing in the statute's text or our precedent supports this catch-22."[305]

When Harassment May Constitute Unlawful Retaliation

Another intersection between harassment law and Title VII's anti-retaliation provision concerns situations in which a plaintiff reports a potential Title VII violation, and the employer retaliates against the employee in the form of harassment—that is, retaliatory harassment. As discussed in further detail below, there is disagreement among circuit courts regarding how to analyze such claims—more specifically, whether the "severe or pervasive" standard in *Harris*[306] has any applicability to retaliatory harassment claims, though the Supreme Court decision in *Burlington Northern v. White*[307] generally controls Title VII retaliation analyses.

Burlington Northern v. White

The Supreme Court decided *Burlington Northern v. White* in 2006 and set the legal standard for evaluating actionable retaliation. Leading up to *Burlington Northern*, circuit courts had varying requirements concerning the type of conduct that could constitute a violation of Title VII's anti-retaliation provision, with some circuits requiring that retaliation had to take the form of an employer's decision to demote or fire the employee to constitute a violation, while others did not limit actionable retaliation to such "ultimate" employment decisions.[308] Addressing this issue, the Court expressly rejected the interpretation limiting actionable retaliation to only "workplace-related or employment-related retaliatory acts and harm,"[309] and instead held that actionable retaliation is conduct that "could well dissuade a reasonable worker from making or supporting a charge of discrimination."[310] Following *Burlington Northern*, circuit courts apply that standard to a wide variety of alleged retaliation,[311] though some courts are applying *Harris* to claims alleging retaliatory harassment, as explained in further detail below.

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[303] *Id*. at 279.

[304] *Id*. (citing *Ellerth*, 524 U.S. at 765).

[305] *Id*.

[306] Under *Harris*, to show a violation of Title VII's *antidiscrimination* provision, harassment must be "severe or pervasive enough to create an objectively hostile or abusive work environment." 510 U.S. at 21-22. Moreover, the Court in *Harris* further stated that the determination for severity or pervasiveness could be determined only by looking at "all the circumstances," including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Id.* at 23.

[307] 548 U.S. 53, 56 (2006).

[308] *Id.* at 60.

[309] *Id*. at 67.

[310] *Id.* at 57.

[311] *See*, *e.g.*, Hicks v. Baines, 593 F.3d 159, 169-70 (2d Cir. 2010) (holding that alleged retaliatory conduct such as (continued...)

In formulating the retaliation standard, the Court in *Burlington Northern* emphasized differences in the language and purpose of Title VII's antidiscrimination and anti-retaliation provisions, stressing that they prohibit different types of conduct to achieve different ends.[312] The purpose of the antidiscrimination provision, the Court explained, is to ensure that individuals are not discriminated against in the workplace because of their racial, ethnic, religious, or gender-based status.[313] Consistent with that purpose, the Court pointed to the statutory text of that provision limiting actionable discrimination to actions that affect employment, by use of terms such as "hire," "discharge," "compensation," and other employment-related language in describing the prohibited forms of discrimination.[314]

By contrast, the Court observed, the anti-retaliation provision contains "[n]o such limiting words," and interpreted this difference in statutory language to be intentional.[315] The Court also observed that the purpose of the anti-retaliation provision—that is, preventing an employer from interfering (through retaliation) with an employee's efforts to report unlawful conduct under Title VII—could not be achieved if actionable retaliation was limited only to "employer actions and harm that concern employment and the workplace."[316] Such a limited construction, the Court stated, "would not deter the many forms that effective retaliation can take."[317] Rather, interpreting the provision "to provide broad protection from retaliation helps ensure the cooperation upon which accomplishment of the Act's primary objective depends."[318] The Court concluded, based on the textual differences and the distinct purposes of the provisions, that the scope of the anti-retaliation provision "extends beyond workplace-related or employment-related retaliatory acts and harm."[319]

Applying this standard to the facts in *Burlington Northern*, the Court held that the evidence was sufficient to support the jury verdict in favor of the plaintiff, Sheila White.[320] White had alleged that the company reassigned and then suspended her in retaliation for her report to Burlington officials about her supervisor's repeated and negative comments about women.[321] After White reported the comments, Burlington reassigned her from forklift duty, which was considered a "less arduous and cleaner job" than that of a track laborer, and assigned her to perform only track

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changing plaintiffs' shift times and work locations constituted actionable retaliation under *Burlington Northern*, particularly as such changes resulted in plaintiffs having to work alone in inmate facility, which could be dangerous); Crawford v. Carroll, 529 F.3d 961, 974 (11th Cir. 2008) (stating there was "no doubt" that plaintiff suffered actionable retaliation in the form of an unfavorable performance review, which affected her eligibility for a merit pay increase; explaining that "[s]uch conduct by an employer clearly might deter a reasonable employee from pursuing a pending charge of discrimination or making a new one."); Moore v. City of Phila., 461 F.3d 331, 346 (3rd Cir. 2006) (in light of *Burlington Northern*, holding that disproportionately severe discipline constituted actionable retaliation as it "might well dissuade a reasonable worker from filing or supporting a charge of discrimination"; stating evidence would allow reasonable jury to conclude that the discipline plaintiff received for his alleged infraction was "inappropriately severe" and motivated by retaliatory animus for plaintiff's objection to treatment of African-American officers).

[312] *Burlington Northern*, 548 U.S. at 61-64.

[313] *Id*. at 62-63.

[314] *Id*. at 62.

[315] *Id*. at 62-63.

[316] *Id*. at 63.

[317] *Id*. at 64.

[318] *Id*. at 67.

[319] *Id*.

[320] *Id*. at 70.

[321] *Id*. at 57-59.

laborer work.[322] When White filed an EEOC charge alleging that this reassignment was in retaliation for her report, Burlington suspended her without pay a few days thereafter, ultimately reinstating her and paying back wages for the 37-day suspension.[323] In White's Title VII action, she alleged that both acts violated the statute's anti-retaliation provision.[324]

With respect to the reassignment, the Court concluded that the evidence was sufficient to satisfy its standard, explaining that while not every reassignment will constitute actionable retaliation, because the track laborer job was more arduous, and the forklift position required more qualifications and was considered an indication of prestige, this particular reassignment constituted actionable retaliation.[325] The Court observed that "[c]ommon sense suggests that one good way to discourage an employee such as White from bringing discrimination charges would be to insist that she spend more time performing the more arduous duties and less time performing those that are easier or more agreeable."[326]

Concerning the 37-day suspension, the Court similarly concluded that—even though White was repaid for her lost wages upon her reinstatement—the suspension constituted actionable retaliation, stating that White and her family had no way of knowing whether she would return to work and went 37 days without income, and that such an indefinite suspension without pay "could well act as a deterrent [to reporting a Title VII violation], even if the suspended employee eventually received backpay."[327] The Court emphasized that in applying this standard, "[c]ontext matters" because "the significance of any given act of retaliation will often depend upon the particular circumstances."[328]

Whether *Burlington Northern* Applies to Retaliatory Harassment Claims

Circuit courts, in analyzing Title VII claims alleging retaliatory harassment for reporting a potential Title VII violation, have applied varying—and at times directly competing—standards. Though there is limited circuit authority expressly addressing the correct standard to apply in retaliatory harassment claims,[329] circuits have staked ground in at least two contrary positions: application of *Burlington Northern* to determine whether the harassing conduct is actionable (i.e., conduct that would dissuade a reasonable person from making or reporting a claim of discrimination) or application of *Harris* to require that the retaliatory harassment be severe or pervasive enough to create a hostile work environment to constitute actionable retaliation. Given that *Burlington Northern* applies to the analysis of Title VII retaliation claims, it is unclear on what legal basis courts are applying *Harris* to claims alleging retaliatory harassment, though at least one circuit court has noted it sees no reason to analyze harassment motivated by retaliation any differently from harassment based on a protected characteristic (such as sex).[330]

[322] *Id*. at 58.

[323] *Id*.

[324] *Id*. at 59.

[325] *Id*. at 70-71.

[326] *Id*.

[327] *Id*. at 72-73.

[328] *Id*. at 69.

[329] *See* Boss v. Castro, 816 F.3d 910, 920 (7th Cir. 2016) (noting "there is a paucity of caselaw on the matter" addressing the analysis of retaliation-based harassment).

[330] *See id*. at 920 (stating that it sees no reason retaliation-based harassment "must somehow be less objectively offensive than in the context of sex or race and then proceeding to analyze a retaliation claim under the factors in *Harris*).

The Third Circuit has expressly held that in light of *Burlington Northern*, a plaintiff alleging a claim of retaliatory harassment need not establish that the harassment was severe or pervasive to be actionable.[331] The court explained that while it had formerly required a showing of "severe or pervasive" retaliatory harassment, it had since clarified that following *Burlington Northern*, "such claims may go forward upon a showing by the plaintiff that 'a reasonable employee would have found the alleged retaliatory actions materially adverse.'"[332] The court explained "materially adverse" to mean an action that "'well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'"[333] Under this "less-demanding standard," the court found that the alleged retaliatory harassment—including poor treatment following the plaintiff's complaint such as yelling at her and refusing to provide her resources to help in her work—would allow a reasonable jury to conclude that "such treatment would deter a reasonable employee from exercising her rights."[334]

The Second Circuit has also applied *Burlington Northern* to evaluate whether alleged harassment against a plaintiff, in retaliation for filing a discrimination complaint, amounted to actionable retaliation by asking whether those acts would dissuade a reasonable employee from making or supporting a discrimination complaint.[335] The Eleventh Circuit, however, continues to analyze a retaliatory harassment claim to require evidence that the retaliatory conduct was sufficiently severe or pervasive to create a hostile work environment, for the purpose of showing a violation of the *anti-retaliation* provision.[336] The court has explained that its pre-*Burlington Northern* precedent requires a showing of retaliatory harassment "that is sufficiently severe or pervasive to alter the conditions" of the workplace or create an abusive working environment, and expressly stated that retaliatory harassment must meet the standard in *Harris*, not *Burlington Northern*.[337]

The Fourth, Sixth, and Ninth Circuits also appear to require a showing of severe or pervasive harassment for that conduct to constitute actionable retaliation, but with limited or no discussion of the import of *Burlington Northern*.[338] That is despite these courts' application of *Burlington Northern* to other types of alleged retaliation.[339]

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[331] Hare v. Potter, 220 F. App'x 131-32 (3rd Cir. 2007) (citing *Moore*, 461 F.3d at 341).

[332] *Id*. at 132.

[333] *Id*. at 128 (quoting *Burlington Northern*, 548 U.S. at 68, 126 S.Ct. at 2415).

[334] *Id*. at 132-133.

[335] Spector v. Bd. of Trustees of Cmty. Tech. Colls., 316 F. App'x 18, 20-21 (2d Cir. 2009).

[336] Swindle v. Jefferson Cty. Comm'n, 593 F. App'x 919, 928 (11th Cir. 2014).

[337] *Id*. ("That is, to establish a prima facie case of retaliatory harassment, the allegedly adverse actions must meet *Harris*'s rather than *White*'s standard. As a result, retaliatory harassment and the other types of unlawful harassment have the same standard."). *But see* Adams v. City of Montgomery, 569 F. App'x 769, 773 (11th Cir. 2014) (applying *Burlington Northern* to analyze whether employer's alleged denial of plaintiff's transfer request was actionable retaliation under Title VII).

[338] Choulagh v. Holder, 528 F. App'x 432, 438 (6th Cir. 2013) ("In order to establish severe or pervasive retaliatory harassment, both an objective and subjective test must be met: the conduct must be severe and pervasive enough to create an environment that a reasonable person would find hostile or abusive and the victim must subjectively regard that environment as abusive."); Rose v. Mabus, 478 F. App'x 435, 1 (9th Cir. 2012) (holding that district court properly granted summary judgment on plaintiff's retaliatory harassment claim because evidence failed to raise a triable issue that alleged conduct "was sufficiently severe or pervasive to alter the conditions of his employment"); Wells v. Gates, 336 F. App'x 378, 383-85, 387-88 (4th Cir. 2009) (applying *Harris* to evaluate claim alleging retaliatory harassment, with no discussion of *Burlington Northern* in the analysis of that claim, despite analyzing plaintiff's other allegations of retaliatory conduct in the same case under *Burlington Northern*).

[339] *See, e.g.*, Siegner v. Township of Salem, 654 F. App'x 223, 231-232 (6th Cir. 2016) (applying *Burlington Northern* to assess whether the alleged retaliatory conduct—a supervisor's warning to the plaintiff about a low rating—would (continued...)

To the extent that other circuits have reached the analysis of Title VII retaliatory harassment claims,[340] it is unclear what standard these courts are applying, with some analyses reflecting blended language referring to both *Harris* (severity) and *Burlington Northern* (dissuade a reasonable employee). The Seventh Circuit, for example, recently addressed a retaliatory harassment claim and stated that the claim failed in the absence of evidence that the alleged retaliation "was *severe* enough to dissuade a reasonable employee from exercising his Title VII rights."[341] Meanwhile, the D.C. Circuit has analyzed a retaliatory harassment claim to conclude that the harassing acts would not have dissuaded a reasonable employee from reporting discrimination, but then cited *Harris* to note that even if the plaintiff experienced the harassment as harmful, "the standard for severity or pervasiveness is nonetheless an *objective* one."[342]

As reflected above, there is considerable disagreement among courts as to how to analyze retaliatory harassment claims. Certainly, whether a court elects to apply *Harris* or *Burlington Northern* has significant consequence: the retaliatory conduct under *Harris* would have to be severe or pervasive to constitute actionable retaliation, a more demanding standard to meet than that articulated in *Burlington Northern*.

Remedies Under Title VII

The Civil Rights Act of 1991 permits a plaintiff to recover compensatory damages in any case of intentional discrimination, including sexual harassment.[343] Compensatory damages can include the sum of "future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses."[344] A plaintiff may also recover punitive damages against nongovernmental entities upon a showing of "malice or reckless indifference to the federally protected rights" of the complainant.[345] The total amount of combined compensatory and punitive damages that a plaintiff can recover is limited by statute. For employers with more than 14 but fewer than 101 employees, a plaintiff's maximum damages are limited to $50,000; for 201 employees, $100,000; for 501 employees, $200,000; for employers with more than 500 employees damages are capped at $300,000.[346] A complainant who was constructively discharged may also be eligible for awards of backpay or frontpay.[347]

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dissuade a reasonable employee from making or supporting a change of discrimination and holding that it was not actionable on the facts of that case); Sillars v. Nevada, 385 F. App'x 669, 671 (9th Cir. 2010) (applying *Burlington Northern* to determine whether transfer of plaintiff to a different team was actionable retaliation under Title VII); *Wells*, 336 F. App'x at 384-85 (analyzing alleged retaliatory conduct in the form of denial of sick leave and applying *Burlington Northern*).

[340] The Fifth Circuit, for example, has noted that it has not "recognized a retaliatory hostile work environment cause of action." *Heath v. Bd. of Supervisors for S. Univ. and Agric. and Mech. Coll.*, 850 F.3d 731, 741, n.5 (5th Cir. 2017).

[341] Poullard v. McDonald, 829 F.3d 844, 858 (7th Cir. 2016) (citing *Burlington Northern*, 548 U.S. at 68-69) (emphasis added). *But see Boss*, 816 F.3d at 920 (stating that it sees no reason retaliation-based harassment "must somehow be less objectively offensive than in the context of sex or race and then proceeding to analyze a retaliation claim under the factors in *Harris*).

[342] Baird v. Gotbaum, 792 F.3d 166, 171-72 (D.C. Cir. 2015) (citing *Harris*, 510 U.S. at 21) (emphasis in original).

[343] 42 U.S.C. § 1981a.

[344] *Id.* at (b)(3).

[345] *Id.* at (b)(1).

[346] *Id.* at (b)(3)(A)-(D).

[347] *Suders*, 542 U.S. at 147, n.8 (2004) ("The plaintiff [in a constructive discharge case] may recover postresignation damages, including both backpay and, in fitting circumstances, frontpay . . ."); Albemarle Paper Co. v. Moody, 422 (continued...)

In addition to damages, a Title VII sexual harassment plaintiff may also seek injunctive relief.[348] As a general matter, "[a] district court has broad discretionary powers to craft an injunction to the specific violations found to ensure that the employer complies with the law."[349] By way of example, in *EEOC v. Wilson Metal Casket*, the Sixth Circuit upheld an injunction which prohibited the harassing supervisor from "asking any female employee to accompany him off the premises of the Company unless accompanied by at least one other employee, and kissing or placing his hands on any female employee in the work place."[350] The court upheld this injunction even though none of the enjoined conduct was itself, standing alone, likely illegal; the court noted that the injunction "appropriately enjoins conduct which allowed sexual harassment to occur."[351]

Finally, reasonable attorney's fees are available to a prevailing party, either a plaintiff or a defendant, under Title VII.[352] Prevailing plaintiffs generally recover fees unless there are special circumstances that preclude such recovery.[353] A prevailing plaintiff is one who obtains relief which "materially alters the legal relationship between the parties"; for example, the appropriate attorney fee when a plaintiff receives an award limited to nominal ($1) damages is generally "no fee at all."[354] Defendants who prevail are entitled to fees only if the plaintiff's claim was frivolous, unreasonable, or groundless.[355]

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U.S. 405, 421 (1975) ("It follows that, given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.").

[348] 42 U.S.C. § 2000e-5(g)(a)("If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate.").

[349] EEOC v. Wilson Metal Casket, 24 F.3d 836, 842 (6th Cir. 1994).

[350] *Id.*

[351] *Id.*

[352] 42 U.S.C. § 2000e-5(k).

[353] Newman v. Piggie Park Enter., Inc., 390 U.S. 400, 402 (1968) (analyzing Title II of the Civil Rights Act).

[354] Farrar v. Hobby, 506 U.S. 103, 111 (1992) (evaluating identical language in the context of 42 U.S.C. § 1988).

[355] Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978) (evaluating identical language in the context of 42 U.S.C. § 1988).