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# WHAT'S REASONABLE NOW? SEXUAL HARASSMENT LAW AFTER THE NORM CASCADE

*Joan C. Williams,[*] Jodi Short,[**] Margot Brooks,[***] Hilary Hardcastle,[****] Tiffanie Ellis[*****] & Rayna Saron[******]*

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TABLE OF CONTENTS

INTRODUCTION ..... 141
I. DOCTRINAL FRAMEWORK GOVERNING SEXUAL HARASSMENT ..... 147
II. THE NORM CASCADE ..... 149
A. New Norm #1: Sexual Harassment Is a Serious Problem ..... 151
B. New Norm #2: Broad Agreement Exists About What Behaviors Constitute Sexual Harassment ..... 152
C. New Norm #3: Employers Should Not Tolerate Sexual Harassment ..... 153
D. New Norm #4: Sexual Harassment Accusers Are Credible ..... 153
III. FIVE OFT-CITED CIRCUIT COURT CASES DO NOT REFLECT WHAT REASONABLE PEOPLE AND JURIES WOULD LIKELY BELIEVE TODAY ABOUT SEXUAL HARASSMENT ..... 154
A. The Ninth Circuit: *Brooks v. San Mateo* and Its Progeny ..... 155
1. Brooks v. San Mateo ..... 155

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* Distinguished Professor of Law, Hastings Foundation Chair, Director, Center for WorkLife Law, University of California, Hastings College of the Law. The authors wish to thank those whose input has great improved this draft: Hillary Benham-Baker, Julia Campins, Jim Dempsey, Rachel Dempsey, Jennifer Liu, Catharine MacKinnon, and Laura Monfredini.

** Honorable Roger J. Traynor Professor of Law, University of California, Hastings College of the Law.

*** Stephanie Hicks Law Fellow, Center for WorkLife Law.

**** Adjunct Professor and Deputy Library Director, University of California, Hastings College of the Law.

***** Juris Doctor Candidate, May 2019, University of California, Hastings College of the Law.

****** Research Assistant, Center for WorkLife Law.

2. *Subsequent Cases Have Used* Brooks *as the Standard for Sexual Harassment in the Ninth Circuit and Elsewhere* ..... 162
3. *Ninth Circuit Case Law More Consistent with What Reasonable People and Juries Would Likely Find Today* ..... 165
   a. *Ellison v. Brady* ..... 165
   b. *Fuller v. Oakland* ..... 166

B. The Eleventh Circuit: *Mendoza v. Borden* and Its Progeny ..... 168
1. Mendoza v. Borden ..... 168
2. *Subsequent Courts Have Used* Mendoza *to Ratchet Up the Standard for Sexual Harassment in the Eleventh Circuit* ..... 173
3. *Eleventh Circuit Case Law More Consistent with What Reasonable People and Juries Would Likely Find Today* ..... 174

C. The Seventh Circuit: *Baskerville v. Culligan* and Its Progeny ..... 176
1. Baskerville v. Culligan ..... 176
2. *Subsequent Courts Have Used* Baskerville *to Ratchet Up the Standard for Sexual Harassment in the Seventh Circuit* ..... 179
3. *Seventh Circuit Case Law More Consistent with What Reasonable People and Juries Would Likely Find Today* ..... 180
   a. *Hostetler v. Quality Dining* ..... 181
   b. *Smith v. Sheahan* ..... 182

D. The Sixth Circuit: *Bowman v. Shawnee State University* and Its Progeny ..... 183
1. Bowman v. Shawnee State University ..... 183
2. *Subsequent Courts Have Used* Bowman *to Ratchet Up the Standard for Sexual Harassment in the Sixth Circuit* ..... 186
3. *Sixth Circuit Case Law More Consistent with What Reasonable People and Juries Would Likely Find Today* ..... 188

E. The Fifth Circuit: *Shepherd v. Comptroller* and Its Progeny ..... 189
1. Shepherd v. Comptroller ..... 189
2. *Subsequent Courts Have Used* Shepherd *to Ratchet Up the Standard for Sexual Harassment in the*

*Fifth Circuit* ..... 192
3. *Fifth Circuit Case Law More Consistent with What Reasonable People and Juries Would Likely Find Today*..... 195
F. Conclusion..... 196
IV. THE "REASONABLENESS" OF NDAS THAT BAR SURVIVORS FROM DISCLOSING SEXUAL HARASSMENT..... 196
A. The "Reasonableness" Standard..... 197
B. NDAs that Forbid Disclosure in Court or to Regulators Are Not Reasonable..... 201
C. A Framework for Evaluating the Reasonableness of NDAs to Forbid Extralegal Disclosures of Sexual Harassment ..... 205
1. *Extent of Restraint*..... 206
2. *Employer Interests* ..... 207
3. *Discloser Interests* ..... 211
4. *Public Interests* ..... 213
D. The "Reasonableness" Standard as a Reasonable Way Forward..... 221
CONCLUSION ..... 222

## INTRODUCTION

> The first time I remember being sexually harassed at work was at my second job ever, working at a bookstore. There was a man there who always tried to work sexual innuendo into every conversation we had. He'd find excuses to touch my back or arm, and try to give me massages in the breakroom. He was constantly winking at me, licking his lips. He would bring a gym bag to work, and sometimes, when we were in the breakroom together, he'd unpack the bag like he was organizing it. He'd talk to me about his workout routine, how important it was for him to stay in shape so he could maintain his sexual prowess. Then he'd bring out a bottle of KY Jelly, and he'd slowly and deliberately place it on the table. Staring at me.
>
> Sometimes managers would be in the room, pretending not to hear. Occasionally a manager would shake their head at him and tsk tsk, like he was a naughty child. He was not a child. He was 32. I, on the other hand, was a child. I was 17.[1]
>
> - Ijeoma Oluo

1. *See* Ijeoma Oluo, *Due Process Is Needed for Sexual Harassment Accusations—But For Whom?*, MEDIUM (Nov. 30, 2017), https://medium.com/the-establishment/due-process-is-needed-for-sexual-harassment-accusations-but-for-whom-968e7c81e6d6 [https://perma.cc/28M4-T9DW].

Typically social norms change slowly. In the late 1990s, when Ijeoma Oluo was seventeen,[2] sexual harassment was seen as a "tsking" matter: Only 34% of Americans thought it was a serious problem.[3]

Then came Alyssa Milano's #MeToo tweet on October 15, 2017, which was retweeted over a million times across eighty-five countries.[4] Almost immediately, the percentage of Americans who believe that sexual harassment is a serious problem shot up to 64%.[5] By late 2017, roughly 75% of Americans believed that sexual harassment and assault were "very important" issues for the country.[6] That is a norm cascade.

The assumption that sexual harassment reflects nothing more than individual misbehavior is changing as well. Two-thirds (66%) of Americans now say that recent allegations of sexual harassment "mainly reflect widespread problems in society," with only 28% attributing them mainly to individual misconduct.[7] The view that sexual harassment results from a climate of permission created or

2. *See id.*

3. Juana Summers & Jennifer Agiesta, *CNN Poll: 7 in 10 Americans Say Sexual Harassment Is a Very Serious Problem*, CNN (Dec. 22, 2017), https://www.cnn.com/2017/12/22/politics/sexual-harassment-poll/index.html [https://perma.cc/8XKW-TN7H] (presenting information on Americans' views on sexual harassment with data collected in May 1998 and December 2017). A PDF of full poll results is also available. *See CNN December 2017*, SSRS (Dec. 22, 2017), http://cdn.cnn.com/cnn/2017/images/12/21/rel12d.-.sexual.harassment.pdf [https://perma.cc/8W37-A8PH].

4. Andrea Park, *#MeToo Reaches 85 Countries with 1.7M Tweets*, CBS NEWS (Oct. 24, 2017), https://www.cbsnews.com/news/metoo-reaches-85-countries-with-1-7-million-tweets/ [https://perma.cc/H2JY-NTZT]. We note that prior to the proliferation of #MeToo tweets, in 2007, Tarana Burke founded her nonprofit, Just Be Inc., for helping victims of sexual violence and coining her movement "Me Too." *See* Sandra E. Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.amp.html [https://perma.cc/4ZTS-9BYX].

5. Gary Langer, *Unwanted Sexual Advances Not Just a Hollywood, Weinstein Story, Poll Finds*, ABC NEWS (Oct. 17, 2017), https://abcnews.go.com/Politics/unwanted-sexual-advances-hollywood-weinstein-story-poll/story?id=50521721 [https://perma.cc/9UEY-7N8D].

6. Baxter Oliphant, *Women and Men in Both Parties Say Sexual Harassment Allegations Reflect 'Widespread Problems in Society'*, PEW RESEARCH (Dec. 7, 2017), http://www.pewresearch.org/fact-tank/2017/12/07/americans-views-of-sexual-harassment-allegations/ [https://perma.cc/4TDS-WG94].

7. *Id.*

tolerated by an employer, formerly confined to feminist theorists, suddenly seems mainstream.[8]

This Article began in reaction to a panel on sexual harassment presented to federal judges, in which a defense attorney included a squib on *Brooks v. City of San Mateo* from a past continuing legal education program she conducted.[9] During a call to prepare for the program, which included Professor Joan Williams and other members of the panel, joshing ensued as the employment attorneys kidded each other about what they all called the "one free grab" case. This led Professor Williams to look more closely at the details.

The plaintiff, 911 dispatcher Patricia Brooks, worked out of the police station in a city just south of San Francisco.[10] While Brooks was on a 911 call, a senior dispatcher, Steven Selvaggio, put his hand on her stomach and commented on its softness and sexiness.[11] Brooks told Selvaggio to stop touching her and forcefully pushed him away.[12] "Perhaps taking this as encouragement," wrote Judge Alex Kozinski for the Ninth Circuit, Selvaggio trapped Brooks against her desk while she was on another call and put his hand "underneath her sweater and bra to fondle her bare breast."[13] Brooks removed his hand and told him he had "crossed a line," to which Selvaggio responded that she needn't worry about cheating on her husband because he would "do everything."[14] Selvaggio then approached Brooks "as if he would fondle her breasts again."[15] "Fortunately," noted the Court, "another dispatcher arrived at this time, and Selvaggio ceased his behavior."[16] Brooks reported Selvaggio, and the subsequent investigation revealed that "at least" two female coworkers experienced similar treatment.[17] Nonetheless, Judge Kozinski found no sexual harassment on the grounds that the harassment was not severe.[18] This conclusion is hard to understand given that Selvaggio spent 120 days in jail after pleading

8. *See generally* Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169 (1998); Katherine M. Franke, *What's Wrong with Sexual Harassment*, 49 STAN. L. REV. 691 (1997); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998).
9. *See* Brooks v. City of San Mateo, 229 F.3d 917 (9th Cir. 2000).
10. *See id.* at 921.
11. *See id.*
12. *See id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at 922.
18. *See id.* at 926.

no contest to criminal sexual assault for the same incident.[19] How can an incident severe enough to land someone in jail be insufficiently severe to sustain a civil suit for sexual harassment? Is it reasonable to require women to endure criminal sexual assault as a condition of employment?

Relatively little has been written about sexual harassment in law reviews for the past decade.[20] Catharine MacKinnon's foundational *Sexual Harassment of Working Women* was published in 1979.[21] After the Supreme Court's landmark case of *Meritor Savings Banks v. Vinson*[22] in 1986, the number of law review articles increased steadily throughout the 1990s.[23] The number of articles peaked in 1999, with 177 published that year.[24] The volume of law review writing on sexual harassment began to fall thereafter, declining sharply after 2001, and it has continued to decline until very recently.[25]

This Article returns to the topic and asks whether *Brooks v. San Mateo* and four other appellate hostile-environment sexual harassment cases that have each been cited more than 500 times remain good

19. *See id.* at 921.

20. To gauge the volume of law review literature on sexual harassment over the years, we ran a search on Westlaw of the term "sexual harassment" and filtered by secondary sources and then "law reviews and journals," and then counted the number of articles per year with sexual harassment as the main topic from 1988 to 2018. Articles counted were those that either had sexual harassment as their main topic or discussed the subject in some significant way; articles that only contained the term "sexual harassment" but that did not discuss the topic were not counted.

21. *See* CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (Yale Univ. Press 1979).

22. *See* Meritor Savings Banks v. Vinson, 477 U.S. 57 (1986).

23. Some important articles published during this early period include: Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169 (1998) (describing early case law); Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183 (1989) (arguing that sexually oriented behavior undercuts women's ability to be seen as credible colleagues); Katherine M. Franke, *What's Wrong with Sexual Harassment*, 49 STAN. L. REV. 691 (1997) (finding that sexual harassment is a "technology of sexism" that serves to police men into heteronormative masculinity and women into heteronormative femininity); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998) (arguing that sexual harassment, particularly in blue-collar jobs, often is not sexual but is designed to drive women out of coveted jobs).

24. *See supra* note 20.

25. The number of articles declined to 106 in the year 2000; eighty in the year 2001; and fifty-seven in 2002. The downward trend continued through the 2000s, with an average of sixty-three articles per year between 2000–2004 and thirty-seven articles per year between 2005–2009. Even less was written in the 2010s, with an average of sixteen articles per year between 2010–2017. Starting in 2018, the number has increased, with fifty-four articles as of December 10, 2018.

precedent in the light of the norm cascade precipitated and represented by #MeToo.[26] Our analysis is designed to interrupt what we call the "infinite regression of anachronism," or the tendency of courts to rely on cases that reflect what was thought to be reasonable ten or twenty years ago, forgetting that what was reasonable then might be different from what a reasonable person or jury would likely think today.[27] These anachronistic cases entrench outdated norms, foreclosing an assessment of what is reasonable now. To interrupt this infinite regression, this Article pays close attention to the facts of the cases-in-chief discussed below to enable the reader, and the courts, to reassess whether a reasonable person and a reasonable jury would be likely to find sexual harassment today.

To illustrate this infinite regression, this Article also discusses other cases that cite the five cases-in-chief, which we call the "sub-cases."[28] The sub-cases show how the cases-in-chief use the infinite regression of anachronism to ratchet up the standard for what constitutes a hostile environment in their circuit. Both the cases-in-chief and the sub-cases reflect an era when sexual harassment was not taken seriously. They are no longer valid as precedent in an era in which 86% of Americans endorse a "zero-tolerance" policy toward sexual harassment.[29]

It goes without saying that changes in public opinion do not automatically change the validity of legal precedent. Yet sexual harassment is a special case because "reasonableness" plays a central

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26. On Westlaw, the search term used was the West Key Number 78k1185. On Ravel Law, we searched for the phrase "hostile work environment" within the same paragraph as [severe OR pervasive]. Then we chose the three most cited cases in each circuit, from which we chose five that were most inconsistent with post-#MeToo norms. *See* Brooks v. City of San Mateo, 229 F.3d 917 (9th Cir. 2000); Bowman v. Shawnee State Univ., 220 F.3d 456 (6th Cir. 2000); Mendoza v. Borden, Inc., 195 F.3d 1238 (11th Cir. 1999); Shepherd v. Comptroller of Pub. Accounts, 168 F.3d 871 (5th Cir. 1999); Baskerville v. Culligan Intern. Co., 50 F.3d 428 (7th Cir. 1995).

27. *See, e.g.*, Theresa M. Beiner, *Let the Jury Decide: The Gap Between What Judges and Reasonable People Believe Is Sexually Harassing*, 75 S. CAL. L. REV. 791, 817-19 (2002) [hereinafter Beiner 2002].

28. "Sub-cases" were located using the "citing references" function on Westlaw, which provides a list of all cases which cite a case-in-chief. The authors read the cases on these lists and selected as sub-cases those which relied on the cases-in-chief to reach a result which they feel is inconsistent with what a reasonable jury would likely find today.

29. Chris Jackson, *American Attitudes on Sexual Harassment*, IPSOS (Dec. 15, 2017), https://www.ipsos.com/en-us/news-polls/npr-sexual-harassment-2017-12-14 [https://perma.cc/7QPV-JST2].

role in both procedural and substantive ways. Procedurally, the typical sexual harassment case presents as a summary judgment motion by the employer, where the question for the judge is whether a "reasonable" jury could find for the plaintiff after making all factual inferences in the plaintiff's favor.

Reasonableness is also key in the substantive law. Hostile work environment cases—which constitute the lion's share of sexual harassment cases—require courts to assess whether the hostility was severe or pervasive enough to create a hostile environment from the viewpoint of a reasonable person in the plaintiff's position, considering "all the circumstances."[30] The norm cascade around sexual harassment in the wake of #MeToo is relevant both to whether a reasonable jury might find that sexual harassment occurred and regarding what constitutes an objectively hostile work environment from the standpoint of a reasonable person in the plaintiff's position.

Reasonableness enters into sexual harassment cases in a third way too. Employers long have used non-disclosure agreements (NDAs) to prevent employees from revealing sexual harassment they experienced in the workplace.[31] Indeed, NDAs kept many harassment survivors silent for years before #MeToo emboldened them to speak out.[32] NDAs executed in the employment context are enforceable only to the extent that they are "reasonable"[33] based on a weighing of the employer's interest in secrecy, the employee's interest in disclosure, and the public interest in disclosure.[34] The norm cascade provides evidence of the strong public interest in the disclosure of sexual harassment and is thus relevant to whether NDAs that prohibit disclosure of sexual harassment can be reasonably enforced.

The central role of reasonableness pivots the norm cascade directly into sexual harassment law. Whereas smoking at work was widely seen as reasonable and unobjectionable several decades ago, a

30. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998).

31. *See* Hiba Hafiz, *How Legal Agreements Can Silence Victims of Workplace Sexual Assault*, ATLANTIC (Oct. 18, 2017), https://www.theatlantic.com/business/archive/2017/10/legal-agreements-sexual-assault-ndas/543252/ [https://perma.cc/GQM4-APBP].

32. *See id.*

33. *See, e.g.*, CSS, Inc. v. Herrington, 306 F. Supp. 3d 857, 880 (S.D. W. Va. 2018) (holding a confidentiality agreement as void because it was unreasonable, containing no limitation of time or geographic scope); Spirax Sarco, Inc. v. SSI Eng'g, Inc., 122 F. Supp. 3d 408, 427 (E.D.N.C. 2015) (requiring NDAs to be "reasonable under the circumstances to maintain its secrecy").

34. *See, e.g.*, Hammons v. Big Sandy Claims Serv., 567 S.W.2d 313, 315 (Ky. Ct. App. 1978).

rule allowing on-the-job smoking today is now unthinkable. Just as one would not cite outdated smoking rules to support a conclusion about what's reasonable at work today, it makes little sense to cite outdated sexual harassment rulings that reflect very different notions of reasonable workplace behavior than exist today in the light of #MeToo.

This Article is designed to help judges fulfill their role in a very complex cultural environment. Competently written defense briefs will inevitably characterize the cases-in-chief in ways that sound innocuous. This Article seeks to ensure that judges who might be inclined to rely on these oft-cited cases today are fully aware of the factual contexts in which a prior court held that no reasonable person or jury could find sexual harassment. Even judges who felt confident that they knew what was reasonable in the past should not assume they know what Americans believe is reasonable today. Those judges should be more inclined to let juries decide what's reasonable now.

This Article proceeds as follows. Part I discusses the traditional framework governing sexual harassment law.[35] Part II uses polling data to document the norm cascade.[36] Part III reassesses five of the most-often cited circuit court sexual harassment cases in the light of the norm cascade and the norm cascade's influence on what a jury would find reasonable today.[37] Part IV examines what is reasonable in the context of enforcing NDAs against plaintiffs.[38] We conclude by pointing out that judges may soon face an avalanche of opportunities to reflect on the impact of the norm cascade on sexual harassment law.[39] This Article is designed to help them navigate that challenge.

## I. DOCTRINAL FRAMEWORK GOVERNING SEXUAL HARASSMENT

Sexual harassment was first recognized as a cause of action for illegal workplace discrimination under Title VII of the Civil Rights Act of 1964 in *Meritor v. Vinson*.[40] The Court held in *Meritor* that "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult"[41] and that employers cannot require workers to "run a gauntlet of sexual abuse

35. *See infra* Part I.
36. *See infra* Part II.
37. *See infra* Part III.
38. *See infra* Part IV.
39. *See infra* Part V.
40. *See generally* Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986).
41. *Id.* at 65.

in return for the privilege of being allowed to work and make a living."[42] The Court continued: "[F]or sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of . . . employment and create an abusive working environment.'"[43]

Reasonableness entered the hostile-work-environment equation in the 1993 case *Harris v. Forklift*, where the Supreme Court held that to state a valid claim, a plaintiff needs to prove "an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive."[44] *Harris* overturned a lower court decision that held that, although an employer's sexual and sexist statements offended the plaintiff and would offend a reasonable woman, no hostile environment was proven because the statements were not "so severe as to be expected to seriously affect [the plaintiff's] psychological well-being."[45] Noting that the hostile environment test was not "mathematically precise," the Supreme Court explained that it could be determined "only by looking at all the circumstances," which "may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[46] While psychological harm can be taken into account like any other relevant factor, "no single factor is required."[47] As we will see below, some courts have inexplicably turned this language into a requirement that no behavior constitutes sexual harassment unless it is physically threatening.[48]

In *Oncale v. Sundowner* in 1998, the Court again held that the environment must be one that "a reasonable person in the plaintiff's position"[49] would find hostile in light of all circumstances, including "the social context in which [the] behavior occurs and is experienced by [the] target."[50] Thus the plaintiff must prove that the harassing conduct was sufficiently severe or pervasive that a reasonable person

42. *Id.* at 66-67 (quoting Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).
43. *Id.* at 67 (quoting *Henson*, 682 F.2d at 904).
44. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993).
45. *Id.* at 20, 23.
46. *Id.* at 22, 23.
47. *Id.*
48. *See infra* Sections III.B, III.C, III.D, III.E.
49. Oncale v. Sundowner, 523 U.S. 75, 81 (1998).
50. *Id.*

would feel it altered the conditions of employment, considering the evidence as a whole and with due consideration to social context.[51]

Reasonableness also is embedded in the relevant procedural standard, given the typical procedural posture of these cases. In every one of the five cases-in-chief discussed in this Article, judges took the case away from a jury, either by affirming a grant of summary judgment for the employer or by granting judgment as a matter of law after the trial was completed.[52] In both procedural contexts, judges may exclude the jury only if the evidence is such that a reasonable jury could not find for the plaintiff after making all factual inferences in their favor.[53] Thus, in each of the five main cases, as in all hostile environment sexual harassment cases, courts should be deciding whether a reasonable jury could have found that a reasonable person would have considered what happened sexual harassment. We refer to these two standards collectively as the "*Harris* reasonableness standard" or simply the "reasonableness standard."

Removing cases from juries raises fundamental fairness issues in any context, but these issues are particularly acute in the context of sexual harassment cases. The judges in the cases-in-chief made decisions about what *they* thought a reasonable jury could find at a moment in time when norms about sexual harassment were very different, typically in the late 1990s. Even if they were right then, the recent sharp shift in social norms surrounding sexual harassment provides strong evidence that reasonable juries would think differently today.

## II. THE NORM CASCADE

Cass Sunstein coined the term "norm cascade" in 1996.[54] Sunstein pointed out that norm cascades occur when societies

51. *See id.* (providing that social context is a relevant consideration); *Harris*, 510 U.S. at 21 (defining a hostile work environment as "an environment that a reasonable person would find hostile or abusive"); Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986) ("For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'").

52. *See generally* Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705 (2007).

53. *Id.* Given that the overwhelming proportion of sexual harassment cases are brought by women against men, we will use the pronouns "she" and "her" to refer to the person alleging sexual harassment for reasons of grammatical simplicity.

54. *See* Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 909 (1996).

experience sharp shifts in social norms and cited feminism and the anti-apartheid movements as examples.[55] The term "norm cascade"—popularized by Martha Finnemore and Kathryn Sikkink in their 1998 Article "International Norm Dynamics and Political Change"—has been most commonly used in the academic field of international relations.[56] Finnemore and Sikkink describe norms as having a life cycle that consists of "norms emergence" followed by a "norm cascade" and then "internalization."[57] The first stage involves "norms entrepreneurs," who attempt to convince a critical mass of actors to embrace new norms.[58] The cascade begins following a tipping point where a critical mass adopts the new norm, after which the norm becomes internalized and no longer a matter of broad public debate.[59]

Evidence that #MeToo has prompted a norm cascade comes from three different kinds of polls.[60] The most compelling kind of data compares polls taken before #MeToo with those taken afterwards. The second kind of data simply reports the overwhelming agreement among the American public that sexual harassment is a serious problem. The third kind of data compares what people believe is the impact of the norm cascade rather than providing direct evidence of what that impact is. Questions in polls of this kind ask people to compare their understanding of what norms were in the recent past with what norms are today. Combining these three types of data provides a vivid picture of the contours of norm cascade. In effect, it represents five related shifts.

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55. *See id.* at 912.

56. *See* Martha Finnemore & Katherine Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887 (1998).

57. *Id.* at 895.

58. *See id.*

59. *See, e.g.*, Daniel Drezner, *#MeToo and the Trouble with New Norms*, WASH. POST (Feb. 14, 2018), https://www.washingtonpost.com/news/posteverything/wp/2018/02/14/metoo-and-the-trouble-with-norms/?noredirect=on&utm_term=.66026cad68f0 [https://perma.cc/4UKJ-DDL8] (using the term "norm cascade" to debate #MeToo).

60. The Authors have been able to verify that all polls cited are of nationally representative samples except two: Jackson, *supra* note 29; Summers & Agiesta, *supra* note 3. We were unable to verify that these polls were nationally representative due to lack of available information. We have tried to ascertain via phone calls and will continue trying to establish contact in order to verify that all polls are of nationally representative samples.

A. New Norm #1: Sexual Harassment is a Serious Problem

Widespread agreement exists today that sexual harassment is serious. In the late 1990s, only 34% of Americans believed that sexual harassment was a serious problem,[61] but today, around 75% do.[62] In 1998, a majority of Americans said that people were too sensitive about sexual harassment; shortly after the #MeToo tweet, a majority said that workplaces are not sensitive enough to sexual harassment.[63] Americans also seem to believe others are taking sexual harassment more seriously today.[64] Two-thirds (66%) of Americans believe that reports of sexual harassment were generally ignored five years ago; only 26% of Americans believe they are ignored now.[65] Additionally, Americans now recognize that men are sexually harassed too.[66]

The consensus that sexual harassment is a serious problem is strongest among younger people.[67] Americans under thirty years old are more likely than those fifty or older to view sexual harassment as a serious problem.[68] Another poll found that two-thirds (66%) of Americans sixty-five or older say that heightened attention to sexual harassment has made navigating workplace interactions more difficult for men.[69] Only 42% of Americans under age thirty agree.[70] Judges—who are more likely to be over fifty than under thirty—should keep

61. Summers & Agiesta, *supra* note 3.

62. Oliphant, *supra* note 6.

63. *See* Lydia Saad, *Concerns About Sexual Harassment Higher Than in 1998*, GALLUP (Nov. 3, 2017), https://news.gallup.com/poll/221216/concerns-sexual-harassment-higher-1998.aspx [https://perma.cc/NX8F-4KLW].

64. *See* Jackson, *supra* note 29.

65. *Id.*

66. *See* Jacob Bernstein, Matthew Schneier & Vanessa Friedman, *Male Models Say Mario Testino and Bruce Weber Sexually Exploited Them*, N.Y. TIMES (Jan. 13, 2018), https://www.nytimes.com/2018/01/13/style/mario-testino-bruce-weber-harassment.html [https://perma.cc/T7MH-KSMX]; Aja Romano, *Kevin Spacey Has Been Accused of Sexually Assaulting a Minor. He Deflected by Coming Out as Gay*, VOX (Oct. 30, 2017), https://www.vox.com/culture/2017/10/30/16569228/kevin-spacey-assault-allegations-anthony-rapp [https://perma.cc/L5LS-SCAN].

67. *See* Oliphant, *supra* note 6.

68. *See id.* (noting that 81% of adults ages eighteen to twenty-nine say the issue of sexual harassment is "very important" issue for the country, compared to 68% of Americans fifty or older).

69. Nikki Graf, *Sexual Harassment at Work in the Era of #MeToo*, PEW RESEARCH (Apr. 4, 2018), http://www.pewsocialtrends.org/2018/04/04/sexual-harassment-at-work-in-the-era-of-metoo/ [https://perma.cc/T3Z7-C6BF].

70. *Id.*

this in mind when assuming that they know what reasonable Americans believe today.

### B. New Norm #2: Broad Agreement Exists About What Behaviors Constitute Sexual Harassment

The traditional assumption was that one should be wary of labeling problematic behavior as "harassment" because different people (particularly people of different genders) interpret the same behaviors differently. What is harassment to one person might just be horseplay or flirting to another. This view was well expressed by Justice Antonin Scalia's concurrence in *Harris v. Forklift*,[71] which warned that that law "lets virtually unguided juries decide whether sex-related conduct engaged in (or permitted by) an employer is egregious enough" to be considered sexual harassment.[72] Scalia's language likely encouraged federal judges to take summary judgment cases away from these "largely unguided" juries.

If this worry was well justified when Justice Scalia expressed it in 1993, it is no longer so today. Widespread agreement exists (among 96% of women and 86% of men) that touching or groping is sexual harassment.[73] There are similar levels of consensus that sexual harassment includes: being forced to do something sexual (91% of women; 83% of men); masturbating in front of someone (89% of women; 76% of men); exposing oneself (89% of women; 76% of men); sharing intimate photos without permission (85% of women; 71% of men); and sending sexually explicit texts or emails (83% of women; 69% of men).[74] There is even strong agreement that verbal comments alone can constitute harassment: 86% of women and 70% of men believe that making sexual comments about someone's looks or body is sexual harassment.[75]

These findings highlight not only that strong consensus exists about what kinds of behaviors constitute sexual harassment but also that the consensus cuts across gender lines. Men and women now largely agree that people are entitled to show up to work and be treated as colleagues, not as sexual targets or opportunities. Sexual

71. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 24 (1993).

72. *Id.*

73. *The Behaviors Americans Count as Sexual Harassment*, BARNA (Nov. 28, 2017) [hereinafter BARNA], https://www.barna.com/research/behaviors-americans-count-as-harassment/ [https://perma.cc/U7MJ-8V6W].

74. *Id.*

75. *Id.*

harassment—certainly if it involves groping, touching, or sexual ridicule—is now viewed as aberrant behavior that most Americans, of all genders, consider inappropriate.

### C. New Norm #3: Employers Should Not Tolerate Sexual Harassment

The old norm was that employers should not be held responsible for the sexual antics of their employees and that women should "suck it up" if they felt they had been harassed and should not go running to Human Resources for help.[76] When Professor Williams entered the workforce in the 1980s, she was told that sexual harassment was something that any woman worth her salt could handle on her own and that if she could not, she did not belong in the workforce. This is the norm that has perhaps changed most dramatically. Eighty-six percent of Americans now endorse a "zero-tolerance" policy, not necessarily meaning that a harasser should be fired but that harassing behavior should not be excused or tolerated.[77]

### D. New Norm #4: Sexual Harassment Accusers Are Credible

Before #MeToo, women who complained about sexual harassment were often stereotyped as vengeful, lying sluts.[78] Thus in 1992, one senator asked Anita Hill, "Aren't you just a scorned woman?" and she was famously called "a little bit nutty and a little bit slutty" by David Brock.[79] This stereotype was used to compromise Anita Hill's credibility, career, and dignity after she testified at the confirmation hearings of now-Supreme Court Justice Clarence Thomas.[80]

In a stunning reversal, less than a third (31%) of Americans now think that false accusations of sexual harassment are a major

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76. This "old norm" is based on the authors' own workplace experiences. Such experiences were representative of commonly held beliefs.

77. Jackson, *supra* note 29.

78. *See* Joan C. Williams & Suzanne Lebsock, *Now What?*, HARV. BUS. REV. (Apr. 22, 2019), https://hbr.org/cover-story/2018/01/now-what [https://perma.cc/RWD5-AUWE].

79. Margaret Carlson, *Smearing Anita Hill: A Writer Confesses*, TIME (July 9, 2001), http://content.time.com/time/nation/article/0,8599,167355,00.html [https://perma.cc/E2GQ-LQ68]; Williams & Lebsock, *supra* note 78. David Brock later recanted.

80. *See* Carlson, *supra* note 79.

problem.[81] Sixty-four percent of American workers say the accuser is more likely than the accused to be believed at their workplaces—69% of women and 60% of men.[82] At the same time, judges worried about false accusations can take comfort in the fact that 77% of Americans believe that *both* the accuser and the accused should get the benefit of the doubt until proven otherwise in sexual harassment cases.[83]

## III. FIVE OFT-CITED CIRCUIT COURT CASES DO NOT REFLECT WHAT REASONABLE PEOPLE AND JURIES WOULD LIKELY BELIEVE TODAY ABOUT SEXUAL HARASSMENT

The norm cascade has obvious implications for sexual harassment law. As discussed above, sexual harassment is grounded in reasonableness, both substantively and procedurally.[84] In *Harris v. Forklift*, the Court clarified that the "severe or pervasive" requirement in *Meritor* must be assessed from the perspective of a reasonable person: "Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview."[85]

Reasonableness standards are meant to build flexibility and continuous updating into the law, not to entrench norms from another time. Yet many courts have failed to update their understandings of reasonableness and instead rely on cases reflecting standards of reasonableness from the last century. To provide a corrective, this Article highlights aspects of widely cited cases that are substantially out of step with prevailing, widely held norms about sexual harassment—for instance, the finding that a reasonable person would not find conduct amounting to criminal sexual assault sufficiently severe to constitute a hostile work environment. We also pay close attention to whether courts create heightened standards for sexual

81. Graf, *supra* note 69.

82. *11/22: More Than One in Three Women Report Sexual Harassment in the Workplace*, MARIST (Nov. 22, 2017), http://maristpoll.marist.edu/1122-more-than-one-in-three-women-report-sexual-harassment-in-the-workplace/#sthash.iq 5zojER.dpbs [https://perma.cc/P49N-XES5] [hereinafter Marist Poll].

83. Jackson, *supra* note 29. Judges who keep the hostile environment cases from juries, either by upholding a grant of summary judgment for the employer, or by directing a verdict for the employer, typically are very careful not to make open judgments about credibility—that would be to admit that the case needs to go to a jury.

84. *See supra* notes 41-44.

85. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22 (1993).

harassment that reflect the outdated norm that run-of-the-mill sexual harassment is just not that serious. Our findings, presented below, will help to ensure that judges are equipped to properly apply sexual harassment law in a changed and rapidly evolving social and cultural environment.

## A. The Ninth Circuit: *Brooks v. San Mateo* and its Progeny

### 1. Brooks v. San Mateo

The 2000 case *Brooks v. San Mateo* has been cited 1,296 times.[86] *Brooks* was an appeal from a summary judgment for the city of San Mateo, so the relevant standard was whether a reasonable jury, taking all inferences in favor of the plaintiff, could find that Brooks had reasonably perceived her work environment to be hostile.[87] As summarized above, *Brooks* involved a 911 dispatcher whose coworker cornered her, groped her stomach, put his hand up her dress, and "fondled" (the court's word) her bare breast—all against her protestations and while she was attempting to handle emergency calls.[88]

Judge Kozinski conceded that Brooks herself perceived her work environment to be hostile, but he found that she failed to fulfill the additional requirement that the environment be seen as hostile to a reasonable person.[89] He did not mention the relevant standard for granting the employer's summary judgment motion: that no reasonable jury could find for the plaintiff.[90] His opinion in *Brooks* reflects three outdated norms: (1) that groping is not necessarily sexual harassment; (2) that workplace sexual harassment is not serious, even up to and including sexual assault; and (3) that employers should not

86. *Citing References: Brooks v. City of San Mateo*, WESTLAW EDGE, https://1.next.westlaw.com/ (search in search bar for "229 F.3d 917"; then follow the "citing references" hyperlink) (last visited May 10, 2019). Only thirty of the citing cases disagreed with, declined to extend, or distinguished its case from *Brooks*. *Negative Treatment: Brooks v. City of San Mateo*, WESTLAW EDGE, https://1.next.westlaw.com/ (search in search bar for "229 F.3d 917"; then follow the "negative treatment" hyperlink) (last visited May 10, 2019).

87. *See* Brooks v. San Mateo, 229 F.3d 917, 924 (9th Cir. 2000) ("To hold her employer liable for sexual harassment under Title VII, Brooks must show that she reasonably feared she would be subject to such misconduct in the future because the city encouraged or tolerated Selvaggio's harassment.").

88. *See id.* at 921.

89. *See id.* at 925.

90. *See, e.g.*, Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22 (1993).

be held responsible for the sexual antics of their employees and women should just "suck it up" and learn to handle the harassment (as at least two women had done before Brooks complained, as noted in the Introduction).

Under *Oncale*, reasonableness is judged from the viewpoint of a reasonable person in the plaintiff's position.[91] Given that 96% of American women and 86% of men consider "touching or groping" to be sexual harassment, the reasonable person and jury today would be highly likely to see stomach stroking and breast fondling as sexual harassment.[92]

Another quirky aspect of *Brooks* is the extraordinarily high bar it sets for demonstrating "severe" harassment.[93] Recall that the alleged harasser, Selvaggio, was convicted of criminal sexual assault for his conduct and spent 120 days in jail.[94] *Brooks* holds, in effect, that a reasonable person would not consider criminal sexual assault at work severe enough conduct to sustain a claim for sexual harassment.[95] This seems a strange proposition.

Even stranger is Judge Kozinski's discussion in *Brooks* of *Al-Dabbagh v. Greenpeace*,[96] which involved a violent rape in which a coworker detained the plaintiff overnight, "slapped her, tore off her shirt, beat her, hit her on the head with a radio, choked her with a phone cord and ultimately forced her to have sex with him."[97] Judge Kozinski's discussion of this case suggests that sexually unwelcome conduct in the workplace that falls short of violent rape is not "severe" enough to "create a work environment that a reasonable person would consider intimidating, hostile, or abusive."[98]

In fact, *Brooks* goes even further, suggesting that even rape on the job might not support a hostile environment claim: "If the incident here were as severe as that in *Al-Dabbagh*, we would have to grapple with the difficult question of whether a single incident *can so permeate* the workplace as to support a hostile work environment claim."[99] Few judges have been so bold as to claim that even violent

91. *See* Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 81-82 (1998).
92. BARNA, *supra* note 73.
93. *See Brooks*, 229 F.3d at 930.
94. *See id.* at 922.
95. *See id.* at 930.
96. *See id.* at 925.
97. Al-Dabbagh v. Greenpeace, Inc., 873 F.Supp. 1105, 1108 (N.D. Ill. 1994).
98. *Harassment*, U.S. EEOC, https://www.eeoc.gov/laws/types/harassment.cfm [https://perma.cc/AJG7-SPCR] (last visited May 10, 2019).
99. *Brooks*, 229 F.3d at 926 (emphasis added).

rape could not support a sexual harassment case, but a considerable number of judges belittle what happened to plaintiffs in sexual harassment cases by pointing out that it was not sexual assault or rape.[100]

The *Brooks* court's suggestion that even the most severe sexual violence must "permeate" the workplace in order to constitute harassment is a flagrant misreading of Supreme Court precedent, which makes sexual harassment actionable if it is "sufficiently severe *or* pervasive 'to alter the conditions of . . . employment and create an abusive working environment.'"[101] The "permeate" language comes from *Harris v. Forklift*, the landmark case that involved allegations that harassment was *pervasive* not *severe*.[102] It makes sense to require pervasive sexual harassment "permeate" a workplace, but it is unclear what it might mean for a single instance of severe sexual harassment to do so. The Supreme Court has held that sometimes harassment is so serious that it need not be pervasive and therefore need not "permeate" the environment.[103]

Recall that even after Brooks pushed Selvaggio away, he came at her again and fondled her breast and then attempted to approach her a third time.[104] "Fortunately, another dispatcher arrived," notes Judge Kozinski.[105] What if the other dispatcher had not arrived? A reasonable jury might find that Brooks, after having been groped and propositioned, found the situation hostile, indeed frightening, as Selvaggio repeatedly came at her when she was in a vulnerable situation. Brooks could not simply hang up on 911 calls and run. Courts sometimes do not recognize the anxiety that may pervade the workplace for victims who do not know how far a harasser will go when he or she follows them into the bathroom, grabs their breasts or

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100. *See, e.g.*, Morris v. City of Colorado Springs, 666 F.3d 654, 667 (10th Cir. 2012) (using a line of cases where plaintiffs were raped or sexually assaulted to distinguish the conduct in the present case and hold it did not constitute a hostile work environment); LeGrand v. Area Resources for Cmty. & Human Servs., 394 F.3d 1098, 1102 (8th Cir. 2005) (holding that where plaintiff's supervisor made unwelcome sexual advances, kissing plaintiff's mouth, gripping her thigh, and grabbing her buttocks and reaching for her genitals, the behavior did not rise to the level of actionable sexual harassment as "[n]one of the incidents was physically violent or overtly threatening").

101. Meritor Savs. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1996) (emphasis added) (quoting Hensen v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

102. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993).

103. *See Meritor*, 477 U.S. at 67.

104. *See Brooks*, 229 F.3d at 921.

105. *Id.*

buttocks, or exposes him or herself and tells the victim that he or she has no self control.[106] A reasonable jury today might well find that Selvaggio's behavior made the 911 dispatch office a hostile environment for Brooks.

*Brooks* offered a muddied legal analysis in its consideration of whether Brooks's employer could be held liable for Selvaggio's conduct. Given that Selvaggio was not Brooks's supervisor, a negligence standard applied: The city would be liable for Selvaggio's conduct only if it knew or should have known of Selvaggio's conduct.[107] Judge Kozinski mentioned this in a footnote, but he never mentioned or applied this standard in the text.[108] If the negligence standard had been applied, the facts of *Brooks* suggest that a reasonable jury might have concluded that the city should have known of Selvaggio's behavior for a simple reason: It had happened at least twice before.[109] Judge Kozinski asserted that Selvaggio's conduct toward Brooks was an isolated incident,[110] but his own recitation of the facts shows that that was flatly untrue: Judge Kozinski admitted that Selvaggio had made similar advances to at least two other female coworkers.[111] The court also noted that Brooks "cannot rely on Selvaggio's misconduct with other female employees because she did not know about it at the time of Selvaggio's attack."[112] The fact that *Brooks did not know* about the prior assaults does not establish that the *employer should not have known* about them. A reasonable jury could have found that Selvaggio's behavior altered the conditions of Brooks's employment by making it necessary to fend off sexual advances while fielding emergency calls and then to keep quiet about it. Making reasonable inferences in favor of the plaintiff, a jury could have found that the employer had created a climate of permission in which Selvaggio felt free to assault his colleagues and where women were silenced because they believed that they would suffer retaliation if they complained—a prediction that proved true in Brooks's case, as discussed below.[113] While Judge Kozinski's opinion only considers

106. *See* Anderson v. CRST Int'l., Inc., No. CV 14-368 DSF (MANx), 2015 WL 1487074, at *1 (C.D. Cal. Apr. 1, 2015), *aff'd in part, rev'd in part*, 685 F. App'x 524 (9th Cir. 2017).

107. *See* Fuller v. City of Oakland, 47 F.3d 1522, 1527 (9th Cir. 1995) (quoting Ellison v. Brady, 924 F.2d 872, 881 (9th Cir. 1991)).

108. *See Brooks*, 229 F.3d at 927 n.10.

109. *See id.* at 922.

110. *See id.* at 927.

111. *See id.* at 922.

112. *Id.* at 924.

113. *See id.* at 930.

this evidence in the context of the plaintiff's retaliation claim, the same evidence is relevant to the issue of whether the employer should have known about Selvaggio's on-the-job assaults.

Turning to Brooks's retaliation claim, Brooks needed to prove that her employer took an adverse employment action against her in response to her sexual harassment complaint.[114] When Brooks returned to her post after reporting the incident, she was denied her prior shift and given a less desirable one; she was denied her desired vacation schedule; her male coworkers ostracized her; the city was slow to process her workers' compensation claim; and ultimately, she received a "needs improvement" performance evaluation, a downgrade from her prior "satisfactory" rating.[115] The city introduced no evidence to contradict any of this—or at least no evidence the Ninth Circuit considered compelling enough to mention.[116] These facts lend understanding to why at least two other women who were assaulted by Selvaggio before Brooks said nothing.[117] Despite Brooks's extensive evidence of retaliation, instead of sending the claim to a jury to decide whether the city retaliated against Brooks, Judge Kozinski decided the issue himself.[118] In doing so, he discounted the negative performance evaluation, which is considered an adverse employment action under clear Ninth Circuit precedent.[119] He likewise discounted the vacation denial and the unfavorable shift on the grounds that they were "subject to modification" because Brooks "abandoned her job" while appeals were pending.[120] This put Brooks in a position where, to preserve her legal rights, she would have had to continue to work in an environment so upsetting that it had already driven her to take a disability leave.[121] This approach is inconsistent with the Supreme Court's assurance in *Harris v. Forklift* that "Title VII comes into play before the harassing conduct leads to a nervous breakdown."[122]

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114. *See id.* at 928 (citing Payne v. Nw. Corp., 113 F.3d 1079, 1080 (9th Cir. 1997)).

115. *Id.* at 928-29.

116. *See generally id.*

117. *See id.* at 922.

118. *See id.* at 930.

119. *See* Yartzoff v. Thomas, 809 F.2d 1371, 1376 (9th Cir. 1987).

120. *Brooks*, 229 F.3d at 929-30.

121. *See id.* at 922. We infer that Brooks's leave was a disability leave from the Court's statement that "Brooks had trouble recovering from the incident. She took a leave of absence immediately afterward and began seeing a psychologist. She returned to work six months later." *Id.*

122. Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993).

Judge Kozinski achieved this result by disaggregating the evidence of retaliation and discounting each piece of evidence one by one.[123] He discounted the ostracism on the grounds that "an employer cannot force employees to socialize with one another."[124] As noted, he discounted the unfavorable shift, the denial of Brooks's desired vacation time, and the negative evaluation on the grounds that the decisions were not final.[125] This approach is what another commentator has called the "divide-and-conquer strategy."[126] It is a common defense strategy often used in criminal cases in which one "isolate[s] each piece [of evidence] . . . and then attempts to trivialize it by taking it out of context."[127] The divide-and-conquer strategy is inconsistent with Supreme Court precedent that has repeatedly instructed lower courts to consider whether a hostile environment existed using a totality-of-the-circumstances test that considers the evidence as a whole in its social context.[128] Considering each piece of evidence in isolation is the opposite of considering the totality of the circumstances, which focuses on the cumulative effect.

As is commonplace in the cases-in-chief discussed in this Article, the divide-and-conquer strategy is used to support the decision to prevent the case from going to a jury.[129] As is again commonplace, *Brooks* does so by ignoring the totality-of-the-circumstances test as articulated by the Supreme Court and instead tuning out virtually

123. *See Brooks*, 229 F.3d at 929.

124. *Id.*

125. *See id.* at 929-30.

126. Beiner 2002, *supra* note 27, at 814; Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71, 104 (1999) [hereinafter Beiner 1999]; *see also* M. Isabel Medina, *A Matter of Fact: Hostile Environments and Summary Judgments*, 8 S. CAL. REV. L. & WOMEN'S STUD. 311, 314-15 (1999); Eric Schnapper, *Some of Them Still Don't Get It: Hostile Work Environment Litigation in the Lower Courts*, 1999 U. CHI. LEGAL F. 277, 280 (1999); Schneider, *supra* note 52, at 744 ("[A] slice and dice approach to summary judgment . . . [that] does not look at the evidence in a holistic way.").

127. Mendoza v. Borden, Inc., 195 F.3d 1238, 1262 (11th Cir. 1999) (Tjoflat, J., concurring in part and dissenting in part).

128. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998); Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).

129. *See* Beiner 2002, *supra* note 27, at 793; Beiner 1999, *supra* note 126, at 71; Medina, *supra* note 126, at 316; Ann Juliano and Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 582 (2001); Schneider, *supra* note 52, at 706-07; *see also* Megan E. Wooster, *Sexual Harassment Law—The Jury Is Wrong as a Matter of Law*, 32 U. ARK. LITTLE ROCK L. REV. 215, 216 (2010).

everything except the "severe or pervasive" language, holding that what happened to Brooks was not severe as a matter of law.[130]

What is the significance of the fact that this extraordinarily influential opinion was written by Judge Kozinski? In 2008, Judge Kozinski was admonished for posting on a publicly accessible website sexually explicit and degrading images of women, including one where naked women were painted to look like cows.[131] He was admonished for embarrassing the judiciary.[132]

Kozinski was unrepentant, just as he was more recently when allegations emerged that he had sexually harassed interns and clerks since the 1980s.[133] Ultimately, at least fifteen women publicly accused Judge Kozinski of groping their breasts and legs, showing them pornography in chambers asking if they found it sexually arousing, giving them prolonged kisses on the cheek, and soliciting sex.[134] "If

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130. *See* James Concannon, *Actionable Acts: "Severe" Conduct in Hostile Work Environment Sexual Harassment Cases*, 20 BUFF. J. GENDER L. & SOC. POL'Y 1, 8 (2012); V. Blair Druhan, *Severe or Pervasive: An Analysis of Who, What, and Where Matters When Determining Sexual Harassment*, 66 VAND. L. REV 355, 356 (2013); Judith J. Johnson, *License to Harass Women: Requiring Hostile Environmental Sexual Harassment to Be "Severe or Pervasive" Discriminates Among "Terms and Conditions" of Employment*, 62 MD. L. REV. 85, 85 (2003); Schnapper, *supra* note 126, at 326.

131. *See* Maura Dolan, *9th Circuit Judge Alex Kozinski Is Accused by Former Clerks of Making Sexual Comments*, L.A. TIMES (Dec. 8, 2017), http://www.latimes.com/local/lanow/la-me-ln-kozinski-sexual-misconduct-20171208-story.html [https://perma.cc/9APW-WA9L].

132. *See In re* Complaint of Judicial Misconduct, 575 F.3d 279, 284 (3rd Cir. 2009); *see also* Matt Zapotosky, *Prominent Appeals Court Judge Alex Kozinski Accused of Sexual Misconduct*, WASH. POST (Dec. 8, 2017), https://www.washingtonpost.com/world/national-security/prominent-appeals-court-judge-alex-kozinski-accused-of-sexual-misconduct/2017/12/08/1763e2b8-d913-11e7-a841-2066faf731ef_story.html?utm_term=.2677321b1d21 [https://perma.cc/PFS5-MURQ].

133. *See* Scott Glover, *9th Circuit's Chief Judge Posted Sexually Explicit Matter on His Website*, L.A. TIMES (June 11, 2008), https://www.latimes.com/local/la-me-kozinski12-2008jun12-story.html [https://perma.cc/U5PN-HU6E]; Leah Litman, Emily Murphy & Katherine H. Ku, *A Comeback but No Reckoning*, N.Y. TIMES (Aug. 2, 2018) https://www.nytimes.com/2018/08/02/opinion/sunday/alex-kozinski-harassment-allegations-comeback.html [https://perma.cc/K7G8-9F6V].

134. Matt Zapotosky, *Nine More Women Say Judge Subjected Them to Inappropriate Behavior, Including Four Who Say He Touched or Kissed Them*, WASH. POST (Dec. 8, 2017), https://www.washingtonpost.com/world/national-security/nine-more-women-say-judge-subjected-them-to-inappropriate-behavior-including-four-who-say-he-touched-or-kissed-them/2017/12/15/8729b736-e105-11e7-8679-a9728984779c_story.html?utm_term=.42442b3f3334 [https://perma.cc/3LR5-B9C8].

this is all they are able to dredge up after thirty-five years, I am not too worried," commented the judge after the initial allegations first became public.[135] Chief Justice Roberts disagreed.[136] He appointed the Judicial Council of the Second Circuit to lead an investigation, whereupon Judge Kozinski resigned.[137]

Thus, the judge who wrote one of the most cited sexual harassment opinions in the country was deeply out of sync with what his colleagues felt was reasonable behavior at work. *Brooks v. San Mateo* is equally out of sync with what a reasonable jury would find today, when groping is nigh-universally seen as sexual harassment, and 86% of Americans believe in zero tolerance for sexual harassment.[138]

### 2. *Subsequent Cases Have Used* Brooks *as the Standard for Sexual Harassment in the Ninth Circuit and Elsewhere*

Notwithstanding the poor analyses and inaccurate application of Supreme Court precedent, *Brooks* continues to be cited by courts. The current use of *Brooks* keeps sexual harassment cases away from juries and dismisses plaintiffs' claims of sexual harassment in cases involving groping and sexual assaults. One such case involved the plaintiff's alleged post-traumatic stress disorder as the result of sexual assault.[139]

In the 2008 case of *Dolan v. United States*, the plaintiff was a student firefighter at the Department of Land Services.[140] She was harassed and assaulted by her mentor.[141] While she was on a business trip, her mentor asked the plaintiff if she had a place to stay and offered to let her stay at his place; the plaintiff trusted him, viewed him as a mentor, and did not think he was sexually interested in her.[142] When she arrived, he had been drinking, but the plaintiff had seen him drink

135. Dolan, *supra* note 131.

136. Niraj Chokshi, *Federal Judge Alex Kozinski Retires Abruptly After Sexual Harassment Allegations*, N.Y. TIMES (Dec. 18, 2018), https://www.nytimes.com/2017/12/18/us/alex-kozinski-retires.html [https://perma.cc/T2XC-UR8U].

137. *See id.*

138. Jackson, *supra* note 29.

139. *See* Dolan v. U.S., No. 05-3062-CL, 2008 WL 362556, at *16 (D. Or. Feb. 8, 2008).

140. *Id.* at *3.

141. *See id.* at *5-6.

142. *See id.* at *5.

in past without incident and was not concerned.[143] However, she became uncomfortable when he started to slur his speech and was relieved when he went to bed.[144] Ten to fifteen minutes later, he returned wearing only boxer shorts, straddled her while she was sitting in a chair, rubbed his genitals against her, and tried to kiss her.[145] He held her in the chair for about ten minutes before she pushed him off.[146] She thought he was trying to rape her, ran to the bathroom and locked herself inside; he banged on the door and shouted at her to open it.[147] Eventually, she fled the scene.[148] The court cited *Brooks* and said this case was similar: "Although the conduct by [the mentor] [was] certainly egregious and totally unacceptable, it was an isolated incident and it was never repeated."[149] The court cited *Brooks* to support its conclusion that the plaintiff failed to produce evidence to show that a reasonable person would find the environment hostile and granted summary judgment for the employer.[150]

In the 2011 case of *Sanders v. Mohtheshum*, the plaintiff worked at a Pizza Hut.[151] She was harassed by her manager, who groped her buttocks with two hands in front of other employees.[152] He was charged with a misdemeanor after the plaintiff reported the incident to local police who came and removed the manager from the store.[153] The court cited *Brooks* for the proposition that a reasonable woman in the plaintiff's position would not have believed the terms and conditions of employment had been altered by the incident and granted summary judgment for the employer.[154]

In the 2014 case of *Ludovico v. Kaiser Permanente*, the plaintiff was a nurse whose coworker grabbed her by her shoulder, pulled her in so that she was not free to leave, and said he would "take his big wet tongue and shove it into [her] mouth a few times and he was sure

143. *See id.*
144. *See id.*
145. *See id.* at *6.
146. *See id.*
147. *See id.*
148. *See id.*
149. *Id.* at *20.
150. *See id.*
151. *See* Sanders v. Mohtheshum, No. 10-CV-02897-KLM-DW, 2011 WL 6329866, at *1 (D. Colo. Dec. 19, 2011).
152. *See id.*
153. *See id.*
154. *See id.* at *5.

[she] would like that."[155] The court cited *Brooks* to hold that the harassment was not pervasive because it was only a single incident and was not severe enough to alter conditions of employment.[156] The court concluded that the plaintiff had not proved a reasonable person would find the environment hostile.[157] The court granted the employer's motion for summary judgment and cited *Brooks* to defeat the plaintiff's retaliation claim.[158]

*Nelson v. Zinke* is a 2018 case in which the plaintiff was a toxicologist at the Department of the Interior.[159] During a scuba diving mission, the plaintiff and a fellow scientist slept in a small one-room cabin with two bunk beds.[160] On the night of the incident, they had dinner and drank wine before the plaintiff took a sleeping pill and went to bed.[161] The plaintiff recalled that her coworker told her he snored, and she teased him by saying she had earplugs and had taken a sleeping pill.[162] During the night, the plaintiff became aware that someone was in her bed but was still not awake enough to be aware of what was happening.[163] The plaintiff could feel that the person had lifted her top, was fondling her breasts, and pulled her long underwear bottoms down.[164] She was still groggy, wondered where she was, and thought that her husband was with her.[165] When she became more aware and knew something was not right, she stood up from her bunk, and her coworker quickly moved back to his own.[166] The next day during a hike, her coworker told her he only realized she was asleep once she got up from the bunk.[167] He made comments including describing sliding his hand up her leg to "hit her where it counts" and his attempt to remove her long underwear to "go down on her," claiming he thought she was receptive.[168] The plaintiff alleged she

155. *See* Ludovico v. Kaiser Permanente, 57 F.Supp.3d 1176, 1180 (N.D. Cal. 2014).
156. *See id.* at 1196.
157. *See id.*
158. *See id.*
159. *See* Nelson v. Zinke, No. CV 16-135-M-DWM, 2018 WL 1083032, at *1 (D. Mont. Feb. 27, 2018).
160. *See id.* at *2.
161. *See id.*
162. *See id.*
163. *See id.*
164. *See id.*
165. *See id.*
166. *See id.*
167. *See id.*
168. *Id.*

suffered from post-traumatic stress disorder, and after this incident, work became a daily trigger.[169]

The court cited *Brooks* for the proposition that "no reasonable woman in [the plaintiff's] position would believe" that this isolated incident permanently altered the terms or conditions of her employment.[170] The court granted summary judgment for the employer for both this claim and the plaintiff's retaliation claim, again citing *Brooks*.[171]

### 3. *Ninth Circuit Case Law More Consistent with What Reasonable People and Juries Would Likely Find Today*

The prior Subsection described just a few of the over 1,200 cases citing *Brooks*. Many repeat its conclusion that women who were groped and assaulted were not sexually harassed. Instead of further entrenching the infinite regression of anachronism, courts in the Ninth Circuit should turn to two other oft-cited cases, *Ellison v. Brady*[172] and *Fuller v. Oakland*, to support allowing juries to decide what's reasonable now.[173]

#### a. *Ellison v. Brady*

*Ellison* also took place in San Mateo.[174] The case involved an Internal Revenue Service agent, Sterling Gray, who became obsessed with the plaintiff.[175] First he asked her to lunch, and she accepted.[176] Then he asked her for a drink after work, and she declined, suggesting lunch instead, although then she tried to stay away from the office during lunchtime to avoid his invitation.[177] When he finally caught up to her, she declined him outright when he showed up in a three-piece suit and asked her out again.[178] Gray then wrote the plaintiff a bizarre note telling her he cried over her the night before and professing his love.[179] The plaintiff became "shocked and frightened" and left their

169. *See id.* at *6.
170. *Id.*
171. *See id.* at *15.
172. *See, e.g.*, Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991).
173. *See, e.g.*, Fuller v. City of Oakland, 47 F.3d 1522, 1528 (9th Cir. 1995).
174. *See Ellison*, 924 F.2d at 873.
175. *See id.*
176. *See id.*
177. *See id.*
178. *See id.* at 874.
179. *See id.*

common workspace, but Gray followed her and demanded they talk.[180] The plaintiff left the building and showed the note to her supervisor who remarked, "this is sexual harassment."[181] The plaintiff asked her supervisor to let her handle it, which she did by asking a male coworker to talk to Gray and tell him that the plaintiff was not interested and that he should leave her alone.[182] The plaintiff then relocated for four weeks of training in a different city, only to receive a three-page, single-spaced letter from Gray professing his love in unhinged terms.[183]

Importantly, the court considered the experience from the perspective of a reasonable person in the plaintiff's situation in real time:

> We cannot say as a matter of law that Ellison's reaction was idiosyncratic or hyper-sensitive. . . . [Gray] told her that he had been "watching" her and "experiencing" her; he made repeated references to sex; he said he would write again. Ellison had no way of knowing what Gray would do next. A reasonable woman could consider Gray's conduct, as alleged by Ellison, sufficiently severe and pervasive to alter a condition of employment and create an abusive working environment."[184]

The court noted: "Women who are victims of mild forms of sexual harassment may understandably worry whether a harasser's conduct is merely a prelude to violent sexual assault."[185] The court went on to hold that "Title VII's protection of employees from sex discrimination comes into play long before the point where victims" experience psychological harm,[186] a holding subsequently adopted by the Supreme Court in *Harris v. Forklift*.[187]

b. *Fuller v. Oakland*

*Fuller v. Oakland*, which has been cited 683 times, is another case that is in sync with contemporary understandings of sexual harassment.[188] The plaintiff, Patricia Fuller, was a former police officer who had a romantic relationship with a fellow officer, Antonio

180. *Id.*
181. *Id.*
182. *See id.*
183. *See id.*
184. *Id.* at 880.
185. *Id.* at 879.
186. *Id*. at 878.
187. *See* Harris v. Forklift, 510 U.S. 17, 22 (1993).
188. *See e.g.*, Fuller v. City of Oakland, 47 F.3d 1522 (9th Cir. 1995).

Romero.[189] After Fuller broke up with Romero, he repeatedly phoned Fuller and hung up.[190] Romero retrieved her changed and unlisted phone number from personnel records and continued this behavior.[191] After Romero called her at work and threatened to kill himself, Fuller again changed her home number.[192] Romero confronted Fuller in the police parking lot, blocked her exit, and made it clear that he would not let her leave until she gave him her unlisted number once again.[193] Fuller again changed her phone number.[194] Yet again, Romero retrieved it from her personnel files.[195]

Close to a year after her breakup with Romero, Fuller was driving with her new boyfriend when Romero came speeding at them in an unmarked police car.[196] Romero forced Fuller to swerve to avoid head-on collision.[197] Romero continued his harassment, conducting an investigation of arrest rates that Fuller said focused solely on herself and her allies.[198] Romero also allegedly delayed action on Fuller's requests at work, gave her poor quality work assignments, and asked her for an alibi when his car was stolen.[199] Fuller reported "feeling ostracized and afraid for her safety, because visible isolation on the beat endangers an officer's safety."[200] She developed a severe stress disorder, went on disability leave, and ultimately resigned.[201]

The Ninth Circuit overturned the trial court's holding that the alleged conduct was insufficiently severe and pervasive and held that a hostile environment existed.[202] The court enumerated the long list of Romero's actions, focusing on the time he called her and threatened to kill himself and when he ran her and her new boyfriend off the road.[203] These two "incidents, while only single incidents, [were] sufficiently extreme such that Fuller would no longer know what to expect next from Romero, and reasonably [would] be concerned that

189. *See id.* at 1525.
190. *See id.*
191. *See id.*
192. *See id.*
193. *See id.*
194. *See id.*
195. *See id.*
196. *See id.* at 1525-26.
197. *See id.* at 1526.
198. *See id.*
199. *See id.* at 1526.
200. *Id.*
201. *See id.*
202. *See id.* at 1527.
203. *See id.* at 1527-28.

he might do anything at any time."[204] The court then focused on Romero's persistence in obtaining her unlisted phone number, which "would reasonably lead Fuller to believe that, no matter how much she tried, she couldn't escape Romero. Taken together, the fear that Romero might do anything and the fact that she couldn't escape would lead a reasonable woman to feel her working environment had been altered."[205] Like *Ellison*, *Fuller* considered what a reasonable person in the plaintiff's position would consider frightening and inappropriate.[206]

*Ellison v. Brady* and *Fuller v. Oakland* are more consistent than *Brooks v. San Mateo*,[207] both with Supreme Court precedent mandating courts consider the totality of the circumstances and with what reasonable people and juries would likely believe constitutes sexual harassment today.[208]

B. The Eleventh Circuit: *Mendoza v. Borden* and Its Progeny

1. Mendoza v. Borden

In the 1999 case of *Mendoza v. Borden*, the Eleventh Circuit upheld a trial court's directed verdict, again taking the case away from a jury.[209] *Mendoza*, though cited in 1,180 other cases, was controversial when decided—there was an en banc rehearing, and the eleven judges who decided it wrote five different opinions.[210]

Mendoza was an accounting clerk who alleged sexual harassment by Daniel Page, the plant controller and highest-ranking executive at her work site.[211] Mendoza testified that Page followed her around not only when she was working but also during lunch when she went outside to eat at a picnic table.[212] Mendoza testified that "[Page] would look me up and down, very, in an obvious fashion."[213] Three times he "looked at [her] up and down, and stopped in [her]

204. *Id.* at 1528.
205. *Id.*
206. *See id.*
207. *See generally* Brooks v. City of San Mateo, 229 F.3d 917 (9th Cir. 2000).
208. *See generally* Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991); *Fuller*, 47 F.3d 1522.
209. *See* Mendoza v. Borden, Inc., 195 F.3d 1238, 1241 (11th Cir. 1999).
210. *See id.*; *see also supra* note 26.
211. *See Mendoza*, 195 F.3d at 1242.
212. *See id.*
213. *Id.* at 1242-43.

groin area and made a . . . sniffing motion."[214] One day while Mendoza was at a fax machine, Page came up and "rubbed his right hip up against [Mendoza's] left hip" while grabbing her shoulders; "he had a smile on his face . . . like he was enjoying himself."[215] This is not a form of physical contact that happens inadvertently. When Mendoza went into Page's office, angry, and said, "I came in here to work, period," he replied, "[Y]eah, I'm getting all fired up, too."[216]

*Mendoza* reflects three outdated norms: (1) sexual harassment is not actionable unless it consists of "uninhibited sexual threats"[217] or the like; (2) it is difficult to figure out what constitutes harassment because men and women perceive sexual behaviors very differently;[218] and (3) "mere" comments, looks, and physical contact are not severe enough to be considered sexual harassment.[219]

The *Mendoza* majority correctly stated that the *Oncale* test requires that "the objective severity of the harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'"[220] However, instead of examining what a reasonable person in Mendoza's position would think, the court veered into a long string of earlier cases in which courts found no sexual harassment in the context of egregious behavior such as groping of breasts and buttocks, simulated masturbation, and comments such as calling one plaintiff a "sick bitch," telling another "you have the sleekest ass" and inquiring about the color of a coworker's nipples.[221] This infinite regression of

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214. *Id.* at 1243.

215. *Id.* at 1243, 1272.

216. *Id.* at 1243.

217. *Id.* at 1247 (quoting Indest v. Freeman Decorating, Inc., 164 F.3d 258, 263 (5th Cir. 1999)).

218. *See id.* at 1256.

219. *Id.* at 1257.

220. *Id.* at 1246 (citing Oncale v. Sundowner Offshore Services Inc., 118 S. Ct. 998, 1003 (1998) (quoting Harris v. Forklift Systems, Inc., 510 U.S. 17, 23 (1993))).

221. *See* Adusumilli v. City of Chicago, 164 F.3d 353, 357, 361 (7th Cir. 1998) (describing "four isolated incidents in which a co-worker briefly touched her arm, fingers, and buttocks" and coworkers who made the plaintiff the butt of sexual jokes and repeatedly stared at her breasts); Quinn v. Green Tree Credit Corp., 159 F.3d 759, 768 (2d Cir. 1998) (describing a situation where a plaintiff's supervisor touched plaintiff's breasts (but only once, we're reassured) and was told she had the "sleekest ass"); Hopkins v. Baltimore Gas and Elec. Co., 77 F.3d 745, 747 (4th Cir. 1996) (describing how a male plaintiff's supervisor stared at his crotch with a magnifying class, stared at him in the bathroom, and touched his clothing); Shepherd v. Comptroller of Public Accounts of State of Texas, 168 F.3d 871, 872 (5th Cir. 1999)

anachronism ended with the court citing a 1999 Fifth Circuit case that mischaracterized Supreme Court precedent: "All of the sexual hostile environment cases decided by the Supreme Court have involved patterns or allegations of extensive, long-lasting, unredressed, and uninhibited sexual threats or conduct that permeated the plaintiffs' work environment."[222] This is very different from the *Harris* reasonableness standard. The court seemed to be saying that no reasonable person or jury could find a hostile atmosphere in a wide variety of contexts, which most Americans consider sexual harassment today.[223] At a deeper level, the view that only an extensive pattern of uninhibited threats can sustain a cause of action for sexual harassment clearly signals the belief that sexual harassment is not serious unless it is downright frightening.

The five different opinions in *Mendoza* give dramatically different interpretations of the evidence.[224] Judge Tjoflat's dissenting opinion described Page's behavior as "stalking and leering" that continued for at least four months until Mendoza quit her job.[225] "Page stared at Mendoza's groin on at least three occasions and made a loud, sniffing sound. For unexplained reasons, Mendoza failed to become enraptured. In fact, she became rather terrified."[226] Mendoza complained to one coworker that Page harassed her at least twelve different times.[227] "She had been stalked, leered at, touched on her hips and shoulders, and her groin area had been made the object of a sniffing ritual so bizarre that only Page could understand its true import."[228] Judge Tjoflat concluded that "Mendoza's whole employment experience at Borden's may have been pervaded by overt and highly offensive acts of sexual aggression."[229]

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(describing incidents where the plaintiff's coworker told her "your elbows are the same color as your nipples," touched her arm, looked down her dress, and usefully informed her that she had big thighs).

222. *Mendoza*, 195 F.3d at 1247 (quoting Indest v. Freeman Decorating, Inc., 164 F.3d 258, 263 (5th Cir. 1999)).

223. *See* BARNA, *supra* note 73 (finding that virtually all Americans believe that groping is sexual harassment, and 86% of women and 70% of men believe that making sexual comments about someone's body is sexual harassment).

224. *See Mendoza*, 195 F.3d at 1253, 1255, 1257, 1262, 1270.

225. *Id.* at 1259 (Tjoflat, J., concurring in part, and dissenting in part).

226. *Id.* at 1259-60.

227. *See id.* at 1260.

228. *Id.*

229. *Id.* at 1263.

The majority took a very different view of the evidence.[230] The statement about being fired up did not, as a matter of law, "objectively indicate . . . a sexual or other gender-related connotation."[231] The "'following and staring' may betray a romantic or sexual attraction," the majority noted, but it was also "a natural and unavoidable occurrence when people work together in close quarters or when a supervisor keeps an eye on employees."[232] Which was it in this context? Didn't that determination involve a finding of fact? This court did not think so.[233] The incident at the fax machine was dismissed as "one slight touching," ignoring the fact that to grasp both someone's shoulders while at the same time touching his or her hip with one's own hip could reasonably be interpreted as miming of sex rather than a run-of-the-mill office ricochet.[234]

And that is the point. Assuming (as we do) that these five judges were reasonable people, this was a case in which reasonable people not only *could* but actually *did* disagree.[235] That makes it an inappropriate case for a directed verdict. In a directed verdict situation, the court must assume that all of the evidence of the nonmoving party is true and draw all inferences in favor of the nonmoving party.[236] The case "may be taken from the jury only if no rational jury could find against the [plaintiff]."[237] To quote Judge Barkett, "assuming there are reasonable people who, while crediting Mendoza's version of the fact, would not think that staring at a woman's groin area while making sexually suggestive sniffing noises is degrading, humiliating, and/or intimidating, it seems beyond peradventure that many reasonable people would indeed find it to be so."[238]

Why, then, did the majority take the case away from the jury? "In its zeal to discourage the filing of frivolous lawsuits," wrote Judge Tjoflat, "the court today hands down an opinion that will certainly be used by other courts as a model of how *not* to reason in hostile environment sexual harassment cases."[239] Judge Tjoflat was presumably disappointed by *Mendoza*'s continued influence.

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230. *See id.* at 1248.
231. *Id.* at 1248 (majority opinion).
232. *Id.*
233. *See id.*
234. *Id.* at 1249.
235. *See id.* at 1253, 1255, 1257, 1262, 1270.
236. *See id.* at 1269 (Barkett, J., concurring in part, and dissenting in part).
237. *Id.* at 1270 (citing Wilkerson v. McCarthy, 336 U.S. 53, 57 (1949)).
238. *Id.* at 1275.
239. *Id.* at 1257 (Tjoflat, J., concurring in part, and dissenting in part).

One judge who sided with the majority attributed his decision to "the reluctance courts should have about permitting plaintiffs who claim sexual harassment to rely on their subjective impressions of ambiguous conduct."[240] This comment shows a lack of command of sexual harassment law. As the court itself noted in the majority opinion, the hostile environment test requires plaintiffs to prove that the environment would be seen as hostile *by a reasonable person*—an objective test.[241] This is the classic legal mechanism for protecting against a hypersensitive plaintiff.

Judge Tjoflat's opinion also pointed out how the majority misapplied Supreme Court precedent that requires courts to judge the objective severity of an alleged harasser's conduct from the perspective of a reasonable person in the plaintiff's position, considering "all the circumstances" (to quote *Oncale v. Sundowner*)[242] or by "looking at all the circumstances" (to quote *Harris v. Forklift*).[243] Instead, the *Mendoza* majority did what "every defense attorney" does when faced with circumstantial evidence: "[I]solate each piece that the other side puts into evidence and then attempt to trivialize it by taking it out of context."[244] Judge Tjoflat continued, "[B]y examining each of Mendoza's allegations of harassment in isolation from one another, the majority concludes that Mendoza does not have enough evidence to reach the jury because each allegation is individually insufficient."[245]

A final limitation of the *Mendoza* majority opinion is its excessive focus on whether the conduct involved was physically threatening or humiliating. The majority contrasted the facts in *Mendoza* with those in a case where female employees were held down so that other employees could touch their breasts and legs.[246] While that behavior is certainly physically threatening and intimidating, the lack of similar behavior in *Mendoza* is irrelevant: *Harris v. Forklift* did not require that conduct be physically intimidating in order to constitute sexual harassment.[247] As will be

240. *Id.* at 1255 (Carnes, J., concurring).

241. *See id.* at 1245-46 (majority opinion).

242. *Id.* at 1258 (Tjofalt, J., dissenting) (quoting Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75, 81 (1998)).

243. *Mendoza*, 195 F.3d at 1258 (Tjofalt, J., dissenting) (quoting Harris v. Forklift, 510 U.S. 17, 23 (1993)).

244. *Id.* at 1262.

245. *Id.*

246. *See id.* at 1248 (citing Hall v. Gus Constr. Co., 842 F.2d 1010, 1012 (8th Cir. 1988).

247. *See Harris*, 510 U.S. at 23.

discussed in more detail below, these words appeared only as part of a non-inclusive list of factors that "may" exist, in the context of an exhortation by the Supreme Court that lower courts should look at the totality of the circumstances.[248]

### 2. *Subsequent Courts Have Used* Mendoza *to Ratchet Up the Standard for Sexual Harassment in the Eleventh Circuit*

Despite deep disagreement on the panel that decided it, numerous sub-cases cite *Mendoza* to ratchet up the standard for what constitutes sexual harassment. In the 2010 case of *Wallace v. Baker Beauty, Inc.*, two plaintiffs were harassed by the head of their company.[249] The head of the company looked at his female sales representatives and said: "I'll tell you how I make my money off y'all: I pimp out all my hoes"; commented that a stylist had a "nice ass"; bragged about having sex with a particular woman and the types of things he would do with her; called one plaintiff a "stupid bitch" during a sales meeting; recited the phrase "jack each other off"; made comments about a customer "looking sexy with those ta-tas hanging out"; and laid on a hotel bed in front of one plaintiff and a customer, unzipped his pants, and said to the plaintiff, "you know if you ever get any fake boobs, you're going to have to let me see and feel them."[250] The court used *Mendoza* to support its conclusion that the conduct was not sufficiently severe or pervasive, neglecting to mention the controlling reasonableness standard.[251] The court granted summary judgment for the employer.[252]

The 2010 case of *Lindquist v. Fulton County* involved a detention officer harassed by her supervisor.[253] The supervisor said "Hon, I've got to do this," and kissed her buttocks; grabbed her finger as she wrote in a log book and said "Damn, you are so beautiful, why don't you come over here and sit on my lap?"; told her he wished he was the chair she was sitting on so that she would be sitting on him; commented he "wanted to make passionate love to her"; and asked

248. *See id.* at 23; *see also supra* notes 212-213.

249. *See* Wallace v. Baker Beauty, Inc., No. 6:09-CV-0290-JEO, 2010 WL 11565358, at *2 (N.D. Ala. Oct. 5, 2010).

250. *Id.* at *2-4.

251. *See id.* at *10 (N.D. Ala. Oct. 5, 2010).

252. *See Id.* at *12.

253. *See generally* Lindquist v. Fulton Cty., No. 1:09-CV-1102-RWS-WEJ, 2010 WL 11493834 (N.D. Ga. Nov. 23, 2010) report and recommendation adopted, No. 1:09-CV-1102-RWS, 2011 WL 13175953 (N.D. Ga. Jan. 14, 2011).

"what she would do if he just leaned over and kissed her."[254] The court cited *Mendoza* to support its conclusion that the facts "d[id] not satisfy the severe or pervasive harassment requirement," characterizing the facts as "inappropriate comments and one isolated incident."[255] The court once again ignored controlling precedent on reasonableness and granted summary judgment for the employer.[256]

In the 2016 case of *Baldelamar v. Jefferson Southern Corporation*, the plaintiff's coworker harassed her by telling her that Mexicans shouldn't shave their genitals, touching her buttocks, hugging her from behind and pulling her close to his belly, using a measuring tape to simulate his penis and telling her he had a big one, standing behind her while she was working and making gestures as if he was having sex with her, sticking his tongue out at her while looking at her genitals, inviting her to a hotel to have sex, soliciting her to accompany him into a tunnel at the workplace so he could have sex with her, and more.[257] The court cited *Mendoza* to once again consider the "severe or pervasive" issue without considering whether a reasonable jury could find an objectively hostile work environment.[258] The court noted only that the harassment "f[ell] far short of the threshold level of 'severe or pervasive' conduct established by Eleventh Circuit precedent" and adopted the recommendation of the magistrate judge that summary judgment be granted for the employer.[259]

These cases, and others among the over 1,100 cases that have cited *Mendoza*, have ratcheted up the standard for what constitutes a hostile environment in the Eleventh Circuit in ways that are inconsistent with what reasonable people and juries would find today.

### 3. *Eleventh Circuit Case Law More Consistent with What Reasonable People and Juries Would Likely Find Today*

Another oft-cited Eleventh Circuit case deserves more attention, not only because it is more consonant with what reasonable people would consider sexual harassment today, but also because it provides

254. *Id.* at *5-6.
255. *Id.* at *12.
256. *See id.*
257. *See* Baldelamar v. Jefferson S. Corp., No. 415CV00209HLMWEJ, 2016 WL 9330869, at *6-9 (N.D. Ga. Oct. 13, 2016) report and recommendation adopted, No. 415CV00209HLMWEJ, 2016 WL 9331114 (N.D. Ga. Dec. 5, 2016).
258. *See id.*
259. *Id.* at *13.

an important corrective to a common misinterpretation of *Harris v. Forklift*.[260]

*Allen v. Tyson Foods* has been cited 2,651 times, yet the vast majority of those citations use *Allen* to discuss civil procedure standards for summary judgment.[261] Only 165 cases cite *Allen* on the issue of hostile work environment sexual harassment, and this aspect of the case deserves to be cited more. *Allen* involved a poultry processing plant in Alabama that was "engulfed by an atmosphere of improper sexuality" involving sexual intercourse at the plant, sexually graphic jokes, vulgar and sexually demeaning language, groping, exhibiting of genitalia and buttocks, and using chicken parts to mimic sexual organs and activities.[262] The plaintiff's supervisor wrote her at least five sexually explicit notes, and the plaintiff claimed she was "intimidated and harassed" by her supervisor and other employees.[263] The Eleventh Circuit properly referred to the Supreme Court's "totality of the circumstances" test; but even more important is the court's language about whether sexual harassment needs to be "physically threatening or humiliating" in order to constitute a hostile work environment.[264]

That language comes from the Supreme Court's *Harris v. Forklift*, which says that the factors for assessing whether an environment is hostile "*may* include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[265] The *Allen* court correctly noted that the "Supreme Court has provided a non-exclusive set of factors to consider."[266] Too often, as in *Mendoza*, courts act inconsistent with controlling Supreme Court precedent and with what most reasonable people believe today by treating the plaintiff's failure to prove that the harassing behavior was physically threatening as per se proof that what occurred was not serious enough to constitute sexual harassment.[267]

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260. *See generally* Harris v. Forklift, 510 U.S. 17 (1993).

261. *See generally* Allen v. Tyson Foods, Inc., 121 F.3d 642 (1997); *see also supra* note 86.

262. *Id.* at 645.

263. *Id.*

264. *Id.* at 647.

265. *Harris*, 510 U.S. at 23.

266. *Allen*, 121 F.3d at 647 (holding simply that genuine issues of material fact existed on the issue of whether the environment was sufficiently hostile to constitute actionable harassment).

267. *See* Mendoza v. Borden, Inc., 195 F.3d at 1238, 1246 (11th Cir. 1999).

Accordingly, courts in the Eleventh Circuit should look to *Allen* as an important corrective to cases that use the factors listed in *Harris v. Forklift* to ratchet up the standard, in effect holding that sexual harassment exists only when the behavior involved is truly threatening or intimidating.[268] This misinterpretation of the plain language of *Harris v. Forklift* clearly reflects the now-outdated view that sexual harassment is not serious unless it contains an element of threats or violence. Recall that violence is no longer required even for proof of rape.[269]

### C. The Seventh Circuit: *Baskerville v. Culligan* and Its Progeny

#### 1. Baskerville v. Culligan

A third commonly cited case is *Baskerville v. Culligan International Company*, which has been cited 852 times since it was decided in 1995.[270] This Seventh Circuit opinion was written by Judge Richard Posner, who announced himself "reluctant to upset a jury verdict challenged only for resting on insufficient evidence" yet managed to soldier on and do so.[271] Judge Posner found for the employer as a matter of law on the following facts.[272]

Valerie Baskerville was a secretary in the marketing department of a Chicago manufacturer of products for treating water.[273] Her manager was Michael Hall who, Judge Posner said, "we assume truthfully" engaged in an unending series of puerile attempts at sexual humor.[274] When Baskerville asked if he had gotten a Valentine's Day card for his wife (who had not yet moved to Chicago), he responded by miming masturbation.[275] Once when Baskerville wore a leather skirt, Hall grunted "um um um" in a way she interpreted as sexual.[276] When the public address system began, "May I have your attention please," Hall went to Baskerville's desk and said, "You know what

268. *See Harris*, 510 U.S. at 23.

269. *See* JOHN KAPLAN, ROBERT WEISBERG & GUYORA BINDER, CRIMINAL LAW: CASES AND MATERIALS 871, 887 (7th ed. 2012).

270. *See generally* Baskerville v. Culligan Int'l Co., 50 F.3d 428 (7th Cir. 1995); *see also supra* note 26.

271. *Id.* at 430.

272. *See id.*

273. *See id.*

274. *Id.*

275. *See id.*

276. *Id.*

that means, don't you? All pretty girls run around naked."[277] When Baskerville commented that Hall's office was hot, Hall raised his eyebrows and said, "Not until you stepped your foot in here."[278] When she brought him a document to sign, instead of treating her as a colleague with a job to do, he said: "There's always a pretty girl giving me something to sign off on."[279] He told her his wife had told him that he had better clean up his act and "better think of you as Ms. Anita Hill," an evident admission that Hall's wife believed he was sexually harassing Baskerville (and he didn't seem to disagree).[280] Hall told Baskerville that he had left the Christmas party early because he "didn't want to lose control" with so many pretty girls there.[281]

The jury thought that a reasonable person would find this environment hostile and found for Baskerville.[282] Judge Posner overturned the jury verdict in an opinion that reflected three outdated norms: (1) that sexual harassment is not serious or that it can be taken seriously only when the behaviors complained of make the workplace "hellish"; (2) that women who accuse men of sexual harassment are not credible; and (3) that (instead of having a zero-tolerance policy) employers are free to tolerate sexual harassment so long as it comes in the form of lame jokes.[283]

Judge Posner wrote off Hall's sexual comments as merely "boorish" and asserted that the "concept of sexual harassment is designed to protect working women from the kind of male attentions that can make the workplace hellish."[284] Judge Posner continued, "He never touched the plaintiff. He did not invite her, explicitly or by implication, to have sex with him . . . He made no threats. He did not expose himself, or show her dirty pictures."[285] This entirely misses the #MeToo point: When women show up for work, they are entitled to be treated as colleagues, not sexual opportunities.

Judge Posner diminished the harassment experienced by Baskerville by comparing it to sexual assault: "On the one side lie sexual assaults . . . on the other side lies the occasional vulgar banter,

277. *Id.*
278. *Id.*
279. *Id.*
280. *Id.*
281. *Id.*
282. *See id.*
283. *Id.*
284. *Id.*
285. *Id.* at 431.

tinged with sexual innuendo, of coarse or boorish workers."[286] "It is difficult to imagine a context that would render Hall's sallies threatening or otherwise deeply disturbing."[287] Once again, a court misread *Harris v. Forklift* to support the view that inappropriate workplace behavior is not sexual harassment unless it is truly threatening, and once again, a court ignored the *Harris* reasonableness standard.[288]

Judge Posner's characterization of Hall's behavior as "boorish," often repeated by the courts, comes close to the "boys will be boys" attitude that long has been used to excuse male misbehavior.[289] The *Baskerville* jury rejected this even in the early 1990s, and it is even more unlikely that a contemporary jury would accept it today.[290]

Also intriguing is Judge Posner's aside, "we assume truthfully" when reciting the plaintiff's allegations.[291] The opinion contains no reference to an allegation by the employer that the plaintiff was lying.[292] It is true that the relevant procedural standard is that a judge overturning a jury verdict must take all inferences in favor of the nonmoving party, but that is different from having a judge, *sua sponte* and without evidence, raise questions about a plaintiff's truthfulness.[293] Did Posner's aside reflect the stereotype, still common in 1995, that women who complained of sexual harassment cannot be trusted?[294] If so, this is another way in which *Baskerville* is inconsistent with what a reasonable jury would likely believe today.[295]

Judge Posner made much of the fact that Hall was "a man whose sense of humor took final shape in adolescence."[296] But a lame sense of humor is not a defense in a sexual harassment case. Even if Judge Posner's views reflected what a reasonable person and jury might

286. *Id.* at 430.

287. *Baskerville*, 50 F.3d at 430-31.

288. *See* Harris v. Forklift, 510 U.S. 17, 21-22 (1993) (discussing the reasonableness standard used to evaluate whether words or conduct constitutes sexual harassment).

289. *Baskerville*, 50 F.3d at 430.

290. *See id.*

291. *Id.* at 430.

292. *See id.*

293. *See id.*

294. *See* Williams & Lebsock, *supra* note 78 (noting that women have long been stereotyped as making false reports of sexual harassment in the workplace).

295. *See* Graf, *supra* note 69 (asserting that less than a third of Americans think that false accusations of sexual harassment are a major problem); *see also* Marist Poll, *supra* note 82 (finding that nearly two-thirds of individuals polled say that the accuser is more likely than the accused to be believed).

296. *Baskerville*, 50 F.3d at 431.

think in 1995—though they appear not to—they clearly do not reflect what a jury would likely believe now that 96% of women and 86% of men believe that touching or groping constitutes sexual harassment, and 86% of women and 70% of men now feel that making sexual comments about someone's body is sexual harassment.[297]

### 2. *Subsequent Courts Have Used* Baskerville *to Ratchet Up the Standard for Sexual Harassment in the Seventh Circuit*

*Baskerville* has been widely cited to heighten the standard for what constitutes an actionable hostile work environment in the Seventh Circuit. In the 2007 case of *Britz v. White*, a female plaintiff was harassed by a female supervisor who, when she was standing at her desk leaning over to write something, slapped her on the buttocks.[298] When the plaintiff said, "Hey, that was my butt," the supervisor responded, "[O]h, I know. It was just sticking out there, though."[299] Once, when the plaintiff was standing in her cubicle wearing a skirt, the supervisor grabbed the bottom of her skirt and tugged it.[300] The supervisor also came up behind the plaintiff and tugged her hair, poked her in the side, and told her "I love you so much."[301] The court cited *Baskerville* to support the contention that "the concept of sexual harassment is designed to protect working women from the kind of . . . attentions that can make the workplace hellish."[302] Relying on *Baskerville*'s proposition that on one side is sexual assaults, nonconsensual physical contact, and uninvited solicitations, while on the other side is vulgar banter, the court concluded that the plaintiff had failed to present evidence that a reasonable jury could find that the conduct was objectively severe or pervasive and granted summary judgment for the employer.[303]

In the 2008 case of *Enriquez v. United States Cellular Corporation*, four plaintiffs were harassed by their manager.[304] The manager asked the first to lie across his desk in lingerie; told her

297. BARNA, *supra* note 73.

298. *See* Britz v. White, No. 06-3210, 2007 WL 4556700, at *1 (C.D. Ill. Dec. 21, 2007).

299. *Id.*

300. *See id.*

301. *Id.*

302. *Id.* at *3 (quoting Baskerville v. Culligan Int'l Co., 50 F.3d 428, 430 (7th Cir. 1994)).

303. *See id.* at *3, *5.

304. *See* Enriquez v. United States Cellular Corp., No. 06 C 3135, 2008 WL 4925012, at *1 (N.D. Ill. Nov. 14, 2008).

"those . . . pants look good on your ass"; "you have a nice body"; "[your] tits are going to look nice in that shirt"; and attempted to kiss her.[305] He told the second plaintiff "you've got a nice ass"; asked to see her breasts several times; and asked "when are you going to let me lick your tits?"[306] The third plaintiff he approached at a Christmas party, "pushed her legs open, and picked her up to dance, holding her with her legs around his waist for [about] thirty seconds."[307] The manager also sent her text messages, including one that said that she "had a bad boy for a boss and she didn't know the things he could do with her," told her he wanted to go out for drinks and "get her drunk so he could take advantage of her and have her do things that would probably cause trouble for him," and told her "you look good enough to eat right now."[308] He called the fourth plaintiff and asked when they were going to "hook up," twice lifted her up by grasping the outside of her thighs and called her "juicy," and twice tried to kiss her.[309] The court cited *Baskerville* to hold that "a few advances," comments, and "one . . . brief contact" did not create an objectively hostile work environment, and the court granted summary judgment for the employer.[310]

These cases show the way courts have cited *Baskerville* to preclude a finding of sexual harassment in the context of facts that are even more egregious than those involved *Baskerville*. If *Baskerville* itself is inconsistent with what a reasonable person or jury would find today, its progeny are even more so.

### 3. *Seventh Circuit Case Law More Consistent with What Reasonable People and Juries Would Likely Find Today*

Two often-cited Seventh Circuit cases are more consistent than *Baskerville* with Supreme Court precedent and with what reasonable people believe today.

305. *Id.* at *1.
306. *Id.* at *2.
307. *Id.* at *3.
308. *Id.* at *2-3.
309. *Id.* at *3.
310. *Id.* at *10-15 (discussing each plaintiff's case under the *Baskerville* objective standard).

a. *Hostetler v. Quality Dining*

*Hostetler v. Quality Dining*, which has been cited 312 times, involved the assistant manager of a restaurant whose fellow assistant manager "grabbed her face one day at work and stuck his tongue down her throat."[311] The next day when he tried again, she put her head between her knees, at which point he started unfastening her bra.[312] During the same week, he approached her while she was serving customers at the counter and told her, "in crude terms, that he could perform oral sex on her so effectively that '[she] would do cartwheels.'"[313] When she reported him, she was transferred to another restaurant that required a long commute and a redeye shift that got her home most nights at 4:00 a.m.[314] She received counseling for the trauma and was taking Prozac at the time of her deposition.[315] The trial court granted summary judgment for the employer on the grounds that what happened was not severe.[316]

The Fifth Circuit noted that, while Title VII is not a "general civility code,"[317]

> We have no doubt that the type of conduct at issue here falls on the actionable side of the line dividing abusive conduct from behavior that is merely vulgar or mildly offensive. . . . Having a coworker insert his tongue into one's mouth without invitation and having one's brassiere nearly removed is not conduct that would be anticipated in the workplace, and certainly not in a family restaurant. A reasonable person in Hostetler's position might well experience that type of behavior as humiliating, and quite possibly threatening. . . . Even the lewd remark . . . was more than a casual obscenity. . . . These were not, in sum, petty vulgarities with the potential to annoy but not to objectively transform the workplace to a degree that implicates Title VII.[318]

The Seventh Circuit reversed the trial court's grant of summary judgment: "Holding such acts not to be severe as a matter of law is another way of saying that no reasonable person could think them serious enough to alter the plaintiff's work environment."[319] In the case at hand, "[a] factfinder reasonably could interpret the alleged course

311. Hostetler v. Quality Dining, Inc., 218 F.3d 798, 801 (7th Cir. 2000); *see also supra* note 86.
312. *See id.* at 802.
313. *Id.*
314. *Id.* at 804.
315. *See id. at* 805.
316. *See id.*
317. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998).
318. *Hostetler*, 218 F.3d at 807-08.
319. *Id.* at 808-09.

of conduct as sufficiently invasive, humiliating, and threatening to poison Hostetler's working environment."[320] *Hostetler* is an admirably clear and thoughtful application of the reasonable person standard articulated by the Supreme Court in *Harris v. Forklift.*[321]

b. *Smith v. Sheahan*

*Smith v. Sheahan*, which has been cited 204 times, involved a prison guard in the Cook County Jail, Ronald Gamble, who violently assaulted a fellow guard, Valeria Smith, calling her a "bitch," threatening to "fuck [her] up," and pinning her against a wall while twisting her wrist so severely she needed corrective surgery to repair her ligaments.[322] Gamble was convicted of criminal battery and placed under court supervision, but when Smith complained to her employer, she was advised to "kiss and make up."[323] The trial court awarded summary judgment for the employer on the grounds that the incidents were "too isolated to be actionable."[324] Smith provided affidavits from six other female guards recounting a total of seven incidents where Gamble was verbally abusive or physically threatening of female colleagues.[325] After Gamble's conviction, he was promoted, and Smith received a transfer she considered "tantamount to a demotion."[326] The trial court granted summary judgment for Gamble, "partially discount[ing] the seriousness of Gamble's misconduct because Smith 'voluntarily' stepped into the 'aggressive setting' of the jail."[327]

The Seventh Circuit reversed, holding that a "jury would also be entitled to conclude that the assault Smith suffered was severe enough to alter the terms of her employment even though it was a single incident."[328] The court noted that jurors are expected to bring their common sense to assess what behavior is appropriate in a given social setting.[329] The court rejected the defendant's contention that an assault must be sexual to qualify as sexual harassment, pointing out that hostile behavior based on sex is prohibited by Title VII even when the

320. *Id.* at 809.
321. *See* Harris v. Forklift Systems, Inc., 510 U.S. 17, 21 (1993).
322. Smith v. Sheahan, 189 F.3d 529, 531 (7th Cir. 1999); *see also supra* note 86.
323. *Id.*
324. *Id.* at 530.
325. *Id.* at 531.
326. *See id.* at 532.
327. *Id.* at 534.
328. *Id.* at 533.
329. *See id.* at 535.

behavior is not sexual. The court also rejected the employer's contention that Smith consented to violence by choosing to work in the "aggressive setting" of a jail.[330]

While both *Hostetler* and *Smith* involve extreme behavior—far beyond what occurs in most sexual harassment cases or what Supreme Court precedent requires to sustain a case—both signal a healthy respect for the role of the jury in cases where the touchstone is what a reasonable person would consider inappropriate workplace behavior.

## D. The Sixth Circuit: *Bowman v. Shawnee State University* and Its Progeny

### 1. Bowman v. Shawnee State University

*Bowman v. Shawnee State University* is a Sixth Circuit opinion involving sexual harassment of a man by a woman that has been cited 712 times.[331] As in many of the other cases-in-chief, the judges did not allow a jury to decide this case.[332] The Sixth Circuit opinion affirmed a grant of summary judgment to the employer.[333]

Thomas E. Bowman, a part-time instructor teaching health and physical education courses, filed sexual harassment claims against Shawnee State University and Dr. Jessica J. Jahnke, the then Dean of Education.[334] At a Christmas party, Jahnke grabbed Bowman's buttocks.[335] He said that if someone were to do that to her, she would fire him or her, to which she responded that "she controlled his ass and she would do whatever she wanted with it."[336] At work, Jahnke rubbed his shoulder; he jerked away and said, "No."[337] Jahnke kept calling him at home and twice invited Bowman to her house to go with her into her whirlpool and her swimming pool; she propositioned him repeatedly, ignoring his clear statements that he was not interested.[338] When Bowman confronted Jahnke, she accused him of lying, put her finger on his chest, and pushed him towards the door; he responded,

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330. *Id.* at 534-35.
331. *See* Bowman v. Shawnee State University, 220 F.3d 456 (6th Cir. 2000); *see also supra* note 86.
332. *See Bowman*, 220 F.3d at 456.
333. *See id.* at 465.
334. *See id.* at 456, 458.
335. *See id.* at 459.
336. *Id.*
337. *Id.* at 458-59.
338. *See id.* at 459.

"This is the last time you're ever going to touch me."[339] In addition to the sexual harassment allegations, Bowman also alleged that she treated him differently because of his sex, imposing requirements on him that she did not impose on women.[340]

*Bowman* reflects three outdated norms: (1) that groping and persistent sexual comments and propositions do not necessarily constitute sexual harassment; (2) that (instead of zero tolerance) employers are free to allow supervisors to grope and proposition those they supervise; and (3) that only women can be sexually harassed.

Like *Mendoza*, *Bowman* involved sexual harassment with a strong undercurrent of abusive bullying. In addition to the sexual harassment, Bowman alleged that Jahnke: wrote a memorandum chastising Bowman for missing a class when he had not done so; chastised him for missing a meeting that was not required and was scheduled at a time he was teaching; and asked him to come over to her house and repair her deck.[341] The court acknowledged that the defendant "tormented" the plaintiff, but it treated this as irrelevant to his sexual harassment claim.[342] But researchers in sociology, management science, psychology, and human resources journals have documented that sometimes sexual harassment is part and parcel of a pattern of aggression and bullying.[343] The #MeToo movement and

339. *Id.*
340. *See id.*
341. *See id.*
342. *Id.* at 464.
343. *See generally* JEFF HEARN & WENDY PARKIN, GENDER, SEXUALITY AND VIOLENCE IN ORGANIZATIONS: THE UNSPOKEN FORCES OF ORGANIZATION VIOLATIONS (2001). *See generally* Louise F. Fitzgerald, *Sexual Harassment: Violence Against Women in the Workplace*, 48 AM. PSYCHOLOGIST 1070 (1993) (identifying sexual harassment as a form of violence against women); Carol Jones, *Drawing Boundaries: Exploring the Relationship Between Sexual Harassment, Gender and Bullying*, 29 WOMEN'S STUD. INT'L F. 147 (2006); Anne M. O'Leary-Kelly et al., *Sexual Harassment as Aggressive Behavior: An Actor-Based Perspective*, 25 ACAD. MGMT. REV. 372 (2000) (asserting that sexual harassment is one form of aggressive behavior); Rebecca A. Thacker & Gerald R. Ferris, *Understanding Sexual Harassment in the Workplace: The Influence of Power and Politics within the Dyadic Interaction of Harasser and Target*, 1 HUM. RESOURCE MGMT. REV. 23 (1991) (asserting sexual harassment as a power dynamic); Christopher Uggen & Amy Blackstone, *Sexual Harassment as a Gendered Expression of Power*, 69 AM. SOC. REV. 64 (2004) (noting sexual harassment as a gendered expression of power); Dacher Keltner, *Sex, Power, and the Systems That Enable Men Like Harvey Weinstein*, HARV. BUS. REV. (Oct. 13, 2017), https://hbr.org/2017/10/sex-power-and-the-systems-that-enable-men-like-harvey-weinstein [https://perma.cc/WNN8-24SY]; Zoe Williams, *Sexual harassment 101: what everyone needs to know*, GUARDIAN (Oct. 16, 2017), https://www.theguardian.com/world/2017/oct/16/facts-sexual-harassment-

some courts have added an important dimension, highlighting that sexual harassment is, at its core, about the abuse of power.[344] All this should inform courts' discussions of bullying as part of a pattern of sexual harassment in the future.

The *Bowman* court discounted much of the evidence presented on the grounds that Bowman had not shown that the non-sexual conduct he complains of had anything to do with his gender.[345] While he may have been subject to intimidation, ridicule, and mistreatment, he did not show that he was treated in a discriminatory manner because he was male.[346]

In cases involving women, plaintiffs have not been required to prove that the reason for sexual behavior toward them was that they were women, and it is not clear what such proof would look like.[347] Does a boss have to announce, "I am grabbing your butt (or making you fix my deck) because you are a woman/man"?

The *Bowman* court's incredulity in the face of the argument that a man could be the subject of sexual harassment and its consequent imposition of a double standard are both inconsistent with newer understandings of sexual harassment incident to #MeToo. While most of the early highly publicized cases of sexual harassment involved women, more recent stories have highlighted that people of all genders encounter sexual harassment.[348] The belief that sexually harassed men just "got lucky" perpetuates harmful stereotypes of men as always ready for sex and women as always coy. The Supreme Court has

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workplace-harvey-weinstein [https://perma.cc/3D4Y-E92H]; Raj Persaud & Peter Bruggen, *What Is the Link Between Sex and Power in Sexual Harassment?*, PSYCHOL. TODAY (Nov. 08, 2017), https://www.psychologytoday.com/us/blog/slightly-blighty/201711/what-is-the-link-between-sex-and-power-in-sexual-harassment [https://perma.cc/QFV3-JBD9].

344. *See* Grace Donnelly, *Anita Hill: Companies Should Treat Sexual Harassment as an Abuse of Power*, FORTUNE (Dec. 13, 2018), http://fortune.com/2018/12/12/anita-hill-sexual-harassment/ [https://perma.cc/K4EY-A97F]. *See, e.g.*, Smith v. Sheahan, 189 F.3d 529, 533 (1999) ("It makes no difference that the assaults and the epithets sounded more like expressions of sex-based animus rather than misdirected sexual desire (although power plays may lie just below the surface of much of the latter behavior as well.)").

345. *See Bowman*, 220 F.3d at 464.

346. *See id.* at 464.

347. *See, e.g.*, Harris v. Forklift, 510 U.S. 17 (1993).

348. *See, e.g.*, Bernstein et al., *supra* note 66; Michael Paulson, *Kevin Spacey Issues Apology to Actor After Sexual Accusation*, N.Y. TIMES (Oct. 30, 2017), https://www.nytimes.com/2017/10/30/theater/kevin-spacey-gay-anthony-rapp.html [https://perma.cc/98DP-FBPX].

decried this kind of gender stereotyping since the 1970s—for men as well as women.[349]

The trial court found that the Christmas party incident, the whirlpool incident, and the swimming pool incident were sufficiently imbued with a sexual flavor to be sexual harassment, but that the harassment was "not nearly as severe or pervasive" as in earlier cases where no sexual harassment had been found, including one case that involved battery.[350] This is a classic example of the infinite regression of anachronism where, again, the court relied on past cases without making the core reasonableness inquiry required by the Supreme Court.[351]

### 2. *Subsequent Courts Have Used* Bowman *to Ratchet Up the Standard for Sexual Harassment in the Sixth Circuit*

Subsequent cases have cited *Bowman* to deprive plaintiffs of their right to have a jury assess whether a reasonable person in the plaintiff's shoes would find an environment hostile. In the 2003 case of *Hudson v. M.S. Carriers, Inc.*, the plaintiff was harassed by her supervisor's boss.[352] He asked her what kind of panties she was wearing; told her about going to a strip club and swiping the stripper's rear end with his credit card; and called her into his office to show her his "fake penis," which was a pencil which he put close to his genitals.[353] Twice, he took off his shoes and touched the plaintiff with his feet, and once, he wetted his finger and stuck it in her ear, saying he wanted to "make Oreo cookies," which she understood to mean he desired sex.[354] On numerous other occasions, he touched her in an "offensive and unwanted manner."[355]

The court cited *Bowman* for the proposition that a hostile work environment exists when the workplace is "permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment

349. *See generally* Joan C. Williams, *Jumpstarting the Stalled Gender Revolution: Justice Ginsburg and Reconstructive Feminism*, 63 HASTINGS L.J. 1267 (2012) (noting that under the influence of Ruth Bader Ginsberg, the Supreme Court has decried gender stereotypes since the 1970s).

350. *Bowman*, 220 F.3d at 464.

351. *See id.*

352. *See* Hudson v. M.S. Carriers, Inc., 335 F. Supp.2d 853, 856 (W.D. Tenn. 2003), *aff'd*, 126 F. App'x 297 (6th Cir. 2005).

353. *Id.* at 857.

354. *Id.*

355. *Id.*

and create an abusive working environment."[356] Relaying the facts of *Bowman*, the court stated that the behavior was "boorish" but not sufficiently severe or pervasive to survive summary judgment.[357] The court went on to state that just because some of the incidents involved physical invasion, that "[did] not in and of itself militate a finding of hostile environment."[358] Consequently, the court granted summary judgment for the employer.[359]

In the 2009 case of *Talley v. United Parcel Service*, the plaintiff's coworker harassed her.[360] Once he "look[ed] at her private area" and asked her "when you going to leave that old man and get some of this sexy bowleggedness?"[361] Twice he rubbed the plaintiff's arm, once while looking at her private parts and saying "you know you got some money."[362] An unspecified number of times, he looked at the plaintiff's "private area" and said inappropriate things and was generally flirtatious.[363] The court cited *Bowman* and stated that in the present case, the conduct was comparable or less frequent and severe than in *Bowman*.[364] The court said that "[a]lthough it appear[ed] [the] flirtatious or inappropriate behavior occurred more frequently than the three instances of harassment th[e] Plaintiff specifically allege[d], this behavior also appear[ed] to be less severe."[365] Furthermore, the plaintiff did not allege that any of the behavior was physically threatening.[366] Thus, the conduct did not rise to the level of severe or pervasive harassment sufficient to sustain a hostile work environment claim. Once again, the court's analysis failed to conduct the required reasonableness analyses. The court granted the employer's motion for summary judgment.[367]

356. *Id.* at 859 (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)).
357. *Id.* at 862.
358. *Id.*
359. *See id.*
360. Talley v. United Parcel Serv., No. 08-2282, 2009 WL 10698644, at *1 (W.D. Tenn. May 26, 2009).
361. *Id.*
362. *Id.*
363. *Id.*
364. *See id.* at *4.
365. *Id.*
366. *See id.*
367. *See id.*

### 3. *Sixth Circuit Case Law More Consistent with What Reasonable People and Juries Would Likely Find Today*

A case that deserves to be cited more frequently is *Williams v. General Motors*.[368] It is already influential, as it has been cited 833 times.[369] Marilyn Williams, who worked for General Motors for more than thirty years, alleged that she encountered comments such as "hey slut," "I'm sick and tired of these fucking women," and "[y]ou left the dick out of the hand," and propositions to "rub up against me anytime" and "back right up to me."[370] Williams said she also was subjected to constant hazing, such as having a room padlocked while she was inside it, having forms glued to the top of her desk, and having equipment moved to block entrances she needed to use.[371]

*Williams* points out that after *Faragher v. Boca Raton* and *Burlington Industries v. Ellerth*, employers have a duty to take reasonable care to prevent and promptly correct sexually harassing behavior.[372] The Sixth Circuit criticized the lower court for dismissing the incidents as "infrequent, not severe, not threatening or humiliating, but merely offensive."[373] The court also stressed that the "*subjective test must not be construed as requiring that a plaintiff feel physically threatened*."[374] This is an important corrective to some courts' misuse of oft-quoted language in *Harris v. Forklift* listing factors that "may" occur in sexual harassment cases.[375] The *Williams* court also correctly identified that the comments about sluts and fucking women "could be viewed by a jury as humiliating and fundamentally offensive to any woman" and "go[t] to the core of Williams's entitlement to a workplace free of discriminatory animus."[376]

*Williams* also astutely recognized that the hazing behavior dismissed by the district court as "pranks" "could well be viewed as work-sabotaging behavior that creates a hostile work environment," particularly when accompanied by "threatening language and sexually

368. *See generally* Williams v. Gen. Motors Corp., 187 F.3d 553 (6th Cir. 1999).
369. *See id.*; *see also supra* note 86.
370. *Williams*, 187 F.3d at 559.
371. *Id.*
372. *See id.* at 567. *See generally* Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).
373. *Williams*, 187 F.3d at 561.
374. *Id.* at 566 (emphasis in original).
375. *See* Harris v. Forklift, 510 U.S. 17, 23 (1993).
376. *Williams*, 187 F.3d at 563.

aggressive innuendo."[377] Studies of sexual harassment in blue-collar jobs report that razzing and hazing is commonplace in such jobs (often, but not always, accompanied by inappropriate sexual behavior) that can create a hostile work environment.[378]

*Williams* criticized the lower court for having "disaggregated the plaintiff's claims contrary to the Supreme Court's 'totality of circumstances' directives, which robbed the incidents of their cumulative effect."[379] The issue, said the court, "is not whether each incident of harassment *standing alone* is sufficient to sustain the cause of action in a hostile environment case, but whether—taken together—the reported incidents make out such a case."[380] "This totality-of-circumstances examination should be viewed as the most basic tenet of the hostile-work-environment cause of action."[381]

*Williams* deserves to be even more widely cited than it is. It is more consistent than *Bowman* with Supreme Court precedent and with what a reasonable person and jury today would believe constitutes sexual harassment.

## E. The Fifth Circuit: *Shepherd v. Comptroller* and Its Progeny

### 1. Shepherd v. Comptroller

The final case-in-chief is *Shepherd v. Comptroller of Public Accounts*, a Fifth Circuit opinion that has been cited 584 times.[382] Shepherd reflects four outdated norms: (1) that sexualized touching is not sexual harassment; (2) that comments, up to and including "your elbows are the color of your nipples," are "mere utterance[s]" that women need to take in stride; (3) that sexual harassment is not serious unless it is physically threatening; and (4) that (instead of zero tolerance) employers are free to tolerate sexual harassment so long as it does not "destroy . . . [women's] opportunity to succeed in the workplace."[383]

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377. *Id.* at 564.

378. *See generally* JAMES E. GRUBER & PHOEBE MORGAN, IN THE COMPANY OF MEN: MALE DOMINANCE AND SEXUAL HARASSMENT (2005) (exploring the ways sexual harassment affects blue-collar women).

379. *Williams*, 187 F.3d at 561.

380. *Id.* at 562 (emphasis in original).

381. *Id.* at 563.

382. *See generally* Shepherd v. Comptroller of Pub. Accountants, 168 F.3d 871 (5th Cir. 1999); *see also supra* note 86.

383. *Id.* at 872.

Plaintiff's coworker, Jodie Moore, assaulted Debra Jean Shepherd for two years after she got engaged to Moore's brother-in-law.[384] Moore patted his lap and told Shepherd, "[h]ere's your seat," and announced, "your elbows are the same color as your nipples."[385] Moore told Shepherd she had big thighs and "simulated looking under her dress."[386] He also tried repeatedly to look down her top and stroked her arm in an apparently sexual way, rubbing a hand from her shoulder down to her wrist.[387]

The court noted that "Shepherd testified that Moore never propositioned her, asked her out on a date, or suggested that he would like to sleep with her."[388] But of course that is irrelevant: Shepherd alleged a hostile work environment, not quid pro quo harassment.[389] Irrelevant, too, is that Moore "had a friendly relation" with Shepherd outside of work.[390] Because Moore was engaged to Shepherd's brother-in-law, Moore could have been under family pressures to keep up appearances.[391]

Because the employer took prompt and effective remedial action, the plaintiff lost.[392] But what is troubling—and influential—is the court's holding that Moore's behavior did not create a hostile environment because it was not something a reasonable person might find to be sexual harassment.[393] "We agree with Shepherd that the comments made by Moore were boorish and offensive. The comments, however, were not severe."[394] The court wrote off the "nipples" comment as a "mere utterance of an epithet that engender[s] offensive feelings."[395] The court thereby communicated that women should just take such comments in stride.[396]

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384. *See id.*

385. *Id.*

386. *Id.*

387. *See id.* The Authors have made reasonable inferences in favor of the plaintiff (namely that the stroking could be read as sexual) given that this case involved a summary judgment motion brought by the employer.

388. *Id.*

389. *See id.* Quid pro quo sexual harassment is "sleep with me or you're fired" sexual harassment. The legal test requires the plaintiff to prove that the harassment related to sex, was unwelcome, and adversely affected a term or condition of employment. *See, e.g.*, Jones v. Flagship Int'l., 793 F.2d 714, 721 (5th Cir. 1986).

390. *Shepherd*, 168 F.3d at 872.

391. *See id.*

392. *See id.* at 875.

393. *See id.* at 874.

394. *Id.*

395. *Id.* at 872, 874.

396. *See id.* at 874.

However, it wasn't just the comment. The court wrote off the physical touching as "too tepid" on the grounds it was not "physically threatening."[397] This court, too, misused the language from *Harris v. Forklift*, which merely listed physically threatening conduct as a factor that "may" (or may not) exist in sexual harassment cases.[398] Again, the court relied on the outdated understanding that sexual harassment is not serious unless it is downright frightening.[399] This is a far cry from the controlling standard, as articulated by the Supreme Court, that sexual harassment is triggered long before a plaintiff suffers from psychological harm.[400]

Recall that the "tepid" conduct was a coworker running his hand down Shepherd's arm from her shoulder to her wrist, making comments about her nipples, repeatedly trying or miming looking up her skirt and down her shirt.[401] It is not clear how any of this conduct could be read as anything other than sexually aggressive.[402] It is highly unlikely that a reasonable person or jury would agree with the *Shepherd* court's conclusion today.

In a classic example of the infinite regression of anachronism, the court compares what happened to Shepherd as "far less objectionable" than cases of true and actionable sexual harassment involving a female employee who was "sexually groped repeatedly"[403] and an "environment where male coworkers cornered women and rubbed their thighs, grabbed their breasts, and held a woman so that a man could touch her."[404] This again reflects an era when garden-variety sexual harassment was viewed as not serious—as something any woman worth her salt could and should deal with on her own. Assuming that sentiment reflected what a reasonable person or jury would have believed in the late 1990s, it does not reflect what they likely would believe today.[405]

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397. *Id.*

398. Harris v. Forklift, 510 U.S. 17, 17 (1993).

399. *See generally id.*

400. *See id.* at 22.

401. *Shepherd*, 168 F.3d at 874.

402. *See* BARNA, *supra* note 73 (finding that 86% of women and 70% of men believe that making sexual comments about someone's body is sexual harassment).

403. *Shepherd*, 168 F.3d at 874-875 (citing Waltman v. Int'l Paper Co., 875 F.2d 468, 478 (5th Cir. 1989)).

404. *Id.* at 875 (citing Hall v. Gus Const. Co., 842 F.2d 1010, 1012 (8th Cir. 1988)).

405. *See* Jackson, *supra* note 29.

### 2. *Subsequent Courts Have Used* Shepherd *to Ratchet Up the Standard for Sexual Harassment in the Fifth Circuit*

*Shepherd* has been widely cited to heighten the standard for hostile environment in the Fifth Circuit, which one commentator called "perhaps the most aggressive circuit affirming grants of summary judgments" in hostile environment cases.[406] *Shepherd* is cited in cases that involve threats and sexual assaults far in excess of what occurred in *Shepherd*.[407]

In 2004, the Eastern District of Louisiana relied on *Shepherd* to grant summary judgment for the employer in *Equal Employment Opportunity Commission v. Rite Aid Corporation*, which involved a plaintiff harassed by two co-workers.[408] One cupped her breast and backed her into a corner of the store three times; asked for her phone number and threatened to come to her house (which might well make a reasonable woman fear for her safety); commented on her body; and told her numerous times that she better not gain weight.[409] A second coworker also threatened to come to her house and rubbed his finger across the back of her neck, causing her to jump.[410] He pinched her thigh, tried to kiss her, and twice brushed up against her and said, "I wonder what it feel [sic] like."[411] He also walked close to her, looked her up and down and made remarks under his breath, commented how fine and pretty she was, commented how nice her chest was, and asked her what she slept in at night.[412]

The court, which also had evidence of inappropriate conduct towards other female employees, cited *Shepherd* to say that totality of circumstances did not add up to sexual harassment because Title VII only bars conduct so severe or pervasive it "destroys . . . [the] opportunity to succeed in the workplace."[413] The court excused the conduct as merely "offensive and sophomoric" but not severe or pervasive enough to alter the terms or conditions of employment.[414]

406. Medina, *supra* note 126, at 351.

407. *See generally* E.E.O.C. v. Rite Aid Corp., No. CIV.A. 03-2079, 2004 WL 1488578 (E.D. La. June 30, 2004).

408. E.E.O.C. v. Rite Aid Corp., No. CIV.A. 03-2079, 2004 WL 1488578 (E.D. La. June 30, 2004).

409. *See id.* at *1-2.

410. *See id.*

411. *Id.* (implying that the plaintiff believed this to be a reference to what it would feel like to have sex with her).

412. *See id.* at *1-2.

413. *Id.* at *6.

414. *Id.* at *5.

Despite the sexual assaults by two colleagues, the court said the coworker's conduct was the equivalent to the "'mere utterance of an epithet that engender[s] offensive feelings."[415] The court admitted that the conduct was "quite unwelcome" but not severe or physically threatening, despite the assaults and threats to come to the plaintiff's house.[416] This was not the kind of "extreme conduct" that would render a work environment objectively hostile or abusive.[417] Despite acknowledging that the issue was whether a reasonable jury could find a hostile environment, the court inexplicably prevented the extreme facts of this case from reaching a jury based on its reading of *Shepherd*.[418]

In the 2006 case of *Chelette v. State Farm Mutual Automobile Insurance Co.*, yet another plaintiff was harassed by a supervisor, who twice tried to kiss the plaintiff when they were alone together in a car for business reasons, after she had clearly indicated her lack of interest.[419] He also talked about his lack of a sex life and asked whether she had ever thought about having an affair; commented that another co-worker was lucky because he had affairs with young college women; brought her a sheer swimsuit as a gift after a trip to Hawaii; and kept touching her, including trying to kiss her, massaging her shoulder repeatedly, brushing his arm against her breast perhaps more than ten times.[420] He stared at her breasts; commented that "she was proportioned nicely" and her husband was lucky; and "commented about her body and how he liked to watch her walk away."[421] The court relayed the facts of Shepherd as one of several comparison cases and said the allegations in the present case "simply do not rise to the level of severe or pervasive conduct required for recovery."[422] The court granted summary judgment for the employer.[423]

One year later, *Hancock v. Barron Builders & Management Company, Inc.* involved three plaintiffs alleging harassment by the

415. *Id.* (quoting Shepherd v. Comptroller of Pub. Accounts, 168 F.3d 871, 874 (5th Cir. 1999)).

416. *Id.* at *6.

417. *Id.*

418. *See id.* at *6-7.

419. *See* Chelette v. State Farm Mut. Auto. Ins. Co., No. CIVA 04-2440, 2006 WL 2513918, at *2 (W.D. La. Aug. 29, 2006).

420. *See id.* at *9.

421. *Id.*

422. *Id.*

423. *See id.* at 12.

company president.[424] The president described his use of sex toys and demonstrated which positions he preferred; discussed having sex with his wife, referring to her in terms too "demeaning" to be repeated by the court; talked about videotaping his sexual encounters; talked about the number of sex partners he had; graphically described situations where he date-raped women in college; asked for an opinion on Hispanics as sexual partners; requested one plaintiff come to his house in a bikini; and once entered the plaintiff's office and began to take off his shirt.[425] The court cited *Shepherd* to write off this conduct as "[o]ccasional comments, discourtesy, rudeness, or isolated incidents" that, "unless extremely serious," were insufficient to establish sexual harassment.[426] "Title VII is intended only to prohibit . . . conduct . . . ' so severe or pervasive that it destroys . . . opportunity to succeed in the workplace,'" asserted the court—a standard inconsistent with the Supreme Court standard of reasonableness.[427] The president's comments were "boorish and offensive" but "not so severe or pervasive as to affect a term, condition, or privilege of the plaintiffs' employment," said the court, granting summary judgment for the employer.[428]

Another 2007 case, *Combs v. Exxon Mobile Corporation*, involved a plaintiff harassed by a co-worker who pressed his genitals against her buttocks, touched her breasts, and tried to hug her.[429] He also asked "do you want me?" more than three times; asked why the plaintiff didn't find him attractive; told her he "wanted her" and that she aroused him; told her that he dreamt about her at night; said, "I wish I was the sweat that rolls down your neck between your breasts"; told her frequently, "I don't know why I want to have sex with you"; told her he could wear down her determination to have a platonic relationship; and told her, "that sweat looks so good, I can lick the sweat off of you."[430] The court admitted that the conduct was "sophomoric" and "to a reasonable person the conduct would be quite unwelcome" but cited *Shepherd* to support its conclusion that it was

424. Hancock v. Barron Builders & Mgmt. Co., 523 F. Supp.2d 571, 572 (S.D. Tex. 2007).

425. *Id.* at 574.

426. *Id.* at 575.

427. *Id.* (quoting Shepherd v. Comptroller of Pub. Accounts, 168 F.3d 871, 874 (5th Cir. 1999)).

428. *Id.* at 576-77.

429. *See* Combs v. Exxon Mobile Corp., No. 04-151-C, 2007 WL 3353504, at *3 (M.D. La. Nov. 7, 2007).

430. *Id.*

not sufficiently severe, pervasive, or physically threatening enough to alter the conditions of employment.[431] This both ratchets up the "severe or pervasive" inquiry to "threatening" and ignores the *Harris* reasonableness requirement.[432] The court granted summary judgment to the employer.[433]

### 3. *Fifth Circuit Case Law More Consistent with What Reasonable People and Juries Would Likely Find Today*

A Fifth Circuit case, cited 637 times, that is more in tune with what reasonable people and juries would likely find today is *Harvill v. Westward Communications*.[434] The plaintiff, Harvill, was the office manager at a newspaper who alleged sexual harassment by Oscar Rogers, who operated a commercial printing press at the newspaper's offices.[435] The plaintiff alleged that Rogers had "grabbed her and kissed her on the cheek, popped rubber bands at her breasts, fondled her breasts 'numerous times,' patted her . . . buttocks 'numerous times,' [had] c[o]me [up] behind her and rubbed his body against her" and had "made comments . . . about her sex life and her abilities in bed."[436] "Undoubtedly, the deliberate and unwanted touching of Harvill's intimate body parts [could] constitute severe sexual harassment," noted the court, rejecting the trial court's finding that Harvill's allegations were "too conclusory" because she could not name the precise number of times she had been touched, fondled, and grabbed.[437]

This is a welcome contrast to *Brooks v. City of San Mateo*.[438] "The Supreme Court," continued the Fifth Circuit, "has stated that isolated incidents, if egregious, can alter the terms and conditions of employment."[439] The *Harvill* court corrected the district court's mistake of requiring that the harassing conduct alleged to be both severe *and* pervasive, which is a clear misreading of Supreme Court

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431. *Id.* at *3-4 (concluding that she did not sufficiently establish that the conduct was unwelcome).

432. Harris v. Forklift Sys., Inc., 510 U.S. 17, 20-22 (1993).

433. *See Combs*, 2007 WL 3353504, at *6.

434. *See generally* Harvill v. Westward Commc'ns, 433 F.3d 428 (5th Cir. 2005); *see also supra* note 86.

435. *See id.* at 435.

436. *Id.*

437. *Id.* at 436.

438. *See generally* Brooks v. City of San Mateo, 229 F.3d 917 (9th Cir. 2000).

439. *Harvill*, 433 F.3d at 435 (citing Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998)).

precedent.[440] The court also held that a reasonable jury might find the conduct sufficiently pervasive, noting that "Harvill estimated that Rogers touched her breasts or her buttocks perhaps as often as once a week—although she later stated that it may not have been as often as once a week."[441]

The *Harvill* court also was clear about the role of the judge and jury: "Viewing the evidence in the light most favorable to Harvill, the non-movant, we conclude that a reasonable jury could find that Rogers'[s] conduct was sufficiently severe or pervasive to alter a term or condition of Harvill's employment."[442]

*Harvill* provides an important tool that judges in the Fifth Circuit can use to forge a new path in cases that involve employees subjected to unwanted sexual comments and behavior at work.

### F. Conclusion

These five cases-in-chief are nineteen to twenty-four years old, yet they have been very influential in ratcheting up the standards for what constitutes a hostile work environment. This ratcheting-up effect becomes particularly obvious when one sees how the sub-cases have used the cases-in-chief to keep hostile environment cases away from juries and substitute judges' own opinions about what a reasonable person would consider a hostile work environment. Each of the cases-in-chief no longer reflects what most Americans believe today. Judges should step out of the way and let the jury system do its work, updating the law on sexual harassment in the light of the norm cascade represented by #MeToo.

## IV. THE "REASONABLENESS" OF NDAS THAT BAR SURVIVORS FROM DISCLOSING SEXUAL HARASSMENT

As demonstrated in Parts II and III above, the norm cascade prompted by #MeToo has fundamentally altered what's reasonable now in sexual harassment cases.[443] New norms about what's reasonable also have implications for nondisclosure agreements

440. *See id.* at 43
441. *Id.* at 435.
442. *Id.* at 436.
443. *See supra* Parts II-III (discussing the norm cascade and reasonableness standard).

(NDAs) that affect whether plaintiffs can bring their claims forward.[444] NDAs (or confidentiality agreements) are contractual agreements to keep certain specified information secret.[445] NDAs executed in the employment context are enforceable only to the extent that they are "reasonable"[446] based on a weighing of factors discussed below.[447] In this Part, we propose a framework for evaluating the "reasonableness" of sexual harassment NDAs, and we explain how the norm cascade should influence courts' analyses of whether they can be reasonably enforced.

A. The "Reasonableness" Standard

It is a "bedrock" principle of contract law that a promise is unenforceable if important public policy interests outweigh the interest in enforcing the agreement.[448] While the law generally permits employers and employees to agree to contractual constraints on their own speech,[449] courts have recognized that restricting the free flow of information in this way potentially implicates a number of public policy concerns.[450] Consequently, employment-related NDAs are typically enforced only to the extent that they are "reasonable."[451]

444. *See, e.g.*, Equal Emp't Opportunity Comm'n v. Astra USA, Inc., 94 F.3d 732, 741 (1st Cir. 1996).

445. *See NDA 101: What Is a Non-Disclosure Agreement?*, ROCKET LAWYER, https://www.rocketlawyer.com/article/nda-101:-what-is-a-non-disclosure-agreement.rl [https://perma.cc/4WFD-SQZL] (last visited May 10, 2019).

446. *See, e.g.*, CSS, Inc. v. Herrington, 306 F. Supp. 3d 857, 880 (S.D. W. Va. 2018) (holding a confidentiality agreement as void because it was unreasonable, containing no limitation of time or geographic scope); Spirax Sarco, Inc. v. SSI Eng'g, Inc., 122 F. Supp. 3d 408, 425 (E.D.N.C. 2015) (requiring NDAs to be "reasonable under the circumstances to maintain its secrecy").

447. *See, e.g.*, Hammons v. Big Sandy Claims Serv., 567 S.W.2d 313, 315 (Ky. Ct. App. 1978).

448. *Astra USA, Inc.*, 94 F.3d at 744.

449. *See, e.g.*, Cohen v. Cowles Media Co., 501 U.S. 663, 671 (1991) (discussing that private parties may voluntarily enter into an agreement to restrict their own speech, and in doing so they waive their ability to assert First Amendment claims against courts asked to enforce such agreements).

450. *See, e.g.*, *Astra USA, Inc.*, 94 F.3d. at 744.

451. *Herrington*, 306 F. Supp. 3d at 880 (holding a confidentiality agreement as void because it was unreasonable, containing no limitation of time or geographic scope). *See Spirax Sarco, Inc.*, 122 F. Supp. 3d at 427 (requiring NDAs to be "reasonable under the circumstances to maintain its secrecy"); PC Connection, Inc. v. Price, 2015 WL 6554546, at *4 (D.N.H. Oct. 29, 2015) (applying the reasonableness standard to an NDA and non-compete agreement, and holding that "[a] covenant is unreasonable if it is (1) broader than needed to guard the employer's legitimate

There is "no mathematical formula" for ascertaining reasonableness.[452] "Ultimately, the task of determining reasonableness is one of balancing competing interests . . . . Each case must be determined on its own particular facts . . . ."[453] Factors courts commonly considered in determining whether an NDA is "reasonable" include: the extent of

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interests, (2) imposes an undue hardship on the employee; or (3) harms the public interest" (citing Merrimack Valley Wood Prods. v. Near, 876 A.2d 757, 762 (N.H. 2005))); Estee Lauder Cos. v. Batra, 430 F. Supp. 2d 158, 174 (S.D.N.Y. 2006) (requiring nondisclosure and noncompete agreements to be reasonable in time and scope); AmeriGas Propane, L.P. v. T-Bo Propane, Inc., 972 F. Supp. 685, 692 (S.D. Ga. 1997) ("In determining the enforceability of specific nondisclosure clauses, courts must be satisfied with the reasonableness of the clauses."); *see also* Snepp v. U.S., 444 U.S. 507, 519 (1980) (Stevens, J., dissenting) (stating that nondisclosure agreements "are enforceable only if they can survive scrutiny under the 'rule of reason'"); Henry Hope X-Ray Prods. v. Marron Carrel, Inc., 674 F.2d 1336, 1342 (9th Cir. 1982) (applying the relevant state law that nondisclosure agreements must be reasonable); Bodemer v. Swanel Beverage, Inc., 884 F. Supp. 2d 717, 734 (N.D. Ind. 2012) ("[C]onfidentiality agreements 'must be reasonable with respect to the legitimate interests of the employer, restrictions on the employee, and the public interest.'"); Prudential Ins. Co. Am. v. Baum, 629 F.Supp. 466, 468 (N.D. Ga. 1986); Tower Oil & Tech. Co. v. Buckley, 425 N.E.2d 1060, 1065 (Ill. App. Ct. 1981) (holding that the reasonableness of a NDA depends on "whether enforcement of the covenant will injure the public, whether enforcement will cause undue hardship to the promisor and whether the restraint imposed by the covenant is greater than is necessary to protect the interests of the employer"); Newinno, Inc. v. Peregrim Dev., Inc., 2003 WL 21493838, at *2 (Conn. Super. Ct. June 3, 2003) (holding that an NDA, like a non-compete agreement, is valid and enforceable only if it is reasonable); Follmer, Rudzewics & Co. v. Kosco, 362 N.W.2d 676, 683 (Mich. 1984) (holding that courts must "scrutinize" an NDA to determine whether "it goes beyond what is reasonably necessary for the protection of confidential information . . . ."); 1st Am. Sys., Inc. v. Rezatto, 311 N.W.2d 51, 57 (S.D. 1981) (holding that NDAs "are strictly construed and enforced only to the extent reasonably necessary to protect the employer's interest in confidential information").

452. Cent. Monitoring Serv., Inc. v. Zakinski, 553 N.W.2d 513, 521 (S.D. 1996); *accord* Ellis v. James V. Hurson Assocs., 565 A.2d 615, 618 (D.C. 1989) ("[T]he court adopted the Restatement's approach that reasonableness was determined by balancing the employer's need to protect a legitimate interest with the hardship to the employee and injury to the public.").

453. *Zakinski*, 553 N.W.2d at 521.

the restraint,[454] the employer's interest in maintaining secrecy,[455] the employee's interest in disclosure,[456] and the public's interest in disclosure.[457]

The flexibility and factual sensitivity of the "reasonableness" test is well suited to address the different, commonly used types of sexual harassment NDAs and the different contexts in which they are adopted and invoked to prevent disclosures.[458] NDAs differ along three key dimensions: (1) their breadth of coverage;[459] (2) the extent to which they are adopted voluntarily;[460] and (3) the legal context in which they are adopted.[461] First, NDAs differ in their breadth or

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454. *See* Eden Hannon & Co. v. Sumitomo Tr. & Banking Co., 914 F.2d 556, 563 (4th Cir. 1990) (considering whether constraint is "no broader than is necessary" to protect the employer); Layne Christensen Co. v. Bro-Tech Corp., 836 F.Supp.2d 1203, 1223 (D. Kan. 2011) (considering geographic restrictions on NDAs); Shepherd v. Pittsburgh Glass Works, LLC, 25 A.3d 1233, 1244 (Pa. Super. Ct. 2011) (considering duration and geographic restrictions on NDAs); Equifax Servs., Inc. v. Examination Mgmt. Servs., Inc., 453 S.E.2d 488, 491 (Ga. Ct. App. 1994) (considering geographic restrictions on NDAs); *Prudential Ins.*, 629 F.Supp. at 471 (finding that a non-disclosure agreement was overbroad).

455. *See Shepherd*, 25 A.3d at 1244 (considering employer's need for protection from covered disclosures); Tower Oil & Tech. Co. v. Buckley, 425 N.E.2d 1060, 1065 (Ill. App. Ct. 1981) (considering the employer's need for an NDA).

456. *See, e.g.*, *Shepherd*, 25 A.3d at 1247 (considering impact of NDA on employee's ability to earn a living); *Eden Hannon*, 914 F.2d at 563 (considering whether restraint is "unduly harsh and oppressive in curtailing the legitimate efforts of th[e] [promisor] to conduct its business"); *Buckley*, 425 N.E.2d at 1065 (considering whether the NDA will cause "undue hardship" on the employee/promisor).

457. *See, e.g.*, *Shepherd*, 25 A.3d 1233, 1233 (holding that the employee would suffer if the agreement is enforced); *Eden Hannon*, 914 F.2d at 563 (considering whether the restraint is "reasonable from the standpoint of sound public policy"); *Buckley*, 425 N.E.2d at 1065 (considering whether enforcement of the NDA "will injure the public").

458. *See supra* notes 448-457 and accompanying text (discussing the flexibility of the "reasonableness" standard).

459. *See generally* Maxwell S. Kennerly, *Sexual Harassment and the Enforcement of Non-Disclosure Agreements*, LITIG. & TRIAL BLOG (Jan. 16, 2018), https://www.litigationandtrial.com/2018/01/articles/attorney/sexual-harassment-nda/ [https://perma.cc/LRR7-RSC5].

460. *See* Vasundhara Prasad, *If Anyone is Listening, #MeToo: Breaking the Culture of Silence Around Sexual Abuse Through Regulating Non-Disclosure Agreements and Secret Settlements*, 59 B.C. L. REV. 2507, 2524-25 (2018) (discussing that voluntariness is a limited concept with various limitations).

461. *See* Elizabeth C. Tippett, *Blame Nondisparagment Clauses, Not Settlements for Concealing the Most Sexual Misconduct*, MARKET WATCH (Dec. 6, 2017), https://www.marketwatch.com/story/blame-nondisparagement-clauses-not-settlements-for-concealing-the-most-sexual-misconduct-2017-12-06 [https://perma.cc/JG4G-KF34 ] (reporting that non-disparagement agreements—not

specificity of coverage.[462] For instance, some employers require employees to sign broad anti-disparagement NDAs that do not mention sexual harassment explicitly but forbid employees from making any statement that could harm the employer's reputation.[463] Some have interpreted such anti-disparagement NDAs to encompass disclosures about sexual harassment.[464] Indeed, this was long the position of the Weinstein Company, which forced employees to sign broad anti-disparagement agreements and used them for many years to silence Harvey Weinstein's accusers.[465] By contrast, some NDAs are more narrowly tailored to forbid disclosures about specific instances of harassment.[466] Such distinctions may bear on their reasonableness.[467]

Second, NDAs vary in the extent to which they are adopted voluntarily by the signing employee.[468] Some are negotiated explicitly between the employer and the signing employee, while others are imposed by the employer as a condition of employment or a condition of resolving any sexual harassment claim.[469] As a general matter, employees negotiating explicitly for confidentiality terms are likely to have more power and agency than those on whom terms are imposed as a condition of employment.[470] However, negotiating employees differ radically in their income, education, and job security, all of which affect their ability to bargain meaningfully for silence about

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settlement agreements—were the greatest impediment to revealing sexual harassment by Weinstein).

462. *See* Kennerly, *supra* note 459.

463. *See id.* (reporting that the Weinstein Company required employees to sign broad waivers forbidding critical comments that could damage the company's "business reputation").

464. *See id.*

465. *See* Elizabeth C. Tippett, *Blame Nondisparagment Clauses, Not Settlements for Concealing the Most Sexual Misconduct*, MARKETWATCH, (Dec. 6, 2017), https://www.marketwatch.com/story/blame-nondisparagement-clauses-not-settlements-for-concealing-the-most-sexual-misconduct-2017-12-06 https://perma.cc/M7X5-U63E (reporting that non-disparagement agreements—not settlement agreements—were the greatest impediment to revealing sexual harassment by Weinstein).

466. *See generally id.* (explaining that some non-disparagement clauses may be narrow).

467. *See id.* (stating that the specificity of a non-disparagement agreement turns on its reasonableness).

468. *See* Prasad, *supra* note 460, at 2524-25 (discussing that voluntariness is a limited concept with various limitations).

469. *See id.* at 2521.

470. *See id.* (noting the unequal power dynamic between an employee and potential employee in the context of an NDA).

sexual harassment. Such distinctions may be relevant to their reasonableness.[471]

Third, NDAs are adopted against different legal backdrops.[472] Some are adopted to resolve pending or threatened litigation, while others are adopted outside the litigation context to resolve sexual harassment complaints raised informally through an employer's internal channels.[473] Whether an NDA is reasonable may depend, in part, on what it contains and how it was adopted.

In addition, the reasonableness of enforcing a particular NDA might also depend on the context in which a potentially covered disclosure occurs. For instance, existing case law treats disclosures made to a court or regulatory agency differently than disclosures made to the general public outside these legal fora.[474] Below we outline the legal framework for evaluating the "reasonableness" of NDAs and discuss how it is likely to apply in cases where employers attempt to use them to prevent public disclosures by survivors of sexual harassment.

### B. NDAs that Forbid Disclosure in Court or to Regulators Are Not Reasonable

In the context of legal proceedings, courts have definitively struck the "reasonableness" balance to allow disclosures of sexual harassment that would otherwise be covered by an NDA.[475] Case law clearly establishes that NDAs cannot be enforced to bar individuals from disclosing information about harassment in judicial proceedings or to regulators at the Equal Employment Opportunity Commission (EEOC).[476] Longstanding common law doctrine holds that agreements to suppress evidence in judicial proceedings are void as contrary to

471. *See* Tippett, *supra* note 461.

472. *See id.* (discussing how some NDAs are entered while litigation is ongoing and some are entered into as a common place procedure in the workplace).

473. *See id.*

474. *See infra* Section IV.B (discussing that NDA's cannot be enforced to bar individuals from disclosing information about harassment in judicial proceedings or to regulators at the EEOC).

475. *See, e.g.*, Kennerly, *supra* note 459 (stating that NDAs that prohibit disclosure of sexual harassment have been found to violate federal law).

476. *See* Matthew Garrahan, *Harvey Weinstein: How Lawyers Kept a Lid on Sexual Harassment Claims*, FIN. TIMES (Oct. 23, 2017) ("NDAs cannot lawfully prevent people from reporting claims to law enforcement and government agencies, such as the Equal Employment Opportunity Commission in the US.").

public policy.[477] Consistent with this principle, courts have held that an NDA cannot be enforced to prevent individuals from providing evidence about sexual harassment in judicial proceedings.[478] As one court explained, evidence about prior sexual harassment claims settled by an employer is "highly relevant" to resolving hostile environment claims, since hostile environment plaintiffs must establish the severity or pervasiveness of the conduct and the employer's knowledge and handling of it.[479] Public policy strongly favors allowing such probative evidence into judicial proceedings.[480] In weighing competing interests, the court opined that the "plaintiff's interest in being free from unlawful discrimination in the workplace, coupled with the public's interest in the eradication of discrimination, outweighs [the employer's] interest in maintaining the confidentiality of the . . . settlement agreement."[481]

Another court that allowed testimony of prior sexual harassment in spite of an NDA prohibiting it observed that the public's "concern grows more pressing as additional individuals are harmed by identical or similar action."[482] In light of these concerns, courts have concluded that enforcing sexual harassment NDAs in the context of judicial

477. *See, e.g.*, Harris v. Gulf Ins. Co., 297 F. Supp. 2d 1220, 1226 (N.D. Ca. 2003) ("Agreements to suppress evidence have been held void as against public policy." (quoting Williamson v. Super. Ct., 582 P.2d 126, 131 (Cal. 1978))).

478. *See* Kalinauskas v. Wong, 151 F.R.D. 363, 365 (D. Nev. 1993) (refusing to enforce an NDA to prevent previous victims of sexual harassment at defendant company from providing evidence in current sexual harassment lawsuit because it "would condone the practice of 'buy[ing] the silence of a witness with a settlement agreement'"); Denise Rich Songs, Inc. v. Hester, 2004 WL 2563702, at *5 (N. Y. Sup. Ct. Oct. 4, 2004) (finding that employer had no cause of action for breach of a confidentiality agreement by a former employee who had disclosed information in violation of that agreement in connection with an employment discrimination lawsuit); Llerena v. J.B. Hanauer & Co., 845 A.2d 732, 732 (N.J. Super. Ct. Law Div. 2002) (refusing to enforce an NDA to prevent previous victims of sexual harassment at defendant company from providing evidence in current sexual harassment lawsuit); Farmers Group, Inc. v. Lee, 28 P.3d 413, 419 (Kan. App. 2001) (refusing to enforce an NDA signed by a former employee to settle an employment discrimination claim in a subsequent case, allowing the former employee to present "nonconfidential, truthful information . . . in connection with a claim against his former employer"). *See also* Waterson v. Plank Road Motel Corp., 43 F. Supp. 2d 284, 284 (N.D.N.Y. 1999) (allowing testimony by a former employee who settled a harassment complaint against the same employer because the probative value of the testimony outweighed the employer's interest in secrecy).

479. *Llerena*, 845 A.2d at 739.

480. *See id.* (stating that the judiciary's role includes preventing exclusion of probative evidence in the interest of discovering the truth).

481. *Id.* at 739.

482. *Kalinauskas*, 151 F.R.D. at 366.

proceedings would "undermine[] not only individual third-party plaintiffs' ability to vindicate their rights but the judicial system itself."[483] Consequently, they have consistently ordered that plaintiffs be provided with information about prior instances of sexual harassment at the defendant company, even when such instances are covered by NDAs.[484]

Courts similarly have held that NDAs cannot be enforced to bar the provision of information about sexual harassment to the EEOC in the context of an investigation.[485] In *EEOC v. Astra USA*, the court explained that Congress had statutorily commanded the EEOC "to vindicate the public interest in preventing employment discrimination" and allowing employers to prohibit communications with the agency would hobble its ability to investigate discrimination complaints and harm the public interest.[486] The court rejected the employer's argument that the strong public policy interest in settlement supported the full enforcement of settlement agreements, including non-disclosure terms.[487] The court found this interest insignificant when weighed against "public policy [that] so clearly favors the free flow of information between victims of harassment and the agency entrusted with righting the wrongs inflicted upon them."[488] Accordingly, the court held that employees who had signed NDAs with the employer being investigated could nonetheless respond to questions from EEOC investigators and volunteer information concerning sexual harassment at their employer to the EEOC.[489]

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483. *Lee*, 28 P.3d at 420.

484. *See* Meena Yoo, *SEC Disclosures: Balancing Investor Rights with Privacy Rights*, FORDHAM J. CORP. & FIN. L. (May 7, 2018), https://news.law.fordham.edu/jcfl/2018/05/07/sec-disclosures-balancing-investor-rights-with-privacy-rights/#_edn6 [https://perma.cc/V6MY-GMPX] (stating that courts have generally found that companies have an affirmative duty to disclose sexual harassment allegations).

485. *See, e.g.*, Equal Emp't Opportunity Comm'n v. Astra USA, Inc., 94 F.3d 738, 744 (1st Cir. 1996) (stating the Congress's investigatory powers would be seriously curtailed if victims of sexual harassment cannot approach the EEOC). In another context, a federal district court suggested that there is a constitutional right to inform the government of violations of federal laws, and that under the Supremacy Clause, U.S. Constitution Art. VI, this right supersedes local tort or contract rights. *See* Maddox v. Williams, 855 F. Supp. 406, 415 (D.D.C. 1994).

486. *Astra USA, Inc.* at 744 (quoting General Tel. Co. v. Equal Emp't Opportunity Comm'n, 446 U.S. 318, 326 (1980)).

487. *See id.* at 745.

488. *Id.*

489. *See id.*

While the existing case law holding NDAs unenforceable in judicial and regulatory fora covers many of the disclosures likely to be made by survivors who sign sexual harassment-related NDAs, other types of disclosures do not fit squarely within this case law. For a variety of reasons, many survivors choose not to pursue legal action.[490] Sexual harassment lawsuits are costly, lengthy, uncertain, and emotionally grueling for plaintiffs.[491] There is a pervasive sense that "the law often fails to prevent and correct sexual harassment."[492] Indeed, the revelations of #MeToo suggest that a generation of sexual harassment lawsuits failed to produce meaningful social change in workplace norms and behaviors. Thus, many survivors may look to channels outside of formal legal institutions to air grievances, including friends and family, "whisper networks" of other survivors and potential targets of harassment, social media, conventional media, or other public fora.[493]

Case law on disclosures to courts and regulators does not squarely address these kinds of public disclosures. Public disclosures differ from disclosures before judicial and administrative bodies in important ways. Disclosures made outside of legal institutions do not implicate the fundamental fairness and integrity of those institutions, nor can they be shielded from widespread public dissemination by protective orders guarding parties and third parties from unnecessary publicity and embarrassment, as often occurs in legal proceedings.[494] While these distinctions suggest that case law on legal disclosures cannot be applied directly to extralegal public disclosures, Section C below explains that they do not necessarily tip the balance in favor of enforcing sexual harassment NDAs against survivors who wish to

490. *See, e.g.*, Annie Hill, *Nondisclosure Agreements: Sexual Harassment and the Contract of Silence*, GENDER POL'Y REP. (Nov. 14, 2017), http://genderpolicyreport.umn.edu/nondisclosure-agreements-sexual-harassment-and-the-contract-of-silence/ [https://perma.cc/J96A-YL8L] (noting that NDAs may, in some instances, help survivors of sexual harassment).

491. *See id.*

492. *Id.*

493. *See* Hill, *supra* note 490.

494. *See*, *e.g.*, Dunn v. Warhol, No. 91-4169, 1992 WL 102744, at *1-2 (E.D. Pa. May 8, 1992) (holding that the plaintiff had "articulated persuasive reasons why the dissemination of this highly personal information could cause not only serious embarrassment but also severe emotional damage to her and her family" thereby justifying a protective order); Llerena v. J.B. Hanauer & Co., 845 A.2d 732, 739 (N.J. Super. Law Div. 2002) (refusing to enforce NDA to prevent employee who had settled a harassment claim from providing testimony for plaintiff in a harassment suit against their mutual employer but granting a protective order to protect the testifying employee's privacy).

speak.[495] Instead, courts must inquire into the reasonableness of enforcing sexual harassment NDAs to prevent extra-legal disclosures on a case-by-case basis.

### C. A Framework for Evaluating the Reasonableness of NDAs to Forbid Extralegal Disclosures of Sexual Harassment

As laid out above, the reasonableness of an employment-related NDA depends on a balancing of factors, including: the extent of the restraint,[496] the employer's interest in maintaining secrecy,[497] the employee's interest in disclosure,[498] and the public's interest in disclosure.[499] To our knowledge, no existing case has applied this framework to a sexual harassment NDA. Drawing on case law in analogous contexts, this Section discusses how each factor should be analyzed to determine the reasonableness of sexual harassment NDAs.[500] Based on a balancing of the relevant interests, we argue that NDAs generally should not be enforced to silence survivors who wish to publicly discuss their harassment outside of legal proceedings. However, we acknowledge that there are legitimate countervailing

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495. *See infra* Section IV.C (explaining that courts have been using a balancing approach to enforcing NDAs by looking at factors such as the interests of the employer, employee, and the general public).

496. *See* Eden Hannon & Co. v. Sumitomo Trust & Banking Co., 914 F.2d 556, 563 (4th Cir. 1990) (considering whether constraint is "no broader than is necessary" to protect the employer); Layne Christensen Co. v. Bro-Tech Corp., 836 F. Supp. 2d 1203, 1231 (D. Kan. 2011); Prudential Ins. V. Baum, 629 F. Supp. 466, 471 (N.D. Ga. 1986) (finding that an NDA was overbroad and unenforceable); Shepherd v. Pittsburgh Glass Works, LLC, 25 A.3d 1233, 1244 (Pa. Super. Ct. 2011) (considering duration and geographic restrictions in determining reasonableness of an NDA); Equifax Servs., Inc. v. Examination Mgmt. Servs., Inc., 453 S.E.2d 488, 491 (Ga. Ct. App. 1994).

497. *See, e.g.*, Tower Oil & Tech. Co. v. Buckley, 425 N.E.2d 1060, 1065 (Ill. App. Ct. 1981); *Shepherd*, 25 A.3d at 1244 (considering employer's need for protection from covered disclosures).

498. *See, e.g.*, *Eden Hannon & Co.*, 914 F.2d at 563 (considering whether restraint is "unduly harsh and oppressive in curtailing the legitimate efforts of th[e] [promisor] to conduct its business"); *Tower Oil*, 425 N.E.2d at 1065 (considering whether the NDA will cause "undue hardship" on the employee/promisor); *Shepherd*, 25 A.3d at 1247 (considering impact of NDA on employee's ability to earn a living).

499. *See, e.g.*, *Eden Hannon & Co.*, 914 F.2d at 563 (considering whether the restraint is "reasonable from the standpoint of sound public policy"); *Tower Oil & Tech. Co.*, 425 N.E.2d at 1065 (considering whether enforcement of the NDA "will injure the public"); *Shepherd*, 25 A.3d at 1247.

500. *See infra* Section IV.C (discussing the extent of restraint, interests of the employer in protecting business secrets, interests of the discloser, and interests of the general public).

interests that should be taken into account, including the interests that many survivors have in confidentiality. We argue that the "reasonableness" test provides courts with the flexibility to accommodate competing interests and to adapt to changed circumstances over time as the law and the facts on the ground develop in this nascent area.

1. *Extent of Restraint*

Courts do not favor enforcing broad, undifferentiated restrictions contained in NDAs, confidentiality agreements, or restraints on trade more generally.[501] The general rule is that "covenants that are functionally overbroad are unreasonable and void as a matter of law."[502] Courts typically require NDAs to identify with specificity the type of information the employee may not disclose.[503] Courts will refuse to enforce overbroad NDAs or will narrowly tailor such covenants if they choose to enforce them.[504] For instance, courts have refused to enforce a non-solicitation clause that contained "no additional limiting language or circumstances in the case that otherwise would limit the scope of the restriction."[505] Courts also commonly read temporal or geographic limitations into agreements lacking them.[506] This standard of narrow tailoring should bar the use

501. *See, e.g.*, AMP Inc. v. Fleischhacker, 823 F.2d 1199, 1202 (7th Cir. 1987) (recognizing that broad confidentiality agreements constitute unreasonable restraints on trade), *superseded by statute*, 765 ILL. COMP. STAT. 1065/8 (1999); Prudential Ins. Co. Am. v. Baum, 629 F. Supp. 466, 471 (N.D. Ga. 1986) ("Nondisclosure covenants adjudged overbroad are considered an unfair restraint upon competition."); SI Handling Sys., Inc. v. Heisley, 658 F. Supp. 362, 372 (E.D. Pa. 1986) ("[A]ny agreement which seeks to restrict post-employment activities is subject to the same standards [as noncompetition clauses]."); Whelan Security Co. v. Kennebrew, 379 S.W.3d 835, 843 (Mo. 2012) (citing the proposition that restrictive covenants must be narrowly tailored to be enforceable); Puritan-Bennett Corp. v. Richter, 679 P.2d 206, 211 (Kan. 1984) (stating that enforcement of a nondisclosure agreement "would unreasonably infringe upon appellant's right to earn a living").

502. Capital One Fin. Corp. v. Kanas, 871 F. Supp. 2d 520, 535 (E.D. Va. 2012) (reviewing a Separation Agreement for ambiguity to determine if it was overbroad).

503. *See id.*

504. *See* Concord Orthopaedics Prof'l Ass'n v. Forbes, 702 A.2d 1273, 1276 (N.H. 1997) (citing the principle that courts will narrowly tailor covenants not to compete by geographic scope, duration, and regarding only legitimate employer interests).

505. *Whelan Security*, 379 S.W.3d at 843 (finding the non-solicitation clause unenforceable because it was "unreasonably overbroad").

506. *See Concord Orthopaedics*, 702, A.2d at 1276.

of broad anti-disparagement NDAs that do not contain scope restrictions of any kind against sexual harassment survivors who wish to speak.

2. *Employer Interests*

The speech restrictions contained in an employment-related NDA are enforceable only to the extent "reasonably necessary for the protection of the employer."[507] An employer cannot simply assert a bald preference for secrecy but rather must assert a "legitimate and substantial business justification" for the speech restriction.[508] "[I]n cases where the employer's interests do not rise to the level of a proprietary interest deserving of judicial protection, a court will conclude that a restrictive agreement merely stifles competition and therefore is unenforceable."[509] Traditionally, courts have found employers' interests in protecting trade secrets to provide the highest and plainest justification for confidentiality,[510] although even these core interests are not absolute and remain subject to a balance of other

507. *Shepherd*, 25 A.3d at 1244; *see also* PharMethod, Inc. v. Caserta, 382 Fed. App'x. 214, 220 (3d Cir. 2010) ("A restrictive covenant is reasonably necessary for the protection of the employer when it is narrowly tailored to protect an employer's legitimate interests."); HR Staffing Consultants, LLC v. Butts, No. 2:15-3155, 2015 WL 3492609, at *12 (D.N.J. June 2, 2015), *aff'd*, 627 F. App'x 168 (3d Cir. 2015) (holding that a non-compete limiting the defendant's ability to work in five New Jersey counties only for a period of one year was narrowly tailored to ensure the covenant is no broader than necessary to protect the employer's interests); Campbell Soup Co. v. Desatnick, 58 F. Supp. 2d 477, 488-89 (D.N.J. 1999) ("Under New Jersey law, . . . [t]o minimize the hardship imposed on the employee, the geographic, temporal and subject-matter restrictions of an otherwise enforceable agreement not to compete will be enforced only to the extent reasonably necessary to protect the employer's legitimate business interests.") (citations omitted).

508. Banner Health Sys. v. Nat'l Labor Relations Bd., 851 F.3d 35, 41 (D.C. Cir. 2017); *accord* Ellis v. James V. Hurson Assocs., 565 A.2d 615, 618 (D.C. 1989) (employer must assert a "legitimate interest").

509. Ingersoll–Rand Co. v. Ciavatta, 542 A.2d 879, 892, 894 (N.J. 1988) (finding that since "[t]he line between [protectable] information, trade secrets, and the general skills and knowledge of a highly sophisticated employee will be very difficult to draw," courts are expected to "narrowly" construe an employer's need for protection); *see also* GPS Indus., LLC v. Lewis, 691 F. Supp. 2d 1327, 1333 (M.D. Fla. 2010) (citing FLA. STAT. § 542.335(1)(h) (2019) (indicating that Florida courts "construe a restrictive covenant narrowly, against the restraint or against the drafter where legitimate business interests have been established").

510. *See generally* Bodemer v. Swanel Beverage, 884 F. Supp. 2d 717 (N.D. Ind. 2012).

interests.[511] Courts also give solicitude to employer interests in the secrecy of confidential business information—for instance, customer lists or business strategy—that may not qualify for trade secret protection.[512]

These core interests do not necessarily exhaust the universe of protectable interests.[513] Courts will look to the totality of the facts and circumstances of the individual case to assess the legitimacy of the employer's asserted interest.[514] Such ad hoc analysis has not yielded clear rules or bright lines around what constitutes a protected employer interest. However, the logic of the existing case law suggests that employment-related NDAs can be used to protect only the employer's legitimate business interests.[515]

The term "business interest" is not well defined in the case law, but the legitimacy of a "business interest" in secrecy often turns on whether the disclosure of covered information would cause the employer "competitive harm."[516] The prospect of competitive harm is clearly present when an employee threatens to provide a competitor with confidential information about the employer's business strategy,

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511. *See* Hammons v. Big Sandy Claims Serv. Inc., 567 S.W.2d 313, 315 (Ky. Ct. App. 1978)

512. *See, e.g.*, Overholt Crop. Ins. Serv. Co. v. Travis, 941 F.2d 1361, 1361 (8th Cir. 1991); Roto-Die Co. v. Lesser, 899 F. Supp. 1515, 1518 (W.D. Va. 1995) (recognizing that information such as customer lists, marketing information, and product development information, "if disclosed to competitors, would destroy a company's ability to compete"); *see also* Insulation Corp. of Am. v. Brobston, 667 A.2d 729, 734 (Pa. Super. 1995) (including "corporate information such as overhead costs, profit margin, dealer discounts, customer pricing, marketing strategy and customer contract terms" in category of non-trade secret information); Bell Fuel Corp. v. Cattolico, 544 A.2d 450, 460-61 (Pa. Super. 1988) (discussing customer information); Durham v. Stand-By Labor of Ga., Inc., 198 S.E.2d 145, 150 (Ga. 1973); Jodi L. Short, *Killing the Messenger: The Use of Nondisclosure Agreements to Silence Whistleblowers*, 60 PITT. L. REV. 1207, 1229 (1999).

513. *See, e.g.*, Cronimet Holdings, Inc. v. Keywell Metals, LLC, 73 F. Supp. 3d 907, 915-16 (N.D. Ill. 2014).

514. *See, e.g.*, *id.*; Reliable Fire Equip. Co. v. Arredondo, 965 N.E.2d 393, 396 (Ill. 2011). Additionally, many courts will not enforce nondisclosure clauses that contain no time limitation. *See* McGough v. Nalco Co., 496 F. Supp. 2d 729, 756 (N.D. W. Va. 2007); *see also* Prudential Ins. Co. Am. v. Baum, 629 F. Supp. 466, 471 (N.D. Ga. 1986) ("[T]he absence of any restriction upon the duration of the nondisclosure provision renders it unenforceable."); Howard Schultz & Assoc. of the Se., Inc. v. Broniec, 236 S.E.2d 265, 265 (Ga. 1977); Thomas v. Best Mfg. Corp., 218 S.E.2d 68, 68 (Ga. 1975) (holding that contracts limiting the disclosure of "confidential" information in perpetuity are unenforceable).

515. *See* Short, *supra* note 512, at 1212.

516. *Id.* at 1229.

products, or customers.[517] By contrast, courts have declined to enforce NDAs where there was no evidence that disclosure of the covered information would harm the employer's competitive position.[518] For instance, courts found NDAs unenforceable where the employer sought to protect the stability of its own workforce without respect to its competitors.[519] The threatened disclosure need not be made to a

517. *See, e.g.*, Milliken & Co. v. Morin, 731 S.E.2d 288, 295 (N.C. 2012); Shepherd v. Pittsburgh Glass Works, LLC, 25 A.3d 1233, 1244 (Pa. Super. Ct. 2011) (holding that legitimate business interests that are protectable under a confidentiality agreement include "trade secrets and confidential information"); *see also* Roto-Die Co. v. Lesser, 899 F. Supp. 1515, 1518 (W.D. Va. 1995) (recognizing that information about customer lists, marketing, and product development "if disclosed to competitors, would destroy a company's ability to compete"); Roberson v. C.P. Allen Const. Co., 50 So. 3d 471, 475 (Ala. Civ. App. 2010) (holding that an employer enjoys a protectable interest if the employee was privy to confidential information, secret lists, or developed close relationship with clients; additionally, employer's investment in the employee can also constitute protectable interest); ACAS Acquisitions (Precitech) Inc. v. Hobert, 923 A.2d 1076, 1084–85 (N.H. 2007) ("Legitimate interests of an employer that may be protected from competition include: the employer's trade secrets[;] . . . confidential information other than trade secrets . . . such as information regarding a unique business method; an employee's special influence over the employer's customers[;] . . . contacts developed during the employment; and the employer's development of goodwill and a positive image.").

518. *See, e.g.*, Slijepcevich v. Caremark, Inc., No. 95C7286, 1996 U.S. Dist. LEXIS 110, at *4 (N.D. Ill Jan. 4, 1996) ("[C]ourts will enjoin former employees only when there is a threat that they will disclose secret information to a competitor."); Great Lakes Carbon Corp. v. Koch Indus., Inc., 497 F. Supp. 462, 469 (S.D.N.Y. 1980) (noting that the employer did not lose any business due to disclosures and considering this as a factor militating against enforcement of the nondisclosure agreement); Durham v. Stand-By Labor of Ga., Inc., 198 S.E.2d 145, 149 (Ga. 1973) ("Covenants not to disclose and utilize confidential business information are related to general covenants not to compete because of the similar employer interest in maintaining competitive advantage.").

519. *See, e.g.*, GPS Indus., LLC v. Lewis, 691 F. Supp. 2d 1327, 1334 (M.D. Fla. 2010) (holding the company did not have a legitimate business interest in protecting from use or disclosure all prospective or existing customers globally, nor was it able to protect all information obtained in employment); Prudential Ins. Co. Am. v. Baum, 629 F. Supp. 466, 472 (N.D. Ga. 1986) (holding a nondisclosure covenant applicable to "any information whatsoever pertaining to contractholders or [plaintiff's] products" as unenforceable because the information protected did not fall under the plaintiff's legitimate business interests); *see also* Carlson Grp., Inc. v. Davenport, No. 16-CV-10520, 2016 WL 7212522, at *4 (N.D. Ill. Dec. 13, 2016) (holding that a confidentiality clause protecting all information of or concerning its business was unenforceable as not protecting a legitimate business interest); Trailer Leasing Co. v. Assocs. Commercial Corp., No. 96 C 2305, 1996 WL 392135, at *3 (N.D. Ill. July 10, 1996) (holding that "[s]ince TLC cannot possibly have a near-permanent relationship with a prospective customer," the confidentiality agreement covering all prospective customers does not address a legitimate business interest and

competitor in order to constitute competitive harm.[520] However, courts enforcing NDAs based on the employer's interest in secrecy have tended to do so when the employer can show that non-enforcement would place it "in imminent peril of suffering significant competitive losses."[521] Information about sexual harassment in the employer's workplace does not typically harm the employer's ability to compete effectively with other companies.

Rather, the harm presented by disclosures about harassment is more in the nature of reputational harm or embarrassment. Case law explicitly addressing NDAs has not squarely addressed whether protection against such harms could constitute a "legitimate business interest." But cases assessing the salience of such harms in other contexts are instructive and suggest that the bar is very high for these types of claims. Case law on the applicability of the confidential business information exemption from disclosure under the federal Freedom of Information Act (FOIA) has stressed that mere "embarrassment does not rise to the level of substantial competitive harm of the type recognized by the courts" as necessary to abrogate FOIA's disclosure requirements.[522] This is true even if the employer can show that the embarrassment attendant to the disclosure of secret information is anticipated to be "so severe that it could indirectly harm the company's bottom line."[523] Case law on protective orders similarly suggests that "where embarrassment is the chief concern, the

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is unenforceable); R.R. Donnelley & Sons Co. v. Fagan, 767 F. Supp. 1259, 1268 (S.D.N.Y. 1991) (holding plaintiff's noncompete and nondisclosure covenants were unenforceable because plaintiff did not prove that it enjoyed near-permanent customer relationships with its clients and thus did not have protectable, legitimate business interest justifying broad restraint on senior executive's employment); AssuredPartners, Inc. v. Schmitt, 44 N.E.3d 463, 475-76 (Ill. App. Dist. 2015) (holding a provision that sought to protect "virtually every fact, plan, proposal, data, and opinion that [the employee] became aware of during the time he was employed," regardless of whether it was in any way proprietary or confidential in nature as unenforceable); Schmersahl, Treloar & Co., P.C. v. McHugh, 28 S.W.3d 345, 348 (Mo. Ct. App. 2000).

520. *See* Uniroyal Goodrich Tire Co. v. Hudson, 856 F. Supp. 348, 349 (E.D. Mich. 1994), *aff'd*, 97 F.3d 1452, No. 95-1130, 1996 U.S. App. LEXIS 25322 (6th Cir. Sept. 12, 1996).

521. *Uniroyal*, 1996 U.S. App. LEXIS 25322 at *2.

522. United Techs. Corp. v. U.S. Dept. of Defense, 601 F.3d 557, 562 (D.C. Cir. 2010). *See also* Glickstein v. Neshaminy Sch. Dist., No. 96-6236, 1998 WL 83976, at *3 (E.D. Pa. Feb. 26, 1998) (holding that the confidential information covered by the agreement included presumptively public information and the parties reached the agreement to avoid embarrassment. Therefore, the agreement was invalid).

523. Short, *supra* note 512, at 1232.

embarrassment must be 'particularly serious' to suffice."[524] In this context—where "embarrassment"[525] is an explicit ground for granting a protective order—the asserted harm of disclosure cannot be merely reputational but rather must affect the "competitive and financial position" of the firm.[526] It will be difficult for employers to establish this type of interest in preventing disclosures about sexual harassment.[527]

3. *Discloser Interests*

The reasonableness of a disclosure restriction also depends on the strength of the discloser's interest in revealing the contested information. Even if the employer can articulate a legitimate business interest in secrecy, the speech restrictions in an NDA cannot be "so large as to . . . impose undue hardship on the [employee]."[528] Survivors who wish to disclose their harassment have strong psychological and health interests in doing so.[529] As catalogued below, there are many psychological and physical harms associated with sexual harassment.[530] Mental health professionals caution that keeping the experience of harassment secret is "literally toxic to [one's] health" because timely treatment and care is essential for mitigating harm.[531]

Survivors also have economic interests in disclosure that are analogous to the interests that other employees have in escaping more traditional employment-related NDAs barring the disclosure of trade secrets or confidential business information. Courts long have recognized that such speech restrictions can constrain an employee's

524. *Glickstein*, 1998 WL 83976 at *3 (refusing to grant a protective order for medical and financial materials produced in sexual harassment litigation to prevent embarrassment).

525. FED. R. CIV. P. 26(c)(1).

526. Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1121 (3d Cir. 1986).

527. Employers may have a stronger interest in protecting the confidentiality of settlement terms in NDAs resolving sexual harassment claims than in protecting the underlying facts surrounding the harassment, because the employers' generosity relative to its competitors could arguably place it at a competitive disadvantage.

528. Hammons v. Big Sandy Claims Serv. Inc., 567 S.W.2d 313, 315 (Ky. Ct. App. 1978), *accord* OVRS Acquisition Corp. v. Cmty. Health Servs., Inc., 657 N.E.2d 117, 126 (Ind. Ct. App. 1995); Mountain Comprehensive Health Corp. v. Gibson, No. 2013-CA-000373-MR, 2015 WL 1194508, at *2 (Ky. Ct. App. Mar. 13, 2015).

529. Nicole Spector, *The Hidden Health Effects of Sexual Harassment*, NBC: BETTER (Oct. 13, 2017, 11:14 AM), https://www.nbcnews.com/better/health/hidden-health-effects-sexual-harassment-ncna810416 [https://perma.cc/5EX9-WHH3].

530. *See id.*

531. *Id.*

ability to obtain and function successfully in a new job in their field.[532] For instance, it would be impossible for an automotive engineer to change jobs within the industry if he or she is forbidden from discussing any and all automotive production processes. Consequently, many courts have characterized employment-related NDAs as restraints on trade viewed with disfavor at common law much like covenants not to compete, and they have narrowed or abrogated them in order to allow employees to pursue employment opportunities.[533]

To be sure, harassment NDAs do not restrain trade in the same way as traditional NDAs protecting technical or confidential business information. Nonetheless, the principle underlying the non-harassment cases—that employees should not be inhibited from earning a living in their chosen profession—favors non-enforcement in cases involving sexual harassment disclosures as well. Workplace sexual harassment is an experience that profoundly impacts survivors' professional lives, and forced silence about that experience can similarly impair survivors' future employment prospects.[534] "[T]he feelings of shame or guilt that a person may feel when sexually harassed at work can devastate their self-esteem and sense of self-

532. *See* RESTATEMENT (SECOND) OF CONTRACTS ch. 8, topic 2 § 186(1) (AM. LAW INST. 1981)

533. *See id.* ("A promise is unenforceable on grounds of public policy if it is unreasonably in restraint of trade."); *see also* PC Connection, Inc. v. Price, No. 15-cv-208-PB, 2015 WL 6554546, at *4 (D.N.H. Oct. 29, 2015) (applying the same reasonableness standard to an NDA and non-compete agreements); Bodemer v. Swanel Beverage, 884 F. Supp. 2d 717, 733 (N.D. Ind. 2012) (predicting that the Indiana Supreme Court would analyze a confidentiality agreement like a covenant not to compete); Archer Daniels Midland Co. v. Whitacre, 60 F. Supp. 2d 819, 825 (C.D. Ill. 1999) (holding that under Illinois law, noncompetition and nondisclosure agreements are considered restrictive covenants, and therefore operate at least as partial restraints of trade requiring careful scrutiny by courts); Cent. Monitoring Serv., Inc. v. Zakinski, 553 N.W.2d 513, 521 (S.D. 1996) (equating NDAs with covenants not to compete and applying the American Jurisprudence standard of reasonableness for covenants to compete to an NDA). Many courts similarly find that confidentiality clauses or NDAs operate as noncompete agreements. *See, e.g.*, Fay v. Total Quality Logistics, LLC, 799 S.E.2d 318, 323 (Ct. App. 2017), *reh'g denied*, (May 26, 2017), *cert. granted*, (Feb. 1, 2018) (holding a nondisclosure agreement to be so overbroad as to be considered a noncompete agreement).

534. *See* Hill, *supra* note 490; Jennifer Berdahl & Jana Raver, *Sexual Harassment*, *in* APA HANDBOOK OF INDUSTRIAL AND ORGANIZATIONAL PSYCHOLOGY, VOL. 3: MAINTAINING, EXPANDING, AND CONTRACTING THE ORGANIZATION 641 (Sheldon Zedeck ed., 2011); *see generally* Afroditi Pina & Theresa A. Gannon, *An Overview of the Literature on Antecedents, Perceptions and Behavioural Consequences of Sexual Harassment*, 18 J. SEXUAL AGGRESSION 209 (2010).

worth as a professional."[535] Harassment may make the target doubt his or her own abilities or wonder if he or she was hired solely for sexual reasons.[536] Survivors who are young or new to a field might wonder if this is just the way things are and if they will have to learn to live with the harassment if they wish to continue their employment.[537] "If they have nothing to compare it to, they may not have an idea of what is normal . . . ."[538] Forced silence normalizes harassment and may lead victims to believe that they must leave the workplace or their chosen field to escape it.[539] This inhibits their ability to earn a living and restrains trade in violation of well-established public policy interests. Taken together, survivors' interests in disclosure should weigh heavily in the "reasonableness" balance.

4. *Public Interests*

Courts have recognized that in many contexts secrecy implicates the public interest as well as the interests of the contracting parties.[540] Thus, courts have admonished that, in addition to balancing the parties' interests, courts should ensure that NDA restrictions are not "so large as to interfere with the public interests."[541] Courts have found that the public has interests in: employees' ability to find work in their chosen field;[542] the free flow of information in markets;[543] integrity in

535. Spector, *supra* note 529.
536. *See id.*
537. *See id.*
538. *Id.*
539. *See id.*
540. *See, e.g.*, Hammons v. Big Sandy Claims Serv. Inc., 567 S.W.2d 313, 315 (Ky. Ct. App. 1978).
541. *Id.* at 315. *See* Mountain Comprehensive Health Corp. v. Gibson, No. 2013–CA–000373–MR, 2015 WL 1194508, at *2 (Ky. Ct. App. Mar. 13, 2015); OVRS Acquisition Corp. v. Cmty. Health Servs., Inc., 657 N.E.2d 117, 126 (Ind. Ct. App. 1995). Some courts have looked to whether or not the breadth of the restriction is harmful to the public good. *See* Concord Orthopaedics Prof'l Ass'n v. Forbes, 702 A.2d 1273, 1276 (N.H. 1997) (holding that referring physicians are not "actual clients" within the meaning of a non-compete and to hold as such would "not foster the public good").
542. *See* Cent. Monitoring Serv., Inc. v. Zakinski, 553 N.W.2d 513, 521 (S.D. 1996).
543. *See* DONALD J. ASPELUND & JOAN E. BECKNEW, EMPLOYEE NONCOMPETITION LAW § 2.1 (2018).

corporate governance;[544] exposing illegal activity;[545] revelations implicating public health and safety;[546] and a discrimination-free workplace.[547] Disclosures of sexual harassment advance all of these interests. This Subsection focuses on the interests in exposing illegal activity and protecting public health and safety, arguing that these interests should inform decisions about the reasonableness of sexual harassment NDAs.[548]

Courts have been dubious of employer attempts to conceal illegality via NDAs.[549] Sexual harassment is illegal. As such, courts should be wary of employer attempts to conceal it against the wishes of survivors. In litigation over the tobacco company Brown & Williamson's attempt to recover incriminating documents that were allegedly stolen from it by a former paralegal, the court explained the perverse incentives that would be created if employers were allowed to contract to conceal their illegal behavior:

> If the B&W strategy were accepted, those seeking to bury their unlawful or potentially unlawful acts from consumers, from other members of the public, and from law enforcement or regulatory authorities could achieve that objective by a simple yet ingenious strategy: all that would need to be done would be to delay or confuse any charges of health hazard, fraud, corruption, . . . or other misdeeds, by focusing instead on inconvenient documentary evidence and labelling it as the product of . . . interference with contracts . . . . The result would be that even the most severe public health and safety dangers would be subordinated . . . in the public mind to the malefactors' . . . contract claims, real or fictitious.[550]

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544. *See* Espinoza v. Hewlett-Packard Co., No. 6000–VCP, 2011 WL 941464, at *10 (Del. Ch. 2011).

545. *See* Bowman v. Parma Bd. of Educ., 542 N.E.2d 663, 667 (Ohio Ct. App. 1988) (refusing to enforce an agreement precluding a school board from disclosing a teacher's history of pedophilia to other school districts); Terry Morehead Dworkin & Elletta Sangrey Callahan, *Employee Disclosures to the Media: When is a "Source" a "Sourcerer"?*, 15 HASTINGS COMM. & ENT. L.J. 357, 387 (1992) (observing that "[a]ll sources of trade secret law observe certain limitations, explicitly or implicitly excluding from protection information concerning wrongdoing").

546. *See Bowman*, 542 N.E.2d at 667 (refusing to enforce an agreement precluding a school board from disclosing a teacher's history of pedophilia to other school districts).

547. *See* Llerena v. J.B. Hanauer & Co., 845 A.2d 732, 737 (N.J. Super. Ct. Law Div. 2002) (holding that there is significant public interest in a discrimination-free workplace) (citing Dixon v. Rutgers, State Univ. of N.J., 541 A.2d 1046, 1063 (1988) (O'Hern, J., concurring)).

548. *See infra* Section IV.C.IV (arguing that courts should be wary of employer attempts to conceal sexual harassment).

549. *See, e.g.*, *Bowman*, 542 N.E.2d at 737.

550. Maddox v. Williams, 855 F. Supp. 406, 415 (D.D.C. 1994).

In addition to the general public interest against concealing illegal activity, the investing public has a specific interest in knowing what types of liability risks companies are exposed to in this domain.[551] In fact, investors have begun demanding clauses in merger agreements representing that executives and managers of the target firm have not been accused of sexual harassment, suggesting a strong investor interest in disclosure of harassment.[552]

Not only is sexual harassment legally prohibited, but it also poses risks to public health and safety.[553] Health and safety are arguably paramount in the hierarchy of public interests recognized by courts.[554] But traditionally, sexual harassment has not been viewed as a public health and safety issue. Rather, it has been viewed as a private harm to an individual who may contract for compensation and silence based on his or her own personal interests.[555] #MeToo has revealed sexual harassment to be a broader public, social, and economic harm by documenting the sheer pervasiveness of sexual harassment in the workplace and by providing compelling personal narratives illustrating the serious harms it causes. #MeToo vividly reinforced what social science research long has documented: that large numbers of individuals experience sexual harassment at work and that the perpetrators are often serial harassers whose behavior is not isolated to one individual.[556] The numbers matter for understanding sexual

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551. *See, e.g.*, EMPOWER Act, H.R. 3728, 115th Cong. (2018) (requiring public companies to report the number of sexual harassment cases they settled and the presence of employees with repeated settlements in their annual SEC filings); Espinoza v. Hewlett-Packard Co., No. 6000–VCP, 2011 WL 941464, at *10 (Del. Ch. 2011) (finding that disclosure of a letter detailing sexual harassment allegations against the Hewlett-Packard CEO would "be valuable to a society concerned with corporate governance and integrity").

552. *See* Nabila Ahmed, *Wall Street is Adding a New 'Weinstein Clause' Before Making Deals*, BLOOMBERG NEWS (Aug. 1, 2018, 11:29 AM), https://www.bloomberg.com/news/articles/2018-08-01/-weinstein-clause-creeps-into-deals-as-wary-buyers-seek-cover [https://perma.cc/3QPD-UKT6] (discussing that these guarantees have come to be known as "#MeToo rep[s]" or "Weinstein clause[s]").

553. *See* Spector, *supra* note 529.

554. *See* Carol M. Bast, *At What Price Silence: Are Confidentiality Agreements Enforceable?*, 25 WM. MITCHELL L. REV. 627, 672 (1999); *see also* Short, *supra* note 512, at 1212.

555. *See* MACKINNON, *supra* note 21.

556. *See* CHAI R. FELDBLUM & VICTORIA A. LIPNIC, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE 6 (2016), https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf [https://perma.cc/EUM5-P5KL] (finding that in a survey of U.S. workers, 25% said that they had experienced sexual harassment in the workplace, 40% reported experiencing one or more behaviors that

harassment as a social rather than an individual problem. As one court opined in allowing discovery about prior sexual harassment despite an NDA, the public's "concern [about sexual harassment] grows more pressing as additional individuals are harmed by identical or similar action."[557] The weight of this interest has also been suggested by recent commentary recommending that sexual harassment NDAs should be kept "in an information escrow that would be released for investigation by the EEOC . . . and other investigative authorities if another complaint is received against the same perpetrator."[558]

In addition, #MeToo stories have made salient the serious harms to health and safety caused by sexual harassment, which have been extensively documented in social science research. Researchers have shown that individuals who experience sexual harassment are at greater risk for a number of health problems, including: increased stress,[559] depression,[560] PTSD,[561] and lower reported psychological wellbeing.[562] These problems can last well beyond the time when the

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would constitute sexual harassment, and 60% experienced insults based on their gender); Remus Ilies et al., *Reported Incidence Rates of Work-Related Sexual Harassment in the United States: Using Meta-Analysis to Explain Reported Rate Disparities*, 56 PERS. PSYCHOL. 607, 607 (2006) (conducting meta-analysis of fifty-five studies of over 86,000 respondents find that 58% of women experienced harassing behaviors in the workplace); Paula McDonald, *Workplace Sexual Harassment 30 Years on: A Review of the Literature* 14 INT'L J. MGMT. REVS. 1 (2012) (estimating based on an overview of then-existing research that between 40–75% of women and 12–31% of men experience workplace sexual harassment).

557. Kalinauskas v. Wong, 151 F.R.D. 363, 366 (D. Nev. 1993).

558. Ian Ayres, *Targeting Repeat Offender NDAs*, 71 STAN. L. REV. 76, 76 (2018).

559. *See* Berdahl & Raver, *supra* note 534; Pina & Gannon, *supra* note 534.

560. *See* Jason N. Houle et al., *The Impact of Sexual Harassment on Depressive Symptoms During the Early Occupational Career*, 1 SOC'Y & MENTAL HEALTH 89, 89 (2011) (finding significantly higher levels of depression in harassed vs. non-harassed workers controlling for factors like work-related stressors, education, and history of depression); Pina & Gannon, *supra* note 534; Amy E. Street et al., *Gender Differences in Experiences of Sexual Harassment: Data From a Male-Dominated Environmen*t, 75 J. CONSULTING & CLINICAL PSYCHOL. 464, 464 (2007).

561. *See* Pina & Gannon, *supra* note 534; Street, *supra* note 560.

562. *See* Berdahl & Raver, *supra* note 534, at 648-49; M. Sandy Hershcovis & Julian Barling, *Comparing Victim Attributions & Outcomes for Workplace Aggression & Sexual Harassment*, 95 J. APPLIED PSYCHOL. 874, 875 (2010); Liberty J. Munson, Andrew G. Miner & Charles Hulin, *Labeling Sexual Harassment in the Military: An Extension and Replication*, 86 J. APPLIED PSYCHOL. 293, 296 (2001); Morten Birkeland Nielsen et al., *Sexual Harassment: Prevalence, Outcomes, and Gender Differences Assessed by Three Different Estimation Methods*, 19 J. Aggression, Maltreatment & Trauma 252, 253 (2010); Pina & Gannon, *supra* note

harassment occurred,[563] and they often manifest as physical symptoms, including pain, nausea, and sleep disorders.[564] These harms are not only personally devastating to survivors but they also may require costly medical treatment, can negatively impact the survivor's broader circle of family and co-workers, and have measurable negative impacts on the broader economy.[565] Workers who have experienced harassment are less productive,[566] have lower levels of organizational commitment[567] and job satisfaction,[568] and have increased turnover rates.[569] Studies have also shown that sexual harassment has negative consequences for bystander witnesses to harassment, who report negative job, health, and psychological outcomes that mirror those experienced by harassment targets.[570]

While the harms of sexual harassment are substantial, they are not always immediately recognized and often remain latent and unaddressed for some period of time, exacerbating the associated health risks.[571] Studies have documented that many victims of behaviors that fit the legal definition of sexual harassment do not identify their experiences as harassment.[572] However, it has been

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534, at 221 (finding that harassment survivors are at greater risk of experiencing anger, fear, sadness, humiliation, and mistrust); Street, *supra* note 560, at 465.

563. *See generally* Houle et al., *supra* note 560 (finding that early career sexual harassment has long-term effects on depressive symptoms later in life).

564. *See* Pina & Gannon, *supra* note 534, at 221; Spector, *supra* note 531. Anecdotally, it has been reported that harassed "[e]mployees talk of having a pit in their stomach commuting to work, having anxiety, panic attacks, inexplicable fits of crying and physical manifestations of stress: hair falling out, hives, weight gain or loss, sleeplessness and lethargy." *Id.*

565. *See infra* notes 566-569.

566. *See* Berdahl & Raver, *supra* note 534, at 649; Pina & Gannon, *supra* note 534, at 220.

567. *See* Berdahl & Raver, *supra* note 534, at 649; Munson, Minor, & Hulin, *supra* note 562, at 296; Pina & Gannon, *supra* note 534, at 220 (finding that less attachment to the employer organization leads to costly work withdrawal behaviors, including being late, neglectful, and avoiding work tasks).

568. *See* Hershcovis & Barling, *supra* note 562, at 874; Nielsen et al., *supra* note 562, at 254; Pina & Gannon, *supra* note 534, at 220.

569. *See* Berdahl & Raver, *supra* note 534, at 649; Hershcovis & Barling, *supra* note 562, at 886; Pina & Gannon, *supra* note 534, at 220.

570. *See* Berdahl & Raver, *supra* note 534, at 650; Pina & Gannon, *supra* note 534, at 221.

571. *See infra* notes 572-575.

572. *See* Ilies et al., *supra* note 556, at 623-24 (finding that less than half of women who reported experiencing harassing behaviors labeled their experience as harassment); Heather McLaughlin, Christopher Uggen & Amy Blackstone, *The Economic and Career Effects of Sexual Harassment on Working Women*, 31 GENDER & SOC'Y 333, 345 (2017) (finding that less than one third of both men and women

shown that discussion about incidents of harassment with co-workers, friends, and family can help individuals recognize their own experiences as harassment and seek help.[573] Critically, failing to recognize sexual harassment does not insulate victims from the harms associated with it.[574] Those harms have been found to affect individuals even if they do not label the harassing behavior they experienced as "sexual harassment."[575] This latent quality exacerbates the potential harms of harassment and heightens the public interest in open and honest dialogue about it.

In addition to social science research documenting the pervasiveness and the harm of sexual harassment, various state and federal statutes provide evidence of the growing consensus that there is a strong public interest in disclosing sexual harassment.[576] Section 178 of the Second Restatement of Contracts indicates that in deciding whether a contract violates public policy, courts should consider, among other factors, "the strength of [the] policy as manifested by legislation or judicial decisions."[577] While courts do not need statutory authority to invoke the public policy exception to NDA enforceability and may rely solely on adverse third-parties impacts, statutory labor law, open records laws, whistleblower protection laws, and the cascade of legislative activity in the wake of #MeToo provide persuasive evidence of the public interest in bringing harassment to light.[578]

The National Labor Relations Act (NLRA) has long been held to forbid employers' use of NDAs to prevent employees from discussing workplace sexual harassment with one another on the grounds that this would violate the act's protections of employees' right to engage in concerted activities for the purpose of mutual aid or

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who experienced harassing behaviors labeled their experience as harassment); Munson, Minor & Hulin, *supra* note 562, at 294.

573. *See* McLaughlin, Uggen & Blackstone, *supra* note 572, at 337.

574. *See* Munson, Minor, & Hulin, *supra* note 562, at 300-01.

575. *Id.* at 293, 300-01.

576. *See* RESTATEMENT (SECOND) OF CONTRACTS ch. 8, topic 1, § 178 (AM. LAW INST. 1981).

577. *Id.*

578. *See* Bowman v. Parma Bd. of Educ., 542 N.E.2d 663, 663 (Ohio Ct. App.) (refusing to enforce an agreement precluding a school board from disclosing a teacher's history of pedophilia to other school districts despite lack of clear statutory authority to do so); Ryan M. Philp, *Silence at Our Expense: Balancing Safety and Secrecy in Non-Disclosure Agreements*, 33 SETON HALL L. REV. 845, 860, 876 (2003) (arguing that legislation is not definitive but can serve "as a judicial guidepost"); Stewart J. Schwab, *Wrongful Discharge Law and the Search for Third-Party Effects*, 74 TEX. L. REV. 1943, 1956-60 (1996).

protection.[579] State open records statutes have provided grounds for some state courts to invalidate NDAs shielding sexual harassment claims settled by government entities.[580] Most states have enacted statutes affording whistleblowers protection "to expose, deter, and curtail wrongdoing."[581] These could support non-enforcement of NDAs used to conceal employer wrongdoing.

Finally, in the wake of #MeToo, there has been a wave of legislative activity explicitly addressing sexual harassment NDAs.[582] New York and Washington have enacted legislation limiting the use of NDAs to conceal harassment or other types of sexual assault.[583]

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579. *See* Phoenix Transit Sys. & Amalgamated Transit Union, Case 28-CA-15177, 337 NLRB No. 78 (N.L.R.B 2002) (ordering employer to cease and desist from "[m]aintaining or enforcing a rule which prohibits employees from discussing among themselves their sexual harassment complaints" based on their rights under Section 7 of the National Labor Relations Act to engage in concerted activities for the purpose of mutual aid or protection).

580. *See* Pierce v. St. Vrain Valley Sch. Dist., 944 P.2d 646, 649-51 (Colo. App. 1997) (concluding based on the existence of state open records laws that the provisions of a settlement agreement "prohibiting discussion or disclosure of the circumstances surrounding plaintiff's resignation and prohibiting disparaging comments or remarks are void as a violation of public policy"; overturned on the grounds there was no statutory directive guiding that decision); Asbury Park Press v. Cty. of Monmouth, 966 A.2d 75, 75, 79 (N.J. Super. Ct. App. Div. 2009) (reversing the trial court and ordering the County to disclose documentation of a sexual harassment settlement with one of its employees to journalists despite a confidentiality agreement: "The trial court found it significant that [the harassment victim] and the County included terms of confidentiality in their settlement agreement. But the parties' agreement cannot override the public's right of access under OPRA.").

581. Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of State Whistleblower Protection*, 38 AM. BUS. L.J. 99, 100 (2000) (discussing that in 2000, all fifty states had whistleblower protection statutes; in 2010, some states had removed these statutes); 2012 Whistleblowing Legislation, NAT'L CONFERENCE OF STATE LEGISLATURES (Nov. 19, 2012), http://www.ncsl.org/research/labor-and-employment/2012-whistleblower-legislation.aspx [https://perma.cc/QW4B-TEXB].

582. *See, e.g.*, S.B. S6382A (N.Y. 2018); S.B. 5996 (Wash. 2018); CAL. CODE OF CIV. P. § 1002 (2017).

583. *See* S.B. S6382A (N.Y. 2018) (prohibits nondisclosure clauses in any settlement, agreement or other resolution of a claim or cause of action, the factual foundation for which involves sexual harassment unless the agreement expressly states that it is the complainant's preference to include such a confidentiality provision); S.B. 5996 (Wash. 2018) (prohibits employers from requiring employees to sign, as a condition of employment, a NDA preventing them from "disclosing or discussing sexual harassment or sexual assault occurring in the workplace, at work-related events coordinated by or through the employer, or between employees, or between an employer and an employee, off the employment premises" and provides that such agreements—including nondisclosure agreements that predate the new law—will be void and unenforceable); *see also* CAL. CODE OF CIV. P. § 1002 (2017)

Similar legislation has been introduced in Kansas, New Jersey, and Pennsylvania.[584] A bipartisan group of U.S. senators introduced the EMPOWER Act, which would prohibit NDAs covering sexual harassment as "a condition of employment, promotion, compensation, benefits or change in employment status"[585] and render such existing NDAs unenforceable.[586] This groundswell of legislative activity, viewed against the backdrop of state statutes providing more generalized protections for employees and whistleblowers, provides strong evidence of a public interest in disclosure.

That said, there are public interests in secrecy that should be considered as well. Many survivors of harassment prefer confidentiality to public disclosure.[587] As one member of the employment defense bar put it, "With the possible exception of Gloria Allred, almost nobody wants attention to be drawn to a sexual harassment case"—including survivors.[588] This means that there is a public interest in maintaining the option for survivors to negotiate for enforceable confidentiality provisions in agreements settling harassment claims. Some have argued that finding sexual harassment NDAs unenforceable would make them unavailable to the many survivors who want them because employers and accused harassers would either refuse to settle harassment claims or would not be willing to pay significant compensation to a survivor to settle claims that could later be made public with impunity.[589] These are serious concerns. However, it is not clear that abrogating NDAs to permit public disclosures by the small handful of survivors who decide to go public after signing an NDA would radically alter settlement practices by employers and employees in run-of-the-mill cases. As discussed above, such disclosures are already permitted in court, to regulatory

(prohibiting non-disclosure provisions in cases involving a felony sex offense, childhood sexual abuse, sexual exploitation of a minor, and sexual assault).

584. H.B. 2695 (Kan. 2018) (prohibiting state funds distribution to pay sexual harassment claims and prohibiting non-disclosure agreements for sexual harassment settlements in "certain circumstances"); S.B. No. 121 (N.J. 2018) (barring agreements that conceal details of discrimination claims); S.B. No. 999 (Pa. 2018) (prohibiting NDAs within contracts or secret out-of-court settlements related to sexual harassment or misconduct).

585. EMPOWER Act, S. 2994 (a)(1) 115TH Cong. (2018).

586. *See* EMPOWER Act, § (a)(2).

587. *See* Robin Shea, *In Defense of Confidentiality (Yes, Even In Harassment Cases)*, CONSTANGY, BROOKS, SMITH & PROPHETE LLP (Jan. 12, 2018), https://www.constangy.com/employment-labor-insider/ban-confidentiality-in-sex-harassment-settlements-youll [https://perma.cc/9RKF-WZ4R].

588. *Id.*

589. *See id.*

agencies, and to fellow employees.[590] Nonetheless, there is no evidence that these broad exceptions have inhibited employers' use of sexual harassment NDAs.[591] The continued availability of NDAs to those survivors who want them is an empirical question that can only be answered in time as law and practices evolve in response to changing norms. The ability of survivors to negotiate meaningfully for confidentiality is an interest that courts should consider as these cases come before them.

D. The "Reasonableness" Standard as a Reasonable Way Forward

As indicated above, rather than wait for common law standards governing sexual harassment NDAs to develop, some states are proceeding with legislation to enact categorical rules that presumably reflect the legislature's view of the appropriate balance of employer, employee, and public interests. For instance, New York's recently enacted statute prohibits nondisclosure clauses in any settlement, agreement, or other resolution of a claim or cause of action, "the factual foundation for which involves sexual harassment," unless the agreement expressly states that it is the "complainant's preference" to include such a confidentiality provision.[592] Washington state's proposed legislation prohibits employers from requiring employees to sign sexual harassment NDAs as a condition of employment, but it allows employers and employees to negotiate confidentiality provisions as a part of settlement agreements.[593]

Even if such statutes embody sound policy, they do not diminish the importance of the common law's case-by-case approach to reasonableness assessments. First, most states have not enacted statutes addressing sexual harassment NDAs. The common law is the only avenue for addressing them in these jurisdictions. Second, even in states with statutes governing sexual harassment NDAs, questions are likely to arise over whether agreements reached in compliance with the statute are nonetheless unreasonable. For instance, Washington's statute permits NDAs reached as part of settlement agreements, and these might be unreasonable under common law

590. *See supra* Subsections IV.B.-C.

591. *See* Ayres, *supra* note 558, at 85 (suggesting that employers continue to draft NDAs that prohibit lawful disclosures and arguing that sexual harassment NDAs should only be enforceable if they explicitly disclose the rights that survivors retain to report the perpetrator's behavior to the EEOC and other investigative authorities).

592. S.B. S6382A (N.Y. 2018).

593. *See* S. 5996, 65th Leg., Reg. Sess. (Wash. 2018).

standards in some circumstances.[594] Similarly, some have argued that New York's requirement that an NDA be the "complainant's preference" swallows the statute's prohibition on NDAs because employers will refuse to settle claims without including a boilerplate "complainant's preference" clause.[595] Nominally compliant NDAs in which signers are forced to assert an affirmative preference for confidentiality might well be unreasonable under common law standards.[596] Finally, this is an area where norms, standards, and practices are evolving rapidly; the social ground is shifting beneath our collective feet. The appeal of the "reasonableness" analysis described in this section is that it allows for a different balance to be struck under different factual circumstances and for enforceability standards to evolve with norms and practices.

## CONCLUSION

Polling data suggests that judges may soon face an avalanche of opportunities to reflect on the impact of the norm cascade on the law: 38% of Americans in a recent Gallup poll said that recent events have made them more likely to sue.[597] Plaintiffs' employment lawyers and human resources professionals report being deluged with sexual harassment complaints.[598] An NBC–*Wall Street Journal* poll found that 78% of women are now more likely to speak out if they feel they are being treated unfairly due to their gender, and 77% of men say they

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594. *See* Wash. S.B. 5996 (2018).

595. John L. Valentino, *Will N.Y. Law Banning Non-Disclosure Agreements Eliminate Their Use?*, BOUSQUET HOLSTEIN, PLLC (Aug. 16, 2018), http://bhlawpllc.com/publication/will-n-y-law-banning-non-disclosure-agreements-eliminate-their-use/ [https://perma.cc/2N47-S463].

596. *See generally id*. Indeed, it is particularly important for courts to police the reasonableness of such NDAs, as employers are likely to point to "complainant's preference" clauses as evidence that an agreement is presumptively valid even if they do not meaningfully reflect the complainant's preferences. *Id*.

597. Saad, *supra* note 63.

598. *See* Amelia Gentleman & Joanna Walters, *#MeToo is Raising Awareness, But Taking Sexual Abuse to Court is a Minefield*, GUARDIAN (Oct. 20, 2017, 7:06 PM), https://www.theguardian.com/world/2017/oct/21/metoo-is-raising-awareness-but-taking-sexual-abuse-to-court-is-a-minefield [https://perma.cc/AV24-C22Y]; *see also* Yuki Noguchi, *#MeToo Complaints Swamp Human Resources Departments*, NPR (June 4, 2018, 2:30 PM), https://www.npr.org/2018/06/04/615783454/-metoo-complaints-swamp-human-resource-departments [https://perma.cc/CBS6-45QY]; Maya Rhodan, *#MeToo Has 'Tripled' Web Traffic for the Federal Agency That Investigates Harassment*, TIME (June 12, 2018), http://time.com/5308836/sexual-harassment-metoo-eeoc-complaints/ [https://perma.cc/CHE4-UBGD].

are more likely to speak out now if they see a woman being unfairly treated for the same reason.[599] Perhaps more radically, women who experience sexual harassment are now much more likely to recognize it as such.[600]

This dramatic change in norms around sexual harassment has occurred in a very short period of time. Courts must take these new norms into account in deciding sexual harassment cases today. These new norms define what it means to be a "reasonable jury" or a

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599. Carrie Dann, *NBC/WSJ Poll: Nearly Half of Working Women Say They've Experienced Harassment*, NBC NEWS (Oct. 30, 2017, 7:00 AM) https://www.nbcnews.com/politics/first-read/nbc-wsj-poll-nearly-half-working-women-say-they-ve-n815376 [https://perma.cc/4USY-6PCG].

600. *See, e.g.*, CHAI FELDBLUM & VICTORIA LIPNIC, REPORT OF THE CO-CHAIRS OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE 8-10 (2016) (describing shifts in public perception regarding sexual harassment). Historically, polling questions that asked if respondents had experienced specific behaviors (behavioral questions) found sharply higher levels of sexual harassment than did polling questions that asked simply whether the respondent had experienced sexual harassment (direct inquiries). *See, e.g.*, Berdahl & Raver, *supra* note 534, at 642-43. Today, that gap has largely closed, with roughly 60% of women now reporting sexual harassment in direct-inquiry polling. FELDBLUM & LIPNIC, *supra* note 600, at 9. By comparing rates of harassment measured through direct-inquiry and behavioral questions, research has repeatedly shown that only half of all women who have been sexually harassed identify their experiences as "sexual harassment." *See* Iles et al., *supra* note 556, at 607. One meta-analysis of fifty-five studies including over 86,000 respondents found that 58% of women had experienced behaviors that qualified as harassment, but less than half of these women were willing to label them as such. *Id.* This trend is particularly well exemplified in an extensive report released by an EEOC task force in June 2016. *See* FELDBLUM & LIPNIC, *supra* note 600, at 8-10. According to the report, when asked directly (in surveys) if they had experienced sexual harassment, only 25% of women said yes. *Id.* When respondents were given a list of behaviors considered harassing by researchers and asked what they had personally experienced within a given time frame, the rate of harassment rose to 40%. *Id.* at 8-9. When including questions related to gender harassment (i.e. sex-based put downs rather than come-ons) the rate rose to 60% of women. *Id.* at 9. According to polls conducted post the explosion of the #MeToo movement, now between 42–60% of women report being sexually harassed when asked directly, a dramatic shift from only 25% in 2016. *See, e.g.*, *60% of U.S. Women Say They've Been Sexually Harassed Quinnipiac University National Poll Finds; Trump Job Approval Still Stuck Below 40%*, QUINNIPIAC UNIV. (2017), https://poll.qu.edu/national/release-detail?ReleaseID=2502 [https://perma.cc/9JVJ-96WN]. Given that the rate of workplace sexual harassment has remained relatively stable over time, the dramatic increase in the number of women who say they have been sexually harassed is most likely due to a shift in perception; the #MeToo movement has changed the way women view their workplace interactions and has led many to newly label what they have long experienced as "sexual harassment." *See* Iles et al., *supra* note 556, at 625 (finding generally that rates of workplace sexual harassment have remained constant over time).

"reasonable person in the plaintiff's position." They define what information an employer may "reasonably" ask an employee to conceal about sexual harassment. In short, they define what's "reasonable" now.

Our request is modest: Let juries play their proper role in applying the "reasonableness" standards. These standards are designed to allow juries "to make commonsense determinations about human behavior, reasonableness, and state of mind based on objective standards."[601] They are meant to ensure that sexual harassment law is informed by community standards of appropriate behavior in the workplace.[602] Federal judges should allow juries to do the difficult work of grappling with facts and establishing norms about what conduct is considered appropriate in the age of #MeToo. If the polls are any indication, most of us already know.

601. Arthur R. Miller, *The Pretrial Rush to Judgment: Are the "Litigation Explosion," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 NYU L. REV. 982, 1134 (2003).

602. *See* Beiner 1999, *supra* note 126, at 82.

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Diane P. Wood

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# Sexual Harassment Litigation with a Dose of Reality

*Diane P. Wood*[†]

Title VII of the Civil Rights Act of 1964,[1] which prohibits discrimination on the basis of "race, color, religion, *sex*, or national origin"[2] has been around for 55 years. One might think that this was long enough to work out the kinks and ensure that its protections are readily available to any covered person who needs them. But at least parts of the statute are still works-in-progress. Prominent among the latter group is the prohibition against "discriminat[ion] against any individual with respect to his [sic] compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex."[3] There is much one could say about this, starting with the question "what does the word 'sex' mean here?"[4] But that topic, important though it is, deserves its own Symposium.[5] The focus of today's discussion is the #MeToo Movement. If there is any message to be taken from the explosive growth of that hashtag, it is that there is still a great deal of work to be done if the goal is to eliminate sexual harassment and related abusive behaviors.

Why is that? As I just said, statutory protections against sex discrimination in the workplace have existed for more than half a century,

[†] Chief Judge, U.S. Court of Appeals for the Seventh Circuit; Senior Lecturer in Law, The University of Chicago. I wish to thank Adam Davidson, Andrew Miller, and Elizabeth Reese for their invaluable assistance in the preparation of this article.

[1] 42 U.S.C. § 2000e *et seq.* (2012).

[2] 42 U.S.C. § 2000e-2(a)(1) (emphasis added).

[3] *Id.*

[4] *See* Hively v. Ivy Tech Comm. College of Ind., 853 F.3d 339, 340 (7th Cir. 2017) (en banc) (construing the word "sex" to encompass classifications based on sexual orientation); Whitaker v. Kenosha Unified Schl. Dist. No. 1 Bd. of Educ., 858 F.3d 1034, 1038 (7th Cir. 2017) (applying Title IX protections to transgender high school student on sex-stereotyping theory).

[6] *See, e.g.*, Zarda v. Altitude Express, Inc., 883 F.3d 100, 121 (2d Cir. 2018) (en banc) (agreeing with *Hively*); Wittmer v. Phillips 66 Co., 915 F.3d 328, 330 (5th Cir. 2019) (disagreeing with *Hively*).

and there are comparable protections in other specialized settings, including housing,[6] educational institutions,[7] and public benefits.[8] The flood of stories that has emerged in the wake of the #MeToo Movement, however, strongly indicates that those legal rules are not doing the job. The question is why not? And in particular, why have the laws addressing #MeToo in the workplace not been a match for the problem? This inquiry sheds light both on changes that may be especially useful, and on the competing interests that will have to be addressed.

Let's start with the basics: what does *discrimination* on the basis of sex mean? Does it mean classifying one's employees by biological gender and paying the males more money? Certainly yes, but that isn't all it means. Does it mean excluding one sex on the basis of characteristics unique to it—pregnancy for women, susceptibility to prostate cancer for men, and so on? This is a more difficult question in some instances, but Congress has answered it in others. For example, the Pregnancy Discrimination Act of 1978[9] clarifies that the terms "because of sex" or "on the basis of sex" include actions taken on the basis of pregnancy, childbirth, or related medical conditions.[10] For issues covered by that statute, at least, the answer to the second question is also yes. But what about sexual harassment?

For more than two decades after Title VII was enacted, it seems fair to say that very few people imagined that the statute addressed sexual harassment. Some, however, realized that few things affect a person's "terms and conditions of employment" more than sexual harassment. In 1979, Catharine MacKinnon published her groundbreaking book entitled simply "Sexual Harassment of Working Women: A Case of Sex Discrimination."[11] The book revolutionized thinking in this area. In what must be record time for a legal scholar, MacKinnon's concept made its way up to the Supreme Court in 1986, in a case called *Meritor Savings Bank, FSB v. Vinson.*[12] There, in an opinion by then-Associate

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[6] Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (codified at 42 U.S.C. § 3601 *et seq.*).

[7] Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 373 (codified as amended at 20 U.S.C. § 1681 *et seq.*).

[8] *See, e.g.*, Califano v. Goldfarb, 430 U.S. 199, 223 (1977) (finding that gender-based discrimination in the criteria for awarding social security survivor benefits violated the Constitution's due process and equal protection guarantees); Weinberger v. Wiesenfeld, 420 U.S. 636, 642–44 (1975) (striking down as unlawful sex discrimination in violation of equal protection a provision basing social security benefits based only on the earnings of a deceased husband, and not on earnings of a deceased wife).

[9] Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e-(k)).

[10] 42 U.S.C. § 2000e(k).

[11] CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979).

[12] 477 U.S. 57 (1986).

Justice William Rehnquist, the Court recognized that sexual harassment is covered by Title VII. In so doing, it settled several important questions:

- When a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor discriminates on the basis of sex.[13]
- The language of Title VII is not limited to economic or tangible discrimination. The phrase "terms, conditions, or privileges of employment" evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment.[14]
- Sexual misconduct constitutes prohibited sexual harassment, whether or not it is directly linked to the grant or denial of an economic quid pro quo, where such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[15]
- A plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.[16]
- For sexual harassment to be actionable, it must be sufficiently severe *or* pervasive to alter the conditions of the victim's employment and create an abusive working environment.[17]
- The fact that sex-related conduct is "voluntary," in the sense that the complainant has not been forced to participate against her will, is not a defense to a sexual-harassment suit brought under Title VII. The gravamen of any sexual harassment claim is that the alleged sexual advances were "unwelcome."[18]

The Supreme Court has reaffirmed these rulings over the years. In 1993, in the case of *Harris v. Forklift Systems, Inc.*,[19] it held that har-

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[13] *Id.* at 64.

[14] *Id.*

[15] *Id.* at 65.

[16] *Id.* at 66.

[17] *Id.* at 67.

[18] *Id.* at 68.

[19] 510 U.S. 17 (1993) (former employee brought suit against her employer, arguing the company president's gender-based insults and innuendos created an abusive work environment. While the lower court held that the comments were not so severe as to affect her psychological well-being nor to cause her injury, the Supreme Court ultimately held "when the workplace is permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to

assment need not reach the level of tangible psychological injury in order to be actionable.[20] In *Oncale v. Sundowner Offshore Services, Inc.*,[21] it recognized that harassment at the hands of a person of the same sex as the victim falls within the statute.[22] In the twin cases of *Burlington Industries, Inc. v. Ellerth*[23] and *Faragher v. City of Boca Raton,*[24] it set forth the rules for linking a supervisor or other actor's conduct to the employer; those rules in turn establish when the employer will be vicariously liable for misconduct. It is worth stressing in this connection that the link to the ultimate employer is critical—indeed, it is outcome-determinative for purposes of a Title VII action. Courts have held that Title VII creates a remedy *only* against the "employer."[25] From that, they infer that the offender, whether a supervisor, a fellow employee, a customer, or another workplace participant, is *not* individually liable under the statute.[26] Unless, therefore, a state-law theory exists, or another federal statute is available (often true in racial discrimination and harassment cases),[27] the plaintiff can proceed only indirectly against the offending party, by pursuing an action against the employer.

The need to link the offending behavior to the employer is thus one of the hurdles that a victim of sexual harassment must surmount. But it is far from the only one. Most cases do not make it all the way up to the Supreme Court, and the Court chooses only those in which a broader point needs to be made. It is the district courts and the courts of appeals that have the responsibility of sifting through the filed cases and deciding at retail who wins and who loses. At that level, it becomes apparent that even blatant cases of sexual harassment frequently fail.

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alter the conditions of the victim's employment and create an abusive working environment,' Title VII is violated").

[20] *Id.* at 21–22.

[21] 523 U.S. 75 (1998) (the male plaintiff quit and brought a sexual harassment claim against his employer after male crewmen on the oil rig where he worked subjected him to sexual humiliation, sexual assault, and threats of rape).

[22] *Id.* at 81–82.

[23] 524 U.S. 742, 765 (1998) (holding that an employer is vicariously liable for harassment perpetrated by an employee with higher authority over the victim, and noting that this liability is strict if there are tangible job consequences, but if there are no tangible job consequences, the employer may avail itself of an affirmative defense, which requires a showing that the employer exercised reasonable care to "prevent and correct promptly any sexually harassing behavior" and that the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided").

[24] 524 U.S. 775, 780 (1998) (holding that, in cases not involving a tangible employment action, an employer may raise an affirmative defense that "looks to the reasonableness of employer's conduct in seeking to prevent and correct harassing conduct and to the reasonableness of employee's conduct in seeking to avoid harm").

[25] *See, e.g.*, Williams v. Banning, 72 F.3d 552, 555 (7th Cir. 1995); Fantini v. Salem State Coll., 557 F.3d 22, 29 (1st Cir. 2009).

[26] *Id.*

[27] *See, e.g.*, 42 U.S.C. § 1981 (2012).

This paper looks at those cases and asks what went wrong and whether changes in the law are necessary, or if on the other hand the plaintiffs' failures occur as a result of competing policies. Importantly, because more than 98% of all civil litigation is resolved short of a trial, the facts in the cases discussed here are generally not contested: at the motion-to-dismiss stage, the court accepts the facts and inferences in favor of the opponent of the motion;[28] at the summary judgment stage, the court reviews the proffered evidence in the light most favorable to the plaintiff (or more accurately, the non-moving party, as plaintiff normally is in an employment-discrimination case).[29] Yet even with this thumb on the scale, plaintiffs lose an impressive percentage of cases. Sometimes they lose because the court concludes that the described conduct is not severe enough, or not pervasive enough, to affect the terms and conditions of employment.[30] Sometimes, based on the same notion, courts actually overturn jury verdicts for plaintiffs.[31] In other instances, plaintiffs lose because they do not adequately inform the employer of the abuse that is going on.[32] In another line of cases, the court does not see the connection between the harassing acts and the plaintiff's sex.[33] Plaintiffs lose notwithstanding facts that strongly suggest harassment, if they make a mistake and choose the wrong legal theory—for example, if they complain to the Equal Employment Opportunity Commission about sex discrimination, but the facts are later judged to be a better fit for unlawful retaliation.[34] In one egregious instance described below, the EEOC took over a complaint and secured a victory on liability, but the battle then shifted to punitive damages. A jury thought that these damages were appropriate, but the court of appeals overturned the

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[28] *See, e.g.*, Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009) ("When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."); Acosta v. Jani-King of Okla., Inc., 905 F.3d 1156, 1158 (10th Cir. 2018); Progressive Credit Union v. City of New York, 889 F.3d 40, 48 (2d Cir. 2018).

[29] *See* Scott v. Harris, 550 U.S. 372, 380 (2007); Matsushita Elec. Indus. Co., v. Zenith Radio Corp., 475 U.S. 574, 588–89 (1986); Hutchison v. Fitzgerald Equip. Co., 910 F.3d 1016, 1021–22 (7th Cir. 2018).

[30] *See, e.g.*, Saxton v. Am. Tel. & Tel. Co., 10 F.3d 526, 528 (7th Cir. 1993) (upper thigh rubbing, unwanted kissing, leaping out from behind bush); Hilt-Dyson v. City of Chicago, 282 F.3d 456, 463–64 (7th Cir. 2002) (leering, touching); Bilal v. Rotec Indus., 326 Fed. App'x 949, 952–53 (7th Cir. 2009) (inviting sex, sticking chocolate into plaintiff's mouth). *But see* Hostetler v. Quality Dining, Inc., 218 F.3d 798, 801 (7th Cir. 2000) (overturning a district court that dismissed a case on the ground that the conduct was not sufficiently severe).

[31] *See, e.g.*, Baskerville v. Culligan Int'l Co., 50 F.3d 428, 432–33 (7th Cir. 1995) (overturning a district court ruling in favor of the plaintiff on the grounds that the plaintiff's alleged harasser neither touch her nor asked her to go on a date or have sex with him).

[32] *See, e.g.*, Zimmerman v. Cook Cty. Sheriff's Dept., 96 F.3d 1017, 1019 (7th Cir. 1996); Perry v. Harris Chernin, Inc., 126 F.3d 1010, 1014–15 (7th Cir. 1997); Faragher v. City of Boca Raton, 524 U.S. 775, 782–83 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 748–49 (1998).

[33] *See* Berry v. Delta Airlines, Inc., 260 F.3d 803, 810–11 (7th Cir. 2001).

[34] *See, e.g.*, *id.* at 809–10.

jury's verdict because it found that the instructions did not give the jury enough latitude to take into account the relevant collective bargaining agreement.

Other problems lie behind these observable results. As the law has developed, in all but a small number of cases nothing can or will happen unless the victim reports the abuse or harassment in a timely and complete manner. But reporting is often difficult, both psychologically and practically. Reporting mechanisms and confidentiality measures are notoriously leaky. Victims fear either ineffectual responses or retaliation. Victims also fear, with some warrant, that they will not be believed or that the seriousness of the problem will not be appreciated. In those instances, the victim might wind up as the party paying a price for the offensive conduct, through a transfer to a less desirable location, a move to a different job, or in the most extreme cases, even dismissal. Investigations of complaints may be cursory, and their results may rest on credibility determinations that are themselves questionable.

To address these and related problems, changes in the law may be necessary. One area ripe for re-examination is the distinction the Supreme Court has recognized between supervisory harassment and fellow-employee or customer harassment. Another area where greater scrutiny would help is that of preventive measures and remedies. It is, or at least should be, shocking that 80% of women report that they have experienced sexual harassment, and many men have also been victimized. That must stop.

A closer look at some cases in this area will drive these points home. The specific examples presented here come from the Seventh Circuit; in addition, I discuss the preliminary results of a broader survey of the cases that have reached the federal courts of appeals since *Meritor*.[35] One might view the Seventh Circuit examples as the legal version of the popular TV show "Mythbusters." In the spirit of that show, these cases debunk the idea that companies and individuals are routinely found liable for sexual harassment based on innocuous or misunderstood behavior (e.g., "you look nice today," or "let me hold the door for you"). The reality is otherwise: the innocuous actions never get litigated, or if they do, they are quickly thrown out of court, while even truly awful actions frequently fall outside the scope of the law as a result of one or more of the doctrines mentioned earlier. It is worth considering whether those doctrines are performing a valuable function, or if they need to be modified or jettisoned altogether.

The Seventh Circuit cases almost all involve behavior described by the victim of harassment—and accepted by the court because the appeal

[35] 477 U.S. 57 (1986).

is from a motion to dismiss or the grant of summary judgment—that was *not* enough to allow the victim to go forward with her case. For want of a better organizational mechanism, they are presented in chronological order.

The first example is the case of *Saxton v. American Telephone & Telegraph Co.*[36] Plaintiff Saxton began working for AT&T's Design Engineering Staff in 1986.[37] Shortly after she joined the company, she encountered a supervisor in the International Division named Jerome Richardson.[38] The two struck up a casual acquaintance and discussed the question whether Saxton might transfer to Richardson's group.[39] Richardson boasted that he could bring Saxton into his group with a job classification (called MTS) that typically required a bachelor of science degree in engineering or a related field from a reputable university, even though Saxton had only a bachelor of arts degree in computer science from a lesser-known college.[40] Saxton's supervisor told her that the supervisor doubted that Saxton could be transferred into the MTS job.[41] Saxton, however, decided to give the transfer a try; she accepted Richardson's offer and joined his group in January 1988.[42] The former supervisor's qualms were vindicated when, in February or March, Richardson informed Saxton that she actually did not have the MTS job, but instead had a lower classification.[43] Richardson assured her that the opportunity for the promotion was still available, if she performed satisfactorily. As far as the record shows, however, "she never received the MTS promotion."[44]

Then matters took a disturbing turn. In April 1988, Richardson suggested that Saxton and he should meet for drinks after work.[45] Saxton accepted, hoping to discuss her dissatisfaction with her initial lab assignment.[46] The two spent a couple of hours at a suburban nightclub and then drove to a jazz club in Chicago.[47] As the court's opinion recounts, "[w]hile they were at the jazz club, Richardson placed his hand on Saxton's leg above the knee several times and once he rubbed his

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[36] 10 F.3d 526 (7th Cir. 1993).

[37] *Id.* at 528.

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] Saxton v. Am. Tel. & Tel.Co., 10 F.3d 526, 528 (7th Cir. 1993).

[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

hand along her upper thigh."[48] Saxton rebuffed his advances and asked him to stop. She warned him that this behavior could lead to trouble.[49] Richardson, however, was not deterred: on the way out of the club, he pulled Saxton aside and kissed her. She pushed him away after two or three seconds.[50] Once again, Saxton asked him not to repeat his advances, and he seemingly acquiesced.[51] The next morning at work, Saxton reiterated her request that he cease the sexual advances. At the time, Richardson apologized and assured her that he would respect her wishes.[52]

Richardson did not keep his word, as one can see from the court's account of the case:

> Approximately three weeks later, Richardson invited Saxton to lunch with the stated purpose of discussing work-related matters. Afterwards, Richardson was driving Saxton back to her car when he took a detour to an arboretum, stopped the car, and got out to take a walk. Saxton decided to follow suit and walk off on her own. As she did so, Richardson suddenly "lurched" at her from behind some bushes, as if to grab her. Saxton ran several feet in order to avoid Richardson's sudden motion. She again reminded Richardson that his conduct was inappropriate, causing him to become sullen. They then resumed the drive back to Saxton's car without further incident.[53]

After the arboretum incident, Richardson ceased any sexual advances toward Saxton.[54] Saxton then sued for sexual harassment, but her case was dismissed. Here is the court's explanation for its result: "Although Richardson's conduct was undoubtedly inappropriate, it was not so severe or pervasive as to create an objectively hostile working environment."[55] In addition, the court said, AT&T took adequate remedial steps.[56]

Example number two is *Baskerville v. Culligan International Co.*[57] This result was, if possible, even less favorable to the claimant, in whose

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[48] *Id.* at 528.

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.* at 529.

[55] *Id.* at 534.

[56] *Id.* at 535–36.

[57] 50 F.3d 428 (7th Cir. 1995), *abrogated by* Gates v. Bd. of Educ. of the City of Chicago, 916 F.3d 631, 640 (7th Cir. 2019).

favor a jury had ruled at the trial level, but who lost in the court of appeals.[58] Baskerville was hired as a secretary in the marketing department of Culligan, a manufacturer of water-treatment products.[59] Shortly after she joined the company, she was assigned to work for Michael Hall, who had recently been hired to be the Western Regional Manager.[60] Here are the acts of sexual harassment about which Baskerville was complaining, some of which may seem trivial, others more serious:

- He would call her "pretty girl."
- When she was wearing a leather skirt, he made an obnoxious sound as she was leaving his office.
- In response to her comment about how hot his office was, he raised his eyebrows and said, "Not until you stepped your foot in here."
- When the company was broadcasting an announcement over the public address system, Hall said to Baskerville, "You know what that means, don't you? All pretty girls run around naked."[61]
- He once called Baskerville a "tilly," a term that he admitted using for all women.
- He told her that his wife had said that he had "better clean up [his] act" and "better think of [Baskerville] as Ms. Anita Hill."
- He told Baskerville that he left a Christmas party early because he thought he might "lose control" with "so many pretty girls there."[62]
- When she complained about cigarette smoke in Hall's office, he replied "Oh really? Were we dancing, like in a nightclub?"[63]
- When Baskerville checked to see if Hall had sent his wife a Valentine's Day card, he responded that he had not. He continued by saying that it was lonely in his hotel room, where he lived alone while awaiting his wife's move to Chicago, and he had nothing but his pillow for company. At that point, he made a gesture intended to suggest masturbation.[64]

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[58] *Id.* at 430.
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*

Using a standard that the courts have since rejected, under which actionable harassment occurs only if the workplace becomes "hellish" for the victim,[65] the court of appeals found as a matter of law that no jury could conclude that these incidents added up to harassment.[66] In addition, as in *Saxton*, the court was impressed that the company took some steps to protect the victim.[67] Although one might think that the later disapproval of the "hellish" standard is a step forward, we will see that later cases confirm that it is still necessary to show both subjective and objective offensiveness, and that the latter must be enough to affect terms and conditions of employment.

The facts of the next example, *Zimmerman v. Cook County Sheriff's Department*,[68] are more graphic. Michelle Zimmerman was employed as a correctional officer by the Cook County Sheriff's Department.[69] In August of 1992 a fellow officer, Salvatore Terranova, launched a campaign of inappropriate sexual remarks and behavior.[70] For example, he repeatedly referred to his "big dick."[71] His worst act, however, took place on August 14, "when he placed a zucchini between his legs and thrust it against [Zimmerman]'s buttocks."[72] Three days later, she asked her supervisor for a change in work assignment. She did not tie her request directly to Terranova's offensive sexual conduct; she complained only of "a severe personality conflict at my present job."[73] Her supervisor turned her down the next day without conducting any investigation.[74] After a brief time during which the Sheriff's Office separated the two, Zimmerman was reassigned to Terranova's area.[75] He picked up where he had left off.[76] This time, his behavior was even more offensive: the opinion reports that on one occasion, "he grabbed one of her breasts,

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[65] For instance, in Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993), the Supreme Court confirmed that "Title VII comes into play before the harassing conduct leads to a nervous breakdown." *Id.* at 22. It continued, "[a] discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing their careers." *Id. See also* Swyear v. Fare Foods Corp., 911 F.3d 874, 881 (7th Cir. 2018) ("While 'hellish' was once the standard, it is no longer. The Supreme Court standard dictates that the discrimination just be only so severe or pervasive so as to affect the terms and conditions of employment. . . . This is a far cry from hellish.") (citations and quotation marks omitted).

[66] Baskerville v. Culligan Int'l Co., 50 F.3d 428, 431 (7th Cir. 1995).

[67] *Id.*

[68] 96 F.3d 1017 (7th Cir. 1996).

[69] *Id.* at 1018.

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.*

grabbed and rubbed her buttocks, and grabbed her by her wrists and yanked her arms down, injuring one of her arms."[77] The next day, she submitted detailed memoranda concerning these incidents to her superiors.[78] During their investigation, which exonerated Terranova, they separated the two.[79] Shortly afterward she went on disability leave and did not return to her job for a year.[80] The one-year hiatus apparently resolved her remaining workplace problems with Terranova, with whom she had no further contact on the job.[81] She did not, however, acquiesce in his behavior. To the contrary, she filed criminal charges against Terranova. Interestingly, even though he had been exonerated by the Sheriff's Department, he was convicted of sexual assault.[82] Nevertheless, Zimmerman lost her civil sexual harassment action.[83] The problem this time? Insufficient notice to the employer of the nature of the problem she had with Terranova.[84]

The case of *Perry v. Harris Chernin, Inc.*,[85] also failed for lack of adequate notice to the employer.[86] This was an example of less intrusive, but persistent, inappropriate remarks. For instance, about six months into plaintiff Perry's employment, Jackson commented to her, "You know you want me, don't you?"[87] It did not take long for Jackson to escalate his advances. He called Perry to his office a couple of months later on the pretext of discussing her performance.[88] And that is how the conversation began: Jackson commented on Perry's absenteeism. But he then said, "By the way, [in] your interview, I saw your breasts. I saw your nipples . . . . You wore a low-cut blouse, and I could see your breasts, and I knew your nipples were hard."[89] On another occasion, Jackson told Perry that he would "beat [her] with the stick [her] husband used."[90] She understood him to be referring to his penis and his desire to have sex with her.[91] Other inappropriate remarks followed, including comments about her waking up next to him in bed, about whether she was a "screamer," and the observation that she "wore her

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[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.* at 1019.
[85] 126 F.3d 1010 (7th Cir. 1997).
[92] *Id.* at 1011.
[87] *Id.* at 1011–12.
[88] *Id.* at 1012.
[95] *Id.*
[96] *Id.*
[91] *Id.*

clothes well."[92] Perry's effort to sue was blocked by two facts: she never reported any of these comments to anyone at Chernin's; and Chernin's had published policies against sexual harassment in the workplace.[93]

*Hostetler v. Quality Dining, Inc.*,[94] the next example, shows that plaintiffs occasionally win. Although the district court had granted summary judgment for the employer, the Seventh Circuit reversed and remanded to allow the case to go forward.[95] A quick glimpse of those facts explains that ruling. The plaintiff, Hostetler, worked at a Burger King.[96] She alleged that a fellow supervisory employee at her restaurant grabbed her face one day at work and stuck his tongue down her throat.[97] He repeated his effort to kiss her the next day.[98] When she struggled to evade him, he began to unfasten her brassiere, managing to get four out of five snaps undone and threatening to "undo it all the way."[99] On another occasion while Hostetler was working, Payton announced that "he could perform oral sex on her so effectively that '[she] would do cartwheels.'"[100] When Hostetler reported these incidents to her superiors, her district manager remarked that he dealt with his problems by getting rid of them.[101] Days later, Hostetler—not Payton—was transferred to a distant Burger King location.[102] The district court thought that these incidents were not severe enough to amount to harassment and that Burger King had done enough, but the Seventh Circuit saw matters otherwise.[103] It held that "the type of conduct at issue here falls on the actionable side of the line dividing abusive conduct from behavior that is merely vulgar or mildly offensive."[104] Although the court found it more difficult to say whether Payton's behavior was so serious that it would allow a finder of fact to label Hostetler's work environment hostile, since the number of incidents was not high, the court resolved that issue in Hostetler's favor because the two principal acts were physical, rather than merely verbal.[105] It is hard to say why Hostetler received a more favorable reception by the court, but perhaps

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[92] *Id.*

[93] *Id.*

[94] 218 F.3d 798 (7th Cir. 2000).

[95] *Id.* at 812.

[96] *Id.* at 802.

[97] *Id.* at 801.

[98] *Id.*

[99] *Id.* at 801–02.

[100] *Id.*

[101] *Id.* at 804.

[102] *Id.*

[103] *Id.* at 806–07.

[104] *Id.* at 807.

[105] *Id.* at 808.

the physical dimension of the abuse she experienced made a difference. In any event, the court of appeals remanded the case to a district court for trial.[106]

In *Berry v. Delta Airlines, Inc.*,[107] plaintiff Berry complained to her regional manager about incessant harassment from Causevic, her supervisor at Delta Airline's cargo facilities at Chicago's O'Hare Airport.[108] She asserted that Causevic had taken a substantial number of improper and harassing actions: he slid his hand up her shorts to her panty line and told her that he loved her smooth legs; he pulled her blouse away from her chest and tried to look down her shirt at her breasts; he repeatedly asked her if she would take him up on his "proposition" (for sex) and if she would go with him on a "very, very long ride home"; he referred to her as his "girlfriend" in front of others; he asked her on a date; he told her that he thought her "butt" and legs were "sexy"; and he tried to touch or embrace her inappropriately on various occasions.[109] Almost every time Berry sought help from Causevic at work, he would say things such as "give me a kiss first," "what will you do for me," or "only if you go on a long ride with me."[110] The district court granted summary judgment for Delta, and the Seventh Circuit affirmed.[111] It is worth quoting the holding:

> "[I]t is clear that the incidents of workplace "harassment" which occurred after Berry complained to [the regional manager] on June 7, 1999, while unfortunate, are not actionable as sexual harassment under Title VII (either collectively or individually) because Berry has presented no evidence suggesting that any of these incidents were motivated by her gender. Even taken in the light most favorable to Berry, the evidence presented suggests that all of the claimed instances of post-complaint harassment were meant as retaliation for Berry's having complained about Causevic's prior sexual harassment, and were not motivated by any anti-female animus."[112]

The court added that, insofar as the claimed harassment was motivated by Berry's sex, Delta could not be liable because it did not know what was going on.[113]

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[106] *Id.* at 812.

[107] 260 F.3d 803 (7th Cir. 2001).

[108] *Id.* at 805.

[109] *Id.*

[110] *Id.*

[111] *Id.* at 804, 814.

[112] *Id.* at 808–09.

[113] *Id.* at 811.

The next example is a good-news, bad-news story: the case for liability went to a jury, which ruled in the plaintiff's favor, but the case for punitive damages failed in the court of appeals. It is *Equal Employment Opportunity Commission v. Indiana Bell Telephone Co.*[114] The legal question, which went all the way to the en banc court of appeals, related to whether evidence about a company's obligations under its collective bargaining agreement (CBA) was admissible to show the reasonableness of its response to known (indeed, very well known) harassment.[115] The majority held that the company might be able to escape punitive damages based on its obligations under the CBA, and so it vacated the jury's award of punitive damages and remanded for further proceedings.[116]

The underlying behavior was appalling. Gary Amos was a longtime employee of Ameritech; he worked in its coin center and its small business unit.[117] Most of his fellow employees were women.[118] Unfortunately for everyone, he could not seem to resist exposing himself at the workplace. The first glimpse of this behavior dated back to 1975 (and this was a 2002 decision!), when Barbara Huckeba complained to her supervisor that Amos had exposed himself to her three times.[119] Ameritech's response—shocking to modern eyes—was to fire *Huckeba*, not to discipline Amos. It justified that action by saying that Huckeba was more likely than Amos to find a good job elsewhere.[120] And Huckeba was not alone in her complaints. Two other employees also complained in 1975 about sexually offensive conduct; they were luckier than Huckeba only insofar as they did not lose their jobs.[121] But neither did Amos, who both kept his position and avoided discipline.[122] The record established other misconduct on Amos's part in 1988, 1989, 1990, 1991, 1992, 1993, and 1994. The list of misdeeds is a long one: "telling female co–workers that he was in love with them, flashing them, sending notes with sexual messages or propositions, grabbing them and rubbing their hair or buttocks (sometimes with his hands, sometimes with his erect penis), and allowing himself to be seen masturbating at his desk."[123]

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[114] 256 F.3d 516 (7th Cir. 2002) (en banc).

[115] *Id.* at 526.

[116] *Id.* at 528–29.

[117] *Id.* at 519.

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *Id.*

Amos flashed someone in 1989 but was reprimanded only with a warning.[124] The discipline escalated slightly in 1990, when five women informed Ameritech that Amos had pressed his erect penis against them.[125] The company suspended Amos for two weeks. It did not choose a more severe sanction, it appears, because the responsible supervisor did not bother to read Amos's personnel file and thus was unaware of his inglorious history.[126] More complaints followed in 1991 and 1992, but they did not result in discipline.[127] Other than admonitions to stop the offensive behavior,[128] Amos ignored the advice. At long last, the company appeared to be on the brink of firing Amos: on December 18, 1992, the equal employment opportunity coordinator recommended this action.[129] But the coordinator had no power unilaterally to implement that recommendation.[130] And the responsible person—the labor relations manager—was on vacation on December 18.[131] He did not return and review the file until after the Christmas break. Critically more than 30 days had elapsed since Amos's most recent documented misconduct.[132] This was important because the CBA said that disciplinary measures had to be taken within 30 days of the misconduct.[133] That meant, Ameritech said (and the en banc court accepted) that Ameritech had to wait for yet another incident before firing Amos.[134] Not surprisingly, more misconduct occurred in 1993 and early 1994, but Ameritech still did nothing. As the majority put it, "Another public-masturbation incident in March 1994 at last produced Amos's removal."[135] This was enough in the unanimous view of the en banc court to support the jury's verdict on liability for the EEOC; on that point, the court rejected Ameritech's efforts to show why it should not be vicariously liable for Amos's actions.[136] The court split only on the question of punitive damages.[137]

The majority held that even though the terms of the CBA could not help Ameritech on liability, that evidence was still relevant for punitive

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[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.* at 519–20.
[129] *Id.* at 520.
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] *Id.* at 523.
[137] *See generally id.*

damages.[138] In order to win such damages, the court noted, the complaining party (in this case, the EEOC) had to demonstrate that the respondent "engaged in a discriminatory practice . . . with malice or with reckless indifference to the federally protected rights of an aggrieved individual."[139] Ameritech, the court held, was entitled to try to persuade the district court that its decision to comply with the letter of the CBA did not "evince 'malice' or 'reckless indifference' to the federally protected rights of female employees."[140] The case was remanded for further proceedings on this point, though the court did note that a jury that was fully aware of the CBA and Ameritech's explanation for its actions might still return the same $650,000 punitive damages award.[141] Whether this case is a "good news" or a "bad news" story depends on one's viewpoint. From the negative perspective, it shows a company that repeatedly fails to follow through on the promise of its workplace conduct policies, to the great harm of its employees. And it seizes on the technicality of the CBA's 30-day rule to take away the EEOC's punitive damages verdict, despite the overwhelming evidence supporting that remedy. From the positive perspective, the EEOC won the case on liability and, to the extent that victory sent a message to companies not to tolerate this kind of egregious behavior, it may have helped victims of harassment well beyond the Ameritech employees involved.

*Bilal v. Rotec Industries, Inc.*[142] provides the last example. Once again, a defense verdict on summary judgment was upheld by the court of appeals.[143] The key holding was that the following incidents of harassment, spread over 14 months, were not sufficiently severe or pervasive to create an abusive work environment.[144] Admittedly, the first few do not seem too bad in isolation. They include a statement from Chief Executive Officer Oury that plaintiff Bilal (a receptionist for the company) was a "fox," and Oury's invitation to Bilal to join him while watching the Chicago marathon.[145] The remaining three are more troublesome. For example, Bilal alleged that Oury told her pointblank "that her job would be easier if she had sex with him."[146] On another occasion

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[138] *Id.* at 527–28.

[139] *Id.* at 527 (quoting 42 U.S.C. § 1981a(b)(1)).

[140] *Id.* at 528.

[141] *Id.* at 528–29.

[142] 326 Fed. App'x. 949 (7th Cir. 2009).

[143] *Id.* at 951.

[144] *Id.* at 956–57.

[145] *Id.* at 957.

[146] *Id.*

he "walked behind her desk and rubbed his genitalia through his clothing against her arm."[147] In a third incident, Oury "took a piece of chocolate from his mouth and placed it in Bilal's mouth while she was speaking."[148] The court of appeals conceded that at least the chocolate incident deserved comment, but it said that "while bizarre and disgusting, [this behavior] was 'middle-of-the-continuum' physical contact which, because it occurred in relative isolation, cannot be regarded as severe under the existing case law."[149] But perhaps the court's most telling comment came earlier in the opinion, when it had this to say:

> [I]t is lamentable that what appears to have been a robust claim for hostile work environment was so significantly weakened by the inadequate response to the summary judgment motion of the defendants. However, we find no error in the district court's limitation of the analysis and thus proceed to review this claim in light of only the incidents plaintiff presented to the district court.[150]

Bilal's lawyer had failed to support her allegations with evidence admissible at the summary judgment stage, and her complaint failed to alert the company to the precise legal theories she was pursuing.[151] She was left with nothing—not even a job, as the company fired her for alleged insubordination before she brought her Title VII case.[152] *Bilal* thus shows that people can lose cases because of bad lawyering, just as they can lose them because of unfavorable legal rules. It can be hard, however, for a lawyer to know exactly what the court will demand at the summary judgment stage to show a *genuine* issue of *material* fact, especially in any case such as employment cases in which motivation or intent plays a major role.

This anecdotal evidence (for that is all it is) from the Seventh Circuit is nonetheless enough to raise serious concerns about the effectiveness of the legal system in addressing claims of sexual harassment in the workplace. There is a great problem of under-reporting, which leads to the problem that many cases never cross the threshold of a courthouse. For those that do, only some go to the federal courts, while others show up in state court as batteries, intentional infliction of emotional distress, violations of state equal employment laws, and similar theories. And in the federal district courts, sexual harassment cases are,

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[147] *Id.* at 952

[148] *Id.* at 957.

[149] *Id.* at 958.

[150] *Id.* at 956.

[151] *Id.* at 954.

[152] *Id.* at 952.

like almost all other cases, frequently settled. The latter group leave very little in the way of footprints. Finally, even cases that are judicially resolved in the district courts often are not appealed. For the year ending June 30, 2018, 277,000 civil cases were commenced in the district courts, but less than 28,000 civil appeals were commenced over the same period.[153] On the other hand, it is interesting to see the cases that are appealed because they usually reach the court of appeals on an agreed factual record, and so they allow one to see which kinds of situations pass muster and which do not.

That is why it is interesting (and manageable) to study the cases that reach the courts of appeals. Plaintiffs lose these cases for a variety of reasons, some of which are entirely legitimate. Those reasons include:

- Failure to allege a violation of the law
- Insufficient evidence to support allegations
- Another non-merits factor, such as lack of personal jurisdiction, failure to prosecute, etc., dooms the case
- The employer should not be held liable because it responded appropriately or took appropriate preventive or remedial measures
- The employer did not know about the bad behavior
- The employer's reasons for its action were not pretextual
- The employee failed to take advantage of the employer's workplace conduct policy
- The employee did not complain in a timely way

Studying the reasons why plaintiffs lose sheds some light on possible reforms, if the evidence of the widespread incidence of #MeToo problems points to systematic under-enforcement of the laws forbidding sexual harassment, or if it reveals that those laws are too narrow or technical in their scope. A number of avenues are worth studying. First, the mechanisms for reporting harassment still need improvement. Victims fear that they will be seen as whiners, or worse, and that they may wind up with no job at all if they complain about a co-worker, or worse, a supervisor. Anti-retaliation policies can help in this respect, but they have not been as strong as they should be. Second, the inability to sue the offending person under federal law—or put differently, the need to tie all harassment directly to the employer—has hampered enforcement. Particularly if one is concerned with fellow-employee harassment, or harassment from a line supervisor who does not have the power to hire and fire, it may be both undesirable and difficult to tar the ultimate employer with misbehavior that very likely violates the

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[153] *See Federal Judicial Caseload Statistics 2018*, UNITED STATES COURTS (2018), https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2018 [https://perma.cc/KAL8-R5UL].

company's written policies. Informal methods of dispute resolution that are available on a voluntary basis (i.e., not compulsory arbitration) have also proven to be trustworthy and helpful. Finally, a broader re-examination of what ought to be regarded as severe enough to constitute harassment, or pervasive enough, might reveal that even if courts no longer require literal hellishness, the bar may still be too high.

This re-examination will succeed only if it takes all relevant perspectives into account. The courts must be fair arbiters attentive to the positions of all concerned—the victim, the alleged harasser, and the employer. There is much work to be done. But it is important to start from a realistic appraisal of the status quo. We can begin by jettisoning the myth that benign behavior is routinely condemned and getting to work on the serious issues.

WORKPLACE JUSTICE

# THE BE HEARD IN THE WORKPLACE ACT: ADDRESSING HARASSMENT TO ACHIEVE EQUALITY, SAFETY, AND DIGNITY ON THE JOB

Since #MeToo went viral in October 2017,[1] the country has witnessed an unprecedented demand for solutions to ensure accountability for workplace harassment and discrimination and prevent harassment before it happens. We have been reminded, once again, that despite longstanding federal prohibitions against harassment and other forms of discrimination based on sex, race, color, religion, national origin, age, and disability, these reprehensible behaviors continue to infect our workplaces and deny working people, and especially working women, equality, safety, and dignity. Our laws need to be up to the task of shifting workplace culture and providing justice.

**The Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination (BE HEARD) in the Workplace Act (S.1082, H.R. 2148)** offers a groundbreaking set of reforms and seeks to answer the calls for change that have reverberated across the country. The BE HEARD in the Workplace Act is the first comprehensive federal proposal to address workplace harassment in the #MeToo era. It sets a new marker in laying out a clear vision of what it will take to fully address – and prevent – all forms of unlawful workplace harassment and discrimination, including sexual assault. The BE HEARD in the Workplace Act would extend protections against harassment and other forms of discrimination to all workers; remove barriers to access to justice, such as short statutes of limitations and restrictively interpreted legal standards; promote transparency and accountability; and require and fund efforts to prevent workplace harassment and discrimination.

## Extending protections to all workers

Protections against harassment and other forms of discrimination have not kept pace with changes in our nation's workplaces, and are out of step with our cultural norms and expectations. Too many working people have no federal protections against workplace discrimination and harassment, or unclear coverage under federal protections. Individuals who are not considered "employees," such as independent contractors (including many people working in agriculture, hospitality, and care work, who may be misclassified by employers), unpaid interns, and others who work in nontraditional employment relationships, are generally not protected by federal law's prohibitions on workplace discrimination and harassment. In addition, individuals working in small establishments, with fewer than 15 employees, such as most domestic workers, are excluded from core federal civil rights protections against harassment or discrimination at work.

The BE HEARD in the Workplace Act would close these gaps in existing law, ensuring that all working people have the right to work with safety and dignity, by:

- Extending federal laws against workplace harassment and other forms of discrimination to cover all workers, regardless of the size of their workplace.
- Extending federal laws against workplace harassment and other forms of discrimination to cover independent contractors, interns, fellows, volunteers, and trainees.
- Clarifying that unlawful sex discrimination at work includes harassment and other forms of discrimination based on sexual orientation and gender identity.

## Removing barriers to access justice

While federal law prohibits sexual harassment at work and other forms of harassment based on protected characteristics, it also creates barriers to challenging harassment and obtaining redress for harm, including short periods of time

within which a complaint must be filed with the Equal Employment Opportunity Commission (EEOC), restrictive legal standards that have led to too many workers' claims being dismissed, and limits on remedies for those harmed by unlawful harassment. These barriers have made it difficult for individuals to pursue claims of workplace harassment and discrimination, hold perpetrators of harassment and discrimination and their employers accountable, and be made whole for the harm they have suffered.

The BE HEARD in the Workplace Act would remedy these barriers to justice, by:

- ***Extending the time limit for challenging harassment and other forms of workplace discrimination***

  Currently, those working in the private sector or for state or local governments who wish to challenge workplace harassment or discrimination have only 180 days from the date of the harassment or discrimination to file a charge with the EEOC (or 300 days for those living in a state where there is an analogous state law against workplace discrimination); this is the required first step in bringing a workplace harassment or discrimination case.[2] Federal employees have only 45 days from the date of the discriminatory act to initiate a complaint.[3] These extraordinarily short statutes of limitations hamper the ability of individuals to challenge harassment and other forms of discrimination. For those who have experienced sexual assault or other egregious forms of harassment, the trauma of the assault can make it difficult to immediately prepare a legal challenge. The fear of retaliation also makes it difficult for many individuals to take immediate legal action to protect their rights. The BE HEARD in the Workplace Act would extend the statute of limitations for filing a charge to four years and ensure that those working for the federal government have the same amount of time to file a complaint as others.

- ***Ensuring the law's protections against workplace harassment reflect current understandings of unacceptable harassment at work***

  Federal courts have interpreted anti-discrimination law to prohibit workplace harassment when submitting to the conduct becomes a condition of employment or continued employment (for example, when a woman is told she must sleep with her boss to keep her job) or when the harassing conduct is so severe or pervasive as to create an intimidating, hostile, or abusive work environment (typically called "hostile work environment" harassment).[4] Congress intended for anti-discrimination law to reach a broad range of conduct that harms a worker's ability to do her job. However, a number of lower court decisions have interpreted the hostile work environment standard very narrowly, so that conduct most people would find egregious is not considered "severe or pervasive."[5] For example, courts have found that each of the following incidents did not constitute "severe" or "pervasive" harassment and thus the law did not protect against this harassing behavior:[6] a male co-worker forcing his hand under a female co-worker's sweater and fondling her breast;[7] a worker repeatedly making sexual comments towards another worker and suggesting she be spanked;[8] and a supervisor calling a subordinate the N-word on two separate occasions.[9]

  The BE HEARD in the Workplace Act would restore our civil rights laws as tools to prohibit a broad spectrum of egregious harassment, as Congress had intended. It would do so by requiring courts to take into account a number of factors when determining whether illegal harassment has occurred, including: the frequency and duration of the conduct, the location where the conduct occurred, the number of individuals engaged in the conduct, whether the conduct is humiliating, degrading, or threatening, any power differential between the alleged harasser and the person allegedly harassed, and whether the conduct involves stereotypes about the protected class involved.

  The Act would ensure our laws are responsive to the lived experiences of workers by clarifying that harassment can take a number of different forms, including physical, verbal, pictorial, or visual conduct, and that it can occur in person or by other means, such as electronically. Additionally, it would make clear that workplace harassment is impermissible regardless of whether the victim acquiesced or otherwise submitted to or participated in the conduct, the complaining party is the target of harassment or instead a witness to harassment, the conduct occurred outside the workplace, or the conduct was additionally experienced by individuals outside the protected class involved. Moreover, the BE HEARD in the Workplace Act would clarify that harassment can harm workers, regardless of whether the conduct caused tangible injury or psychological injury, and regardless of whether the worker was able to continue to do their job.

- ***Clarifying that discrimination or retaliation need not be the decisive factor motivating an employer's conduct for the conduct to be unlawful***

  Civil rights laws were intended to ensure that protected characteristics like sex, race, color, national origin, religion, age, and disability are not a basis for employer decision-making. They also prohibit employers from engaging in retaliation—adverse action against a worker for complaining about or opposing prohibited harassment or discrimination. In recent years, the Supreme Court has made it more difficult for workers to bring age discrimination claims[10] and claims for retaliation related to sex, race, color, national origin, religion[11] or disability,[12] requiring workers to show not only that the employer was motivated by discrimination or retaliation, but that discrimination or retaliation was the decisive factor in how their employer treated them on the job.[13]

  The BE HEARD in the Workplace Act would provide that those experiencing harassment or other forms of discrimination must only prove that discrimination or retaliation was a motivating factor, rather than the decisive factor, for the employer's conduct, to obtain remedies provided by federal employment discrimination laws. For example, a worker would not have to prove that their complaint about harassment was the decisive factor behind their employer's decision to fire them. Instead, the law would recognize that an employer is liable for discrimination and retaliation if an employment decision was made based on a protected characteristic, even if the employer was also motivated by additional, non-discriminatory reasons.

- ***Restoring strong protections from harassment by supervisors***

  Employers have a heightened legal responsibility for harassment by supervisors because such harassment exploits the authority over subordinates that the employer has allowed the supervisor to excercise. As a result of this heightened obligation, workers have had relatively strong protections from supervisor harassment and employers have had strong incentives to prevent supervisor harassment and remedy it when it occurs.

  The Supreme Court's 2013 decision in *Vance v. Ball State University*[14] undermined protections for victims of supervisor harassment by essentially reclassifying as co-workers those lower-level supervisors who direct daily work activities, but do not have the power to take concrete employment actions like hiring and firing workers. Employers are only liable for harassment by co-workers when the employer's negligence has allowed the harassment to occur. But there is a significant practical difference between these lower-level supervisors and mere co-workers: supervisors with the authority to direct daily work activities wield a significant amount of power that they can use to wreak havoc in the lives of their subordinates, particularly in low-wage sectors. In such industries, lower-level supervisors can harass or retaliate against a worker by reducing hours, denying breaks, or assigning a worker to an undesirable shift, for example, which heightens their ability to use supervisory authority to harass their subordinates. The *Vance* decision creates an incentive for employers to concentrate the power to hire and fire in the hands of a few, while still delegating significant day-to-day authority to lower-level supervisors, in order to avoid vicarious liability for supervisor harassment.

  The BE HEARD in the Workplace Act would ensure that employers can be held vicariously liable for harassment by supervisors with the authority to undertake or recommend tangible employment actions or with the authority to direct a subordinate's daily work activities, regardless of whether they have the authority to hire and fire.

- ***Allowing workers who experience harassment or other forms of discrimination to be made whole for the harm they have suffered***

  When workers win a discrimination lawsuit, they may be able to obtain several forms of relief, including monetary damages. Title VII of the Civil Rights Act of 1964,[15] which prohibits discrimination on the basis of race, color, national origin, sex, or religion, and the Americans with Disabilities Act of 1990,[16] which prohibits discrimination on the basis of disability, provide for the recovery of compensatory and punitive damages.[17] Compensatory damages compensate victims for out-of-pocket expenses caused by the harassment, like the costs of finding a new job and medical expenses, and for any emotional harm, while punitive damages may be awarded to punish an employer who acted maliciously or recklessly when engaging in harassment.

  However, the amounts a worker can receive are limited under current federal law based on the size of the employer. For a worker succeeding in a harassment case against an employer with 15-100 employees, for example, the worker can recover no more than $50,000, no matter how severe the harassment or how culpable the employer.

Even for employers with more than 500 employees, damages are capped at $300,000.[18] These caps have not been adjusted since they were enacted in 1991, more than a quarter century ago. In other words, even if a worker endured rape on the job and suffered from significant physical and emotional trauma and expense, if her employer had only 75 employees, she would not be permitted to recover more than $50,000 if she won her Title VII sexual harassment claim. This would be the case regardless of what out-of-pocket costs she had incurred or how profoundly she had been harmed psychologically, physically, and emotionally.

Under other federal laws that protect workers from discrimination, including the Age Discrimination in Employment Act of 1967,[19] which prohibits age discrimination in employment, and the Rehabilitation Act of 1973,[20] which protects federal employees from disability discrimination, it is unclear whether compensatory and punitive damages are available at all.

The BE HEARD in the Workplace Act would eliminate limits on the compensatory and punitive damages workers can recover under federal employment discrimination laws; clarify that both private sector and federal workers can recover damages for age discrimination in violation of the Age Discrimination in Employment Act of 1967; and make clear that federal workers can recover monetary damages for discrimination on the basis of disability under the Rehabilitation Act of 1973.

### Promoting transparency and accountability

Harassment and other forms of discrimination thrive in the shadows, and those with the least power at work are the most vulnerable. For too long, working people have been afraid to report violations because they fear jeopardizing their safety, jobs, financial security, and career prospects. Moreover, in many instances, employers prohibit workers from discussing or reporting harassment and discrimination by requiring workers to sign confidentiality provisions in employment contracts or settlement agreements, or force workers to resolve claims through private arbitration, which often includes confidentiality requirements, instead of in court. These practices, coupled with the power disparity between the employer and the individual and the threat of retaliation, have often silenced working people, while allowing many employers and individual offenders to evade accountability.

The BE HEARD in the Workplace Act would promote transparency and accountability in the workplace by:

- Prohibiting employers from imposing nondisclosure agreements (NDAs) as a condition of employment that prevent workers from speaking about harassment and discrimination.
- Limiting the use of NDAs in post-dispute settlement and separation agreements, while allowing workers to request an NDA in this context to protect their privacy, with safeguards to promote a knowing and voluntary choice.
- Prohibiting forced arbitration of work-related disputes and protecting workers' ability to act collectively to challenge violations of workplace rights in court.
- Requiring companies bidding on federal contracts to comply with workers' rights laws and report any history of violations of these laws.

### Increasing access to legal services for workers in low-wage jobs and funding efforts by private entities and states to prevent and address employment discrimination

Many individuals, particularly those working in low-wage jobs, lack access to legal services to help them challenge workplace harassment and other forms of discrimination. The opportunity to consult with an attorney to learn about legal rights and options and to enforce those rights is an essential component of access to justice for those facing harassment and other forms of discrimination on the job.

The BE HEARD in the Workplace Act would address this need by:

- Establishing a grant program to help cover costs for individuals who cannot otherwise afford a lawyer to address civil legal needs related to their employment. These include the costs of hiring a lawyer for help filing an EEOC charge or an anti-discrimination lawsuit in court.
- Funding states to designate and support the activities of an independent, private, non-profit entity in the state to protect and advocate for the rights of workers to be free from unlawful employment discrimination. The entity must be authorized to pursue legal, administrative, and other appropriate remedies to prevent and address employment discrimination, investigate complaints, refer individuals to relevant services, educate policymakers, and gather data about employment discrimination.
- Establishing a competitive grant program run by the Women's Bureau of the Department of Labor for grants for private entities to prevent and address employment discrimination, including harassment, with a focus on

supporting the work of entities that serve workers in industries or geographic areas that are most highly at risk for discrimination and harassment and who demonstrate past and ongoing work to address discrimination and harassment.

### Preventing harassment and discrimination and changing workplace culture

Our institutions must be equipped to properly address and remedy workplace harassment once it has occurred, but the ultimate goal of any reform should be to ensure that harassment and discrimination do not occur in the first place. Unfortunately, many prevention efforts to date have focused on compliance, rather than culture change: some employers simply do the bare minimum to try to avoid legal liability, without seeking to make changes to truly ensure safe and equitable work for all. Employers must shift away from this compliance-focused approach towards an evidence-based prevention model that reforms workplace culture.

Additionally, we must address workplace structures that devalue workers. This includes ensuring that all workers are entitled to one fair minimum wage, including tipped workers. The federal tipped minimum cash wage of $2.13 an hour, which has been frozen since 1991, allows harassment and discrimination to thrive in the service and hospitality industries. Workers in the restaurant industry in particular report that reliance on tips to reach any minimally adequate wage often results in being forced to tolerate sexual and other forms of harassment and inappropriate behavior from customers, which in turn can create a workplace culture that encourages harassment by coworkers and supervisors as well.

The BE HEARD in the Workplace Act would reshape workplace culture and prevent harassment and discrimination, including by:

- Ensuring that tipped workers are entitled to the same minimum wage as all other workers, consistent with the Raise the Wage Act.[21]
- Requiring and funding federal agencies to research harassment in employment, including prevalence, the enforcement of anti-discrimination laws, public health and economic impacts of harassment, and prevention strategies.
- Mandating the creation of an EEOC Task Force that includes worker advocates, researchers, union leaders, and individuals who have experienced workplace harassment, to study and provide recommendations for preventing workplace harassment.
- Requiring employers with 15 or more workers to adopt, disseminate in an accessible format, and periodically review, a comprehensive nondiscrimination policy.
- Requiring the EEOC to determine which categories of employers should be required to administer trainings for their workers. For employers required to implement trainings, these trainings must be interactive and must include a separate, tailored training requirement for supervisors. For employers with fewer than 15 workers, the EEOC must provide customizable prevention resources suited to smaller workplaces.
- Requiring the EEOC to provide a model climate survey to employers, which will assist employers in efforts to learn more about whether workers are facing harassment at work and the particular forms such harassment is taking.
- Establishing an Office of Education and Outreach at the EEOC to educate workers about their rights and how to file a complaint with the EEOC.

* * *

As a country, we have long owed working people cultural and institutional change to ensure that everyone can thrive in safe and respectful workplaces. For many years, survivors and advocates have been calling for such change. The momentum created by #MeToo has provided a unique opportunity to deliver powerful and lasting reform to meet the courage of the individuals who have spoken out about the harassment they have experienced.

The BE HEARD in the Workplace Act is a bold solution and a direct response to many of the concerns highlighted by the voices of workers – including the need to extend existing federal civil rights protections to all workers; reform short statutes of limitations, limits on recovery, and narrowly interpreted legal standards that prevented workers from seeking justice; end the culture of secrecy around harassment and discrimination that protected serial harassers; and invest in legal services and robust prevention efforts.

Each of these reforms is essential to creating the better world we seek, where every individual may work with equality, safety, and dignity.

1 In 2006, gender justice activist Tarana Burke coined the phrase "Me Too" and launched a movement for survivors of sexual violence to find healing and strength in solidarity. In October 2017, following media reports of serial sexual harassment and assault by film producer Harvey Weinstein, the actress and activist Alyssa Milano invited survivors to share their experiences of harassment and violence on social media using the hashtag #MeToo. The hashtag quickly went viral worldwide as individuals shared their stories and demanded accountability. The unleashing of the power of their voices has prompted an unprecedented public reckoning with the pervasiveness of harassment, and particularly workplace harassment, that continues today.
2 29 C.F.R. § 1601.13.
3 29 C.F.R. § 1614.105.
4 Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986) (establishing quid pro quo and hostile environment harassment frameworks); *see also* Faragher v. City of Boca Raton, 524 U.S. 775, 787 n. 1 (1998) (explaining that quid pro quo and hostile environment frameworks can be applied to racial discrimination cases); Equal Employment Opportunity Comm'n, Types Of Discrimination: Harrasment, https://www.eeoc.gov/laws/types/harassment.cfm.
5 Some courts have misstated the standard established in *Meritor*, *supra* note 4 at 67, as requiring harassment to be both severe and pervasive, rather than one or the other. In these cases, it is especially difficult for workers who have experienced harassment to obtain relief. *See, e.g., Adams v. Austal, U.S.A., L.L.C.*, 754 F.3d 1240, 1249 (11th Cir. 2014).
6 *Adams, supra* note 5 at 1254-55.
7 Brooks v. City of San Mateo, 229 F.3d 917 (9th Cir. 2000).
8 Singleton v. Dep't of Corr. Educ., 115 F. App'x 119 (4th Cir. 2004).
9 Roberts v. Fairfax Cty. Pub. Sch., 858 F. Supp. 2d 605, 611 (E.D. Va. 2012).
10 Gross v. FBL Fin. Servs., Inc., 557 U.S. 167 (2009).
11 Univ. of Texas Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 360 (2013).
12 T.B. ex rel. Brenneise v. San Diego Unified Sch. Dist., 806 F.3d 451, 473 (9th Cir. 2015) (citing cases that applied a but-for causation framework to Americans with Disabilities Act (ADA) employment discrimination retaliation cases — *Feist v. La., Dep't of Justice, Office of Att'y Gen.*, 730 F.3d 450, 454 (5th Cir.2013); *E.E.O.C. v. Ford Motor Co.*, 782 F.3d 753, 767 (6th Cir.2015) (en banc); *Staley v. Gruenberg*, 575 Fed. Appx. 153, 155 (4th Cir.2014); *Gallagher v. San Diego Unified Port Dist.*, 14 F.Supp.3d 1380, 1390–91 (S.D.Cal.2014) — and applying the but-for causation framework from *Nassar*, *supra* note 11, to an ADA public accommodations retaliation claim).
13 *Supra* notes 10-12.
14 Vance v. Ball State Univ., 570 U.S. 421, 427 (2013).
15 42 U.S.C. § 2000e et seq.
16 42 U.S.C. § 12101 et seq.
17 42 U.S. C. § 1981a.
18 42 U.S.C. § 1981a(b)(3).
19 29 U.S.C. § 621 et seq.
20 29 U.S.C. § 791 et seq.
21 Nat'l Women's Law Ctr., The Raise The Wage Act: Boosting Women's Paychecks And Advancing Equal Pay (Mar. 2019), https://nwlc.org/resources/the-raise-the-wage-act-boosting-womens-paychecks-and-advancing-equal-pay/.

Lyla D. Jameson,
Complainant,

v.

Patrick R. Donahoe,
Postmaster General,
United States Postal Service
(Pacific Area),
Agency.

Appeal No. 0120130992

Agency No. 1F953001112

DECISION

Complainant filed a timely appeal with this Commission from the Agency's decision dated November 21, 2012, dismissing her complaint of unlawful employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. 2000e et seq.
BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Mail Processing Equipment Mechanic (MPE) at the Agency's Stockton Post Office facility in Stockton, California. On November 2, 2012, Complainant filed a formal complaint alleging that the Agency subjected her to harassment on the bases of sex (transgender) and reprisal for prior protected EEO activity under Title VII of the Civil Rights Act of 1964 when:

1. Over the past 20 months her work was tracked and signed off on;

2. On November 22, 2011, her locker was broken into and her property was left out to be stolen;

3. On September 27, 2012, her supervisor repeatedly referred to her as "he"; and

4. On October 2, 2012, she was scheduled for an investigative interview.

Complainant requested that the Agency amend these claims to a complaint that is currently at the hearing process with an EEOC Administrative Judge (AJ), docketed as Agency complaint number 1F-953-0002-12, EEOC hearing number 550-2012-00286X.

On November 21, 2012, the Agency dismissed the complaint. The Agency found that claims 1 and 2 should be dismissed because they were the subject of a previous complaint that is currently pending before an EEOC AJ, docketed as Agency complaint number 1F-953-0002-12, EEOC hearing number 550-2012-00286X. The Agency found that claims 3 and 4 should be dismissed for failure to state a claim because she failed to state a claim.

Complainant now appeals the dismissal to the Commission.

ANALYSIS AND FINDINGS

Claims 1 and 2

The regulation set forth at 29 C.F.R. 1614.107(a)(1) provides that the Agency shall dismiss a complaint that states the same claim that is pending before or has been decided by the Agency or Commission.

Complainant previously filed a complaint, docketed as Agency complaint number 1F-953-0002-12, in which she alleged, amongst other things, that her work had been tracked and signed off on and that her locker was opened and her property was left out to be stolen. That complaint

is currently pending before an EEOC AJ under EEOC hearing number 550-2012-00286X. As a result, we find the Agency properly dismissed these claims pursuant to 29 C.F.R. § 1614.107(a)(1) for raising the same matters that are currently pending before the Commission.1

Claims 3 and 4

The Agency found that Complainant's claims that her supervisor repeatedly referred to her as "he" and that she was scheduled for an investigative interview should be dismissed because the claims are neither severe or pervasive enough to create a hostile work environment. The Agency stated that Complainant did not suffer a harm when her supervisor called her "he", and that being subjected to an investigation without an ultimate employment action does not render an individual aggrieved.

After a review of the record, we find that these claims were improperly dismissed. Complainant alleged that these claims of harassment were part of her overall hostile work environment claim, and she requested that the Agency amend these claims with her other claims of harassment that are currently pending before an EEOC AJ in Agency complaint number 1F-953-0002-12, EEOC hearing number 550-2012-00286X. The Agency erroneously addressed these claims individually to determine if the allegations were severe or pervasive enough to constitute a hostile work environment. Instead, the Agency should have amended these like or related claims to Complainant's pending harassment complaint, or if they were raised after the investigation, informed Complainant that she should request that the AJ amend the pending complaint to include these like or related claims. 29 C.F.R. § 1614.106(d); EEO Management Directive (MD)-110, Chap. 5 Sect. III (B).

Further, with regard to Complainant's allegation that she was subjected to harassment when her supervisor repeatedly referred to her as "he", we note that supervisors and coworkers should use the name and pronoun of the gender that the employee identifies with in employee records and in communications with and about the employee.2 Intentional misuse of the employee's new name and pronoun may cause harm to the employee, and may constitute sex based discrimination and/or harassment.

Finally, with regard to Complainant's allegation that she was harassed when she was subjected to an investigative interview, we note that even if an investigation does not result in an employment action it still may be considered as part of the overall harassment claim. See Ambrose v. Dep't of Transportation, EEOC Appeal No. 0120113178 (Nov. 21, 2012) (Complainant's allegation that she was placed on a performance improvement plan should not have been dismissed for not resulting in an employment action because it was part of a larger claim alleging harassment). Further, with regard to Complainant's claim of retaliatory harassment, the Commission has stated that adverse actions need not qualify as "ultimate employment actions" or materially affect the terms and conditions of employment to constitute retaliation. Lindsey v. U.S. Postal Serv., EEOC Request No. 05980410 (Nov. 4, 1999).

CONCLUSION

Based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we MODIFY the Agency's decision. We affirm the dismissal of Complainant's claims 1 and 2, and we reverse the Agency's dismissal of claims 3 and 4. The Agency is ordered to comply with the order below.

ORDER

The Agency is directed to submit a copy of the complaint file, including this decision, to the EEOC Hearings Unit of the San Francisco District Office within fifteen (15) calendar days of the date this decision becomes final. The Agency shall provide written notification to the Compliance Officer at the address set forth below that the complaint file has been transmitted to the Hearings Unit. Thereafter, the Administrative Judge shall consolidate this complaint with the complaint pending before her in Agency complaint number 1F-953-0002-12, EEOC hearing number 550-2012-00286X, pursuant to 29 C.F.R. § 1614.106(d).

IMPLEMENTATION OF THE COMMISSION'S DECISION (K0610)

Compliance with the Commission's corrective action is mandatory. The Agency shall submit its compliance report within thirty (30) calendar days of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. The Agency's report must contain supporting documentation, and the Agency must send a copy of all submissions to the Complainant. If the Agency does not comply with the Commission's order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission's order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled "Right to File a Civil Action." 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated. See 29 C.F.R. § 1614.409.

STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0610)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the Agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) within thirty (30) calendar days of receipt of this decision or within twenty (20) calendar days of receipt of another party's timely request for reconsideration. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

COMPLAINANT'S RIGHT TO FILE A CIVIL ACTION (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court within ninety (90) calendar days from the date that you receive this decision. In the alternative, you may file a civil action after one hundred and eighty (180) calendar days of the date you filed your complaint with the Agency, or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. "Agency" or "department" means the national organization, and not the local office, facility or department in which you work. Filing a civil action will terminate the administrative processing of your complaint.

RIGHT TO REQUEST COUNSEL (Z0610)

If you decide to file a civil action, and if you do not have or cannot afford the services of

an attorney, you may request from the Court that the Court appoint an attorney to represent you and that the Court also permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). The grant or denial of the request is within the sole discretion of the Court. Filing a request for an attorney with the Court does not extend your time in which to file a civil action. Both the request and
the civil action must be filed within the time limits as stated in the paragraph above ("Right to File a Civil Action").

FOR THE COMMISSION:

_____
Carlton M. Hadden, Director
Office of Federal Operations

May 21, 2013

_____
Date

1 We note that on appeal Complainant asserts that she was not trying to raise these claims a second time, and that she only provided them as background evidence for her additional claims.
2 See OPM Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace, available at http://www.opm.gov/policy-data-oversight/diversity-and-inclusion /reference-materials/gender-identity-guidance/.
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U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of Federal Operations
P.O. Box 77960
Washington, DC 20013

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**PRECEDENTIAL**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 17-2646

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SHERI MINARSKY
Appellant

v.

SUSQUEHANNA COUNTY;
THOMAS YADLOSKY, JR.

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On Appeal from the United States District Court
for the Middle District of Pennsylvania
(District Court No.: 3-14-cv-02021)
District Judge: Honorable Robert D. Mariani

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Argued April 18, 2018

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Before: GREENAWAY, JR., RENDELL, and FUENTES,
*Circuit Judges*

(Opinion Filed: July 3, 2081)

David M. Koller, Esq. [ARGUED]
Erin Grewe, Esq.
Koller Law
2043 Locust Street
Suite 1B
Philadelphia, PA 19103
*Counsel for Appellant Sheri Minarsky*

Dana M. Zlotucha, Esq. [ARGUED]
Michael J. Donohue, Esq.
Kreder Brooks Hailstone
220 Penn Avenue
Suite 200
Scranton, PA 18503
*Counsel for Appellee Susquehanna County*

Gerald J. Hanchulak, Esq. [ARGUED]
The Hanchulak Law Offices
604 South State Street
Clarks Summit, PA 18411
*Counsel for Appellee Thomas Yadlosky, Jr.*

## O PI N I O N

**RENDELL**, *Circuit Judge*:

Thomas Yadlosky, the former Director of Susquehanna County's Department of Veterans Affairs, made unwanted sexual advances toward his part-time secretary, Sheri Minarsky, for years. She never reported this conduct and explained in her deposition the reasons she did not do so. Although Yadlosky was warned twice to stop his inappropriate behavior, it was to no avail. The County ultimately terminated Yadlosky when the persistent nature of his behavior toward Minarsky came to light.

Minarsky seeks to hold Yadlosky, her supervisor, liable for sexual harassment, and her former employer, Susquehanna County, vicariously liable for said harassment. At issue in this case are the two elements of the *Faragher-Ellerth* affirmative defense that Susquehanna County has raised.[1] In granting summary judgment in favor of the

[1] To successfully invoke the *Faragher-Ellerth* affirmative defense, an employer must show that (i) it "exercised reasonable care to avoid harassment and to eliminate it when it might occur," and that (ii) the plaintiff "failed to act with like reasonable care to take advantage of the employer's safeguards and otherwise prevent harm that could have been avoided." *Faragher v. City of Boca Raton*, 524 U.S. 775, 805 (1998).

County, the District Court held that the elements of this defense had been proven as a matter of law. We conclude that given the facts of this case, the availability of the defense regarding both the first element, whether the County took reasonable care to detect and eliminate the harassment, as well as the second element, whether Minarsky acted reasonably in not availing herself of the County's anti-harassment safeguards, should be decided by a jury. Accordingly, we will vacate the judgment of the District Court and remand for further proceedings.[2]

## I. Factual Background

On appeal from the grant of summary judgment in favor of Defendant Susquehanna County, we view the facts in the light most favorable to Plaintiff Minarsky. Nevertheless, the facts are largely undisputed.

### A. Yadlosky's Alleged Harassment

Minarsky served as a part-time secretary at the Susquehanna County Department of Veterans Affairs, working Mondays, Wednesdays, and Fridays. On Fridays, Minarsky worked for Defendant Yadlosky. They worked together in an area separate from other County employees.[3]

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[2] Minarsky also challenges the District Court's dismissal of her remaining state law claim of assault against Yadlosky for lack of supplemental jurisdiction, but that issue is moot in light of our decision.

[3] Yadlosky was a full-time employee, but worked out of different offices on the other days.

Minarsky alleges that soon after she started working at the Department in September of 2009, Yadlosky began to sexually harass her. Yadlosky would attempt to kiss her on the lips before he left each Friday, and would approach her from behind and embrace her, "pull[ing] [her] against him." A. 98. When Minarsky was at her computer or the printer, Yadlosky would purportedly massage her shoulders or touch her face. She testified that these advances were unwanted, and happened frequently—nearly every week. As they worked together, alone, others were seldom present to observe Yadlosky's conduct, other than during the holiday season each year, when Yadlosky asked Minarsky and other female employees to kiss him under mistletoe.[4]

Yadlosky engaged in other non-physical conduct that Minarsky found disturbing. For example, he often questioned Minarsky about her whereabouts during her lunch hour and with whom she was eating. He called her at home on her days off under the pretense of a work-related query but proceeded to ask personal questions. Yadlosky allegedly became hostile if she avoided answering these calls. He sent sexually explicit messages from his work email to Minarsky's work email, to which Minarsky did not respond. He also behaved unpredictably, as on one occasion when he insisted that Minarsky take two full days off, unpaid, to drive her daughter to her cancer treatment, but soon after, he chastised her for seeking time off—even though it fell on days they did not work together.

[4] Another instance noted in the record of an employee observing Yadlosky's behavior toward Minarsky is the incident involving Connie Orangasick. *See infra* pp. 6–7.

Minarsky alleges that the harassment intensified as time passed. When the harassment first began, she mildly and jokingly told him to stop. He did not. She claims that Yadlosky knew that her young daughter was ill and thus knew Minarsky depended on her employment to pay medical bills. She states that she feared speaking up to him in any context, let alone to protest his harassment, because he would react and sometimes become "nasty." A. 142.

### B. Prior Reprimands

Yadlosky reported to Sylvia Beamer, the Chief County Clerk, who reported to the Susquehanna County Commissioners. On two separate occasions, Beamer became aware of Yadlosky's inappropriate behavior toward other women, and reprimanded him. County Commissioner Maryann Warren was aware of one of these incidents. First, in 2009, Beamer observed Yadlosky embrace a female employee. Beamer verbally admonished Yadlosky and told him that such behavior was inappropriate. Second, Commissioner Warren observed Yadlosky act inappropriately with the County's Director of Elections in late 2011 or early 2012. Warren notified Beamer that she saw Yadlosky hug the Director and kiss her on the cheek. Beamer verbally reprimanded Yadlosky once again and told him he could face termination if his inappropriate behavior continued. After both incidents, there was no further action or follow-up, nor was any notation or report placed in Yadlosky's personnel file.

Minarsky became aware of the first reprimand, but not the second. In Minarsky's deposition, she recounted a time when another employee, Connie Orangasick, saw Yadlosky

approaching Minarsky from behind and hugging her. Orangasick walked by, noticed the situation, and said to Yadlosky, "I thought you said yesterday you're not supposed to do that anymore." A. 99. A few minutes later, he responded that he could do whatever he wanted "[o]ver here," referring to the building where he and Minarsky were largely separated from other employees. A. 100. When Minarsky followed up with Orangasick, she learned that Beamer had warned Yadlosky about his inappropriate behavior. After being warned, he then allegedly came back to his office and joked about the incident to Orangasick.

Minarsky also learned that other women had similar encounters with Yadlosky. In addition to the mistletoe episodes, Minarsky spoke to another secretary, Rachel Carrico, who mentioned that she had problems with Yadlosky's hugging, as well. Also, once when Beamer was in the Veterans Affairs office, Minarsky observed Yadlosky as he was attempting to embrace Beamer, but she stopped him and said, "Get away from me." A. 111.

### C. The County's Anti-Harassment Policy

On her first day of work, Minarsky read and signed Susquehanna County's General Harassment Policy. It states that harassment based upon "sex, age, race, religion, national origin, ethnicity, disability, sexual preference and any other protected classification" is prohibited. A. 166; A. 205–06. According to the policy, an employee could report any harassment to their supervisor; if the supervisor is the source of the harassment, the employee could report this to the Chief County Clerk or a County Commissioner.

During the four years Minarsky avers that she was harassed by Yadlosky, she did not report this harassment to either Beamer, the Chief County Clerk, or any of the County Commissioners. Minarsky alleges that she feared elevating the claims to County administrators, because Yadlosky repeatedly warned her not to trust the County Commissioners or Beamer. She claims that he would often tell her to look busy or else they would terminate her position. These warnings, Minarsky contends, along with the fact that Yadlosky had been reprimanded unsuccessfully for his inappropriate advances toward others, prevented her from reporting Yadlosky.

### D. Yadlosky's Termination

In her deposition, Minarsky recounted that she finally revealed the harassment and its emotional toll on her health to her physician in April of 2013. The doctor discussed the situation with Minarsky and emphasized the need to bring an end to the conduct. She encouraged Minarsky to compose an email to Yadlosky, so she would have some documentation.

Minarsky testified that she agonized over this, but finally sent Yadlosky an email on July 10, 2013, prompted by the incident in which Yadlosky allegedly reacted negatively when Minarsky asked to take time off for her daughter's treatment. She wrote, "I want to just let you know how uncomfortable I am when you hug, touch and kiss me. I don't think this is appropriate at work, and would like you to stop doing it. I don't want to go to Sylvia [Beamer]. I would rather resolve this ourselves." A. 170. Yadlosky responded,

> First and more importantly, I never meant to make you feel uncomfortable nor would I ever want to offend you in any way and I will STOP IMMEDIATELY. Secondly, almost from the first day you started (3 years and 9 months) I have been affectionate to you, among other people I was close to[] (only in a friendly manner, no other way intended), why have you never said anything to me before. Third, and to me most important, I thought we had a very good working relationship where we could approach one another on any matters. It disturbs me that you would put this out on an e-mail and not talk to me about this. Apparently I was wrong on thinking that. If you wanted to do this in writing, for proof, you could have typed this out and I would have signed it and you could have kept it.

A. 170. He confronted Minarsky about the email on July 12; she claims that he seemed mostly concerned that his reputation might be tarnished if someone else read her email.

Around the same time, Minarsky confided in her friend and co-worker, Rachel Carrico, about Yadlosky's harassment. When Carrico mentioned what was happening between Yadlosky and Minarsky to another employee, Carrico's supervisor overheard the conversation and reported Yadlosky's conduct to Beamer. At first, Minarsky objected, for fear of losing her job. But Beamer had already been notified, and she interviewed Minarsky about her allegations within a few days. Beamer informed the County Commissioners, who agreed that Yadlosky should be

terminated. The next day, Beamer interviewed Yadlosky. When he admitted to the allegations, Yadlosky was immediately placed on paid administrative leave, and then terminated. The County then hired a Human Resources Director to oversee personnel issues.

Minarsky quit several years later, and she alleges she was uncomfortable in her role after Yadlosky was fired, because her workload increased, and because of inquiries from her new supervisor asking about what had transpired with Yadlosky and who else she had caused to be fired.

## II. Procedural History

Plaintiff Minarsky filed a Complaint, Amended Complaint, and a Second Amended Complaint with five causes of action against Susquehanna County and two against Yadlosky. The counts against the County were: gender discrimination, sexual harassment through a hostile work environment, and quid pro quo sexual harassment, all under Title VII of the Civil Rights Act; gender discrimination under the Pennsylvania Human Relations Act (PHRA); and negligent hiring and retention under Pennsylvania state law. The counts against Yadlosky, all under state law, were: gender discrimination under the PHRA (later withdrawn), intentional infliction of emotion distress (IIED), and assault.

The District Court granted Yadlosky's Motion to Dismiss the IIED claim but denied the County's Motion for Judgment on the Pleadings. After discovery, the County moved for summary judgment. The District Court adopted the Magistrate Judge's Report and Recommendation and granted the County's Motion for Summary Judgment, while

dismissing the remaining count of assault against Yadlosky—the lone remaining state law claim—for lack of supplemental jurisdiction.

On appeal, Minarsky claims that the District Court erred in finding that the County had satisfied both elements of the *Faragher-Ellerth* affirmative defense as to the claim of sexual harassment through a hostile work environment and erred in dismissing the state law claim for lack of supplemental jurisdiction.

## III. Standard of Review

The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1367. This Court has jurisdiction over final orders of the District Court pursuant to 28 U.S.C. § 1291.

We exercise plenary review over the grant or denial of summary judgment and apply the same standard the district court should have applied. *Giles v. Kearney*, 571 F.3d 318, 322 (3d Cir. 2009). Summary judgment is appropriate when, drawing all reasonable inferences in favor of the nonmoving party, "the movant shows that there is no genuine dispute as to any material fact," and thus the movant "is entitled to judgment as a matter of law." *Thomas v. Cumberland Cty.*, 749 F.3d 217, 222 (3d Cir. 2014) (quoting Fed. R. Civ. P. 56(a)). We deny summary judgment if there is enough evidence for a jury to reasonably find for the nonmovant. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

## IV. Hostile Work Environment Claim

On appeal, Minarsky does not contest the District Court's grant of summary judgment on the claims for gender discrimination and quid pro quo sexual harassment in violation of Title VII and the PHRA. Thus, we focus our analysis on the claim of sexual harassment based on a hostile work environment. To establish a Title VII hostile work environment claim against one's employer, a plaintiff employee must prove:

> 1) the employee suffered intentional discrimination because of his/her sex, 2) the discrimination was severe or pervasive, 3) the discrimination detrimentally affected the plaintiff, 4) the discrimination would detrimentally affect a reasonable person in like circumstances, and 5) the existence of *respondeat superior* liability.

*Mandel v. M & Q Packaging Corp*., 706 F.3d 157, 167 (3d Cir. 2013) (internal citations omitted). Defendant Susquehanna County only contests the fifth prong, vicarious liability, which frames our analysis on appeal.

### A. The *Faragher-Ellerth* Affirmative Defense

In the companion cases of *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), the U.S. Supreme Court established standards for when an employee who was harassed in the workplace by a supervisor may impute liability to the employer. In doing so, the Court acknowledged

the sensitive nature of workplace harassment: "a supervisor's power and authority invests his or her harassing conduct with a particular threatening character." *Ellerth*, 524 U.S. at 763.

If the harassment resulted in a "tangible employment action" against the employee, then the employer is strictly liable. *Jones v. Se. Pa. Transp. Auth.*, 796 F.3d 323, 328 (3d Cir. 2015) (quoting *Pa. State Police v. Suders*, 542 U.S. 129, 143 (2004)). The Supreme Court has described a tangible employment action 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.[5]

However, if the harassed employee suffered no tangible employment action, as in the present scenario,[6] the employer can avoid liability by asserting the *Faragher*-

[5] To prove a claim for gender discrimination under Title VII or the PHRA and quid pro quo sexual harassment under Title VII, a plaintiff must show that she suffered an adverse employment action, or "an action by an employer that is serious and tangible enough to alter an employee's compensation, terms, conditions, or privileges of employment." *Jones*, 796 F.3d at 326 (quoting *Storey v. Burns Int'l Sec. Servs.*, 390 F.3d 760, 764 (3d Cir. 2004)). "Regardless of whether [tangible employment action] means precisely the same thing as 'adverse employment action,' we think it clear that neither phrase applies" in this case. *Id.* at 328.

[6] Minarsky did not proffer evidence that she was reassigned, discharged, or demoted.

*Ellerth* affirmative defense. The employer must show "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

The cornerstone of this analysis is reasonableness: the reasonableness of the employer's preventative and corrective measures, and the reasonableness of the employee's efforts (or lack thereof) to report misconduct and avoid further harm. Thus, the existence of a functioning anti-harassment policy *could* prove the employer's exercise of reasonable care so as to satisfy the first element of the affirmative defense. *Faragher*, 524 U.S. at 807.

To prove the second element of the affirmative defense, that the plaintiff unreasonably failed to avail herself of the employer's "preventive or corrective opportunities," the Supreme Court has held that "proof that an employee failed to [exercise] reasonable care to avoid harm . . . will normally suffice to satisfy the employer's burden under the second element of the defense." *Id.* at 807–08; *Ellerth*, 524 U.S. at 765.

### B. District Court Rulings

The Magistrate Judge recommended that the District Court grant summary judgment on all counts. He determined that the County acted reasonably: first, for maintaining an anti-harassment policy, with which Minarsky was familiar,

and second, for reprimanding Yadlosky for his inappropriate conduct two times in the past and for promptly terminating Yadlosky once his misconduct toward Minarsky came to light.

The Judge also found Minarsky's silence—her failure to report the harassment—unreasonable. "The County's reasonable policies and responses," the Magistrate Judge wrote, "are set in stark contrast to the plaintiff's refusal or unwillingness to avail herself of the County's anti-harassment policy to bring Yadlosky's conduct to the attention of County officials." *Minarsky v. Susquehanna Cty.*, 2017 WL 4475978, at *6 (M.D. Pa. May 22, 2017). The Magistrate Judge dismissed Minarsky's alleged apprehension of the Chief Clerk and County Commissioners as unreasonable, because her mistrust of them came "from the very employee Minarsky claims was harassing her," and was not sufficient to excuse her failure to report. *Id.* He cited to caselaw for the principle that a prolonged failure to report misconduct, when a policy existed to report the conduct, is unreasonable as a matter of law, under the facts of those cases.[7]

The Magistrate Judge acknowledged that a failure to avail oneself of a sexual harassment policy, in fear of retaliation, may be reasonable when grounded in fact, which

[7] *E.g.*, *Newsome v. Admin. Office of the Courts of the State of N.J.*, 51 F. App'x 76, 80 (3d Cir. 2002) (non-precedential) (a two-year delay in reporting harassment was unreasonable); *Gawley v. Ind. Univ.*, 276 F.3d 301, 312 (7th Cir. 2001) (seven-month delay unreasonable); *Cacciola v. Work N Gear*, 23 F. Supp. 3d 518, 531–32 (E.D. Pa. 2014) (nine-month delay unreasonable).

he distinguished from what he found to be Minarsky's unfounded concerns. He contrasted Minarsky's situation with the plaintiff's in *Still v. Cummins Power System*, who observed fellow employees suffer retaliation for having followed the anti-harassment policy, and was thus justified in not reporting. 2009 WL 57021, at *13 (E.D. Pa. Jan. 8, 2009).

Minarsky lodged objections to the Magistrate Judge's Report and Recommendation, but the District Court rejected Minarsky's objections and adopted the Report and Recommendation in its entirety. The Court found that the County satisfied the *Faragher-Ellerth* defense: although the County was unaware of Yadlosky's misconduct toward Minarsky, it warned him after each prior incident and fired him as soon as Beamer and the Commissioners were made aware of the allegations, all while Minarsky did not avail herself of the County's sexual harassment policy because she feared the consequences of reporting. The District Court concluded, "no reasonable jury could find that Plaintiff acted reasonably in failing to avail herself of the protections of the sexual harassment policy." *Minarsky v. Susquehanna Cty.*, 2017 WL 4475981, at *1 (M.D. Pa. June 28, 2017).

### C. Analysis

#### *1. Element One*

The first element of the *Faragher-Ellerth* affirmative defense concerns whether the County "exercised reasonable care to prevent and correct promptly any sexually harassing behavior." *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765. We acknowledge that the County maintained a written anti-harassment policy, which Minarsky was asked to read

and sign on her first day. The policy prohibited harassment in the workplace, directed employees to report any harassment to a supervisor, and provided that an employee "may" report to the Chief Clerk or a County Commissioner if the supervisor was the source of harassment. A. 166–67.

The District Court determined that the County had reasonable policies and responses so as to satisfy the first prong of *Faragher-Ellerth* as a matter of law. We disagree. While Yadlosky was reprimanded twice and ultimately fired, we cannot agree that the County's responses were so clearly sufficient as to warrant the District Court's conclusion as a matter of law. Yadlosky's conduct toward Minarsky was not unique; Minarsky's deposition testimony revealed a pattern of unwanted advances toward multiple women other than herself. *See, e.g.*, A. 102–03.

In addition to the mistletoe incidents and his advances toward Rachel Carrico and Connie Orangasick, Yadlosky had also made inappropriate physical advances to two of the women in authority, Chief Clerk Beamer and Commissioner Warren. Minarsky testified that when she later attended the hearing to determine Yadlosky's eligibility for unemployment benefits, she was shocked to learn of the extent to which Beamer knew of Yadlosky's pattern of inappropriate physical contact: apart from the two times Beamer reprimanded Yadlosky for hugging other employees, Yadlosky tried to hug Beamer, too.[8] In her deposition, Commissioner Warren also

[8] In her deposition, Beamer testified, "Once I believe he was going to [hug me]. It was in my office and he started to come around my desk and I just said don't go there. That was early on." A. 192:10–12.

testified that Yadlosky attempted to hug her, put his arm around her, or kiss her on the cheek approximately *ten times*.[9] Although as a Commissioner, Warren was in a position to discipline Yadlosky for his behavior, and although she raised his misconduct to County Commissioner Hall, neither Warren nor Hall reprimanded Yadlosky.[10] Thus, County officials were faced with indicators that Yadlosky's behavior formed a pattern of conduct, as opposed to mere stray incidents, yet they seemingly turned a blind eye toward Yadlosky's harassment.

Was the policy in place effective? Knowing of his behavior, and knowing that Minarsky worked alone with Yadlosky every Friday, should someone have ensured that she was not being victimized? Was his termination not so much a reflection of the policy's effectiveness, but rather, did it evidence the County's exasperation, much like the straw that broke the camel's back? We do not answer these questions, but conclude that there exists enough of a dispute of material fact, and thus a jury should judge all of the facts as to whether the County "exercised reasonable care to prevent and correct promptly any sexually harassing behavior," *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at

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[9] Warren: "He would kind of giggle like a girl, come around the table and lean over and . . . hug me and tried to kiss me on the cheek. . . . I backed the chair up, told him to get away, [asked him what he was] doing and to stop being a jerk." A. 260:16–18, 21–22.

[10] In her deposition, Warren stated that she needed another Commissioner to sign off if she were to take any action against Yadlosky.

765, and thereby determine whether the County satisfied the first element of *Faragher-Ellerth*.

*2. Element Two*

The second element, regarding the reasonableness of Minarsky's failure to report Yadlosky's behavior, presents a similarly troubling set of facts. On the one hand, she remained silent and did nothing to avoid further harm. On the other hand, her silence might be viewed as objectively reasonable in light of the persuasive facts Minarsky has set forth.

We are sensitive to the Supreme Court's emphasis that the second *Faragher-Ellerth* element is tied to the objective of Title VII, to avoid harm, rather than provide redress. *Faragher*, 524 U.S. at 806–07 ("[N]o award against a liable employer should reward a plaintiff for what her own efforts could have avoided."). We also acknowledge that our case precedent has routinely found the passage of time coupled with the failure to take advantage of the employer's anti-harassment policy to be unreasonable, as did the District Court here. *E.g.*, *Jones*, 796 F.3d at 329.[11]

Nevertheless, we cannot ignore Minarsky's testimony as to why she did not report Yadlosky's conduct, and we

[11] In *Jones*, the plaintiff's ten-year delay in reporting her alleged harassment was just one factor we credited in concluding that the defendant satisfied *Faragher-Ellerth*.

believe that a jury could find that she did not act unreasonably under the circumstances.[12]

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[12] This appeal comes to us in the midst of national news regarding a veritable firestorm of allegations of rampant sexual misconduct that has been closeted for years, not reported by the victims. It has come to light, years later, that people in positions of power and celebrity have exploited their authority to make unwanted sexual advances. In many such instances, the harasser wielded control over the harassed individual's employment or work environment. In nearly all of the instances, the victims asserted a plausible fear of serious adverse consequences had they spoken up at the time that the conduct occurred. While the policy underlying *Faragher-Ellerth* places the onus on the harassed employee to report her harasser, and would fault her for not calling out this conduct so as to prevent it, a jury could conclude that the employee's non-reporting was understandable, perhaps even reasonable. That is, there may be a certain fallacy that underlies the notion that reporting sexual misconduct will end it. Victims do not always view it in this way. Instead, they anticipate negative consequences or fear that the harassers will face no reprimand; thus, more often than not, victims choose not to report the harassment.

Recent news articles report that studies have shown that not only is sex-based harassment in the workplace pervasive, but also the failure to report is widespread. Nearly one-third of American women have experienced unwanted sexual advances from male coworkers, and nearly a quarter of American women have experienced such advances from men who had influence over the conditions of their employment, according to an ABC News/Washington Post poll from October of 2017. Most all of the women who experienced

Although we have often found that a plaintiff's outright failure to report persistent sexual harassment is unreasonable as a matter of law, particularly when the opportunity to make such complaints exists, we write to clarify that a mere failure to report one's harassment is not *per se* unreasonable. Moreover, the passage of time is just one factor in the analysis. Workplace sexual harassment is highly

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harassment report that the male harassers faced no consequences. ABC News/Washington Post, *Unwanted Sexual Advances: Not Just a Hollywood Story* (Oct. 17, 2017), http://www.langerresearch.com/wp-content/uploads/1192a1SexualHarassment.pdf.

Additionally, three out of four women who have been harassed fail to report it. A 2016 Equal Employment Opportunity Commission (EEOC) Select Task Force study found that approximately 75 percent of those who experienced harassment *never* reported it or filed a complaint, but instead would "avoid the harasser, deny or downplay the gravity of the situation, or attempt to ignore, forget, or endure the behavior." EEOC Select Task Force, *Harassment in the Workplace*, at v (June 2016), https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf. Those employees who faced harassing behavior did not report this experience "because they fear[ed] disbelief of their claim, inaction on their claim, blame, or social or professional retaliation." *Id.*; *see also* Stefanie Johnson, et al., *Why We Fail to Report Sexual Harassment*, Harvard Business Review (Oct. 4, 2016), http://hbr.org/2016/10/why-we-fail-to-report-sexual-harassment (women do not report harassment because of retaliation fears, the bystander effect, and male-dominated work environments).

circumstance-specific, and thus the reasonableness of a plaintiff's actions is a paradigmatic question for the jury, in certain cases. If a plaintiff's genuinely held, subjective belief of potential retaliation from reporting her harassment appears to be well-founded, and a jury could find that this belief is objectively reasonable, the trial court should not find that the defendant has proven the second *Faragher-Ellerth* element as a matter of law. Instead, the court should leave the issue for the jury to determine at trial.

Here, Minarsky asserts several countervailing forces that prevented her from reporting Yadlosky's conduct to Beamer or a County Commissioner: her fear of Yadlosky's hostility on a day-to-day basis and retaliation by having her fired; her worry of being terminated by the Chief Clerk; and the futility of reporting, since others knew of his conduct, yet it continued. All of these factors were aggravated by the pressing financial situation she faced with her daughter's cancer treatment.

First, the particular nature of Minarsky's working relationship with Yadlosky complicated the situation. They worked alone one day each week, away from others, and on other days he continued to monitor her, ostensibly utilizing his control over her work environment to harass her. Appellees argue that the superior-subordinate dynamic is unremarkable, because all *Faragher-Ellerth* cases involve a power imbalance wherein the harasser controls the working conditions of the harassed. We disagree that this is irrelevant; the degree of control and specific power dynamic can offer context to the plaintiff's subjectively held fear of speaking up, for instance, if the supervisor "took advantage of the power vested in them . . . to facilitate their abuse" or harassment.

*Vance v. Ball State Univ.*, 570 U.S. 421, 458 (2013) (quoting *Faragher*, 524 U.S. at 801).

Second, when Minarsky attempted to assert herself in the workplace, she alleges that Yadlosky became "nasty," which deepened her fear of defending herself or disclosing Yadlosky's misconduct. For example, if she tried to request personal days off or ignored his phone calls on days she was not working, he became ill-tempered. She said,

> He was just unpredictable with his temperament. I had to watch what I said to him. I had to watch how I acted around him. It seemed if he didn't get what he wanted, I seemed to get treated more miserably. The day would be harder if I spoke up about anything he said or [did] in the office. I had to just watch what I did.

A. 153:15–20; *see also* A. 158:6 ("[H]e had a temper."). Moreover, when asked why she was unable to vocally protest Yadlosky's attempts to kiss her, Minarsky stated that she needed her job to pay her daughter's medical bills, and worried that she might lose her job or otherwise be retaliated against if she voiced her distress.[13] When Yadlosky would approach Minarsky because "he thought he should kiss [her] on the lips before he left" each Friday, A. 97:21–22, Minarsky stated in her deposition, "I did not know how to respond. It happened so quickly. I was under probation so I

[13] Minarsky did, however, refuse to walk into his office if there was mistletoe hanging, and admits that this was the only time she specifically voiced her discomfort.

was concerned that . . . if I did not, what was going to happen [to my job]."[14] A. 98:10–12. Although she avers that she meekly protested, she states, "I know I didn't dare speak up to him." A. 99:10–11.

We distinguish this situation from one in which the employee's fear of retaliation is generalized and unsupported by evidence. Several courts have held that a generalized fear of retaliation is insufficient to explain a long delay in reporting sexual harassment. *See, e.g.*, *Pinkerton v. Colo. Dep't of Transp.*, 563 F.3d 1052, 1063 (10th Cir. 2009) (citing cases from the Fifth, Sixth, Eighth, and Eleventh Circuit Courts of Appeals where a generalized fear of retaliation did not excuse a two-to-four month delay in reporting harassment).[15] The First Circuit Court of Appeals has held that a fear of retaliation that is substantiated by evidence in the record may excuse a failure to report, and the jury should decide the credibility of the witness expressing this fear. *See Burns v. Johnson*, 829 F.3d 1, 19 (1st Cir. 2016) (finding "evidence in the record that Burns feared retaliation, which is bolstered by the fact that others expressed fear of

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[14] When Minarsky first began working at the County, her employment was probationary for the first six months.

[15] *See Casiano v. AT&T Corp.*, 213 F.3d 278, 280–81, 287 (5th Cir. 2000) (a four-month delay was unreasonable); *Thornton v. Fed. Express Corp.*, 530 F.3d 451, 457 (6th Cir. 2008) (two-month delay); *Williams v. Missouri Dep't of Mental Health*, 407 F.3d 972, 976 (8th Cir. 2005) (four-month delay); *Walton v. Johnson & Johnson Svcs., Inc.*, 347 F.3d 1272, 1277, 1290–91 (11th Cir. 2003) (two-and-a-half-month delay).

retaliation for mere participation in the . . . investigation into [the harassment, along with] evidence that Burns had earlier reported her concerns, including to her direct supervisor").

Here, Minarsky identifies instances where asserting herself rendered her working conditions even more hostile, and she was led to believe that she should not protest her supervisor's conduct. Presented with these facts, a reasonable jury could find that Minarsky's fear of aggravating her work environment was sufficiently specific, rather than simply a generalized, unsubstantiated fear.[16]

Third, although Minarsky's fear of retaliation was subjective, we disagree with the District Court's view that it was clearly unfounded. Yadlosky discouraged her from using the anti-harassment policy by underscoring that she could not trust the Commissioners or the Chief Clerk—those to whom she would report the harassment. He warned her that they might "get rid" of Minarsky and her job, which she alleged "made it very hard for [her] to think of going to them." A. 101:20–21, 24–25. The District Court discounted this because it was Yadlosky himself who made these comments. But the fact that he was the harasser does not mean that Minarsky should have disbelieved his comments about people in authority whom he knew better than she did, and does not render her fear unfounded. Minarsky was merely a part-time employee. Yadlosky was the Director of Veterans Affairs for the County. We do not think that her failure to avail herself of

[16] The trial judge can instruct the jury that a plaintiff's fears must be specific, not generalized, in order to defeat the *Faragher-Ellerth* defense.

this avenue was necessarily unreasonable, and a jury could find the same.

Fourth, Minarsky discovered that the County had known of Yadlosky's behavior and merely slapped him on the wrist, without more—bolstering Minarsky's claim that she feared the County would ignore any report she made. "[H]e had been warned and it went nowhere," she observed. A. 142:21. She proffered evidence that Yadlosky openly disregarded his behavioral warnings in front of Minarsky and continued to emphasize distrust with the County officials. She said,

> [The warning] didn't phase him at all and he's telling me not to trust the Chief Clerk, the Commissioners; they would get rid of me; they would get rid of my job. I didn't know how to perceive that. Was this going to mean my job if I speak up? *It didn't help the first time with the first person speaking up.*

A. 142:22–143:1 (emphasis added). A jury could find that Minarsky reasonably believed that availing herself of the anti-harassment policy would be futile, if not detrimental. *See, e.g.*, *Harvill v. Westward Commc'ns, LLC*, 433 F.3d 428, 437 (5th Cir. 2005) (a harassed employee "is not obligated to go through the wasted motion of reporting the harassment" if the employee reasonably believes that subsequent complaints would be futile).

Fifth, a reasonable jury could consider the pernicious nature of the harassment compounded with its frequency and duration to contextualize Minarsky's actions. Minarsky

endured over three-and-a-half years of being kissed on the lips, touched, and embraced by her boss, without her consent, all while he sent her explicit emails and monitored her whereabouts. She witnessed him hugging others and asking female employees to kiss him under mistletoe. Minarsky seemingly agonized over her situation. She only revealed her harassment to her husband years later, because she knew he would have urged her to quit even though her family desperately needed the money. When Minarsky eventually did share her situation with her husband, she expressed that if she quit, she then feared Yadlosky would harass her replacement.[17] Even then, it was only after Minarsky's medical doctor emphasized that Minarsky was being treated inappropriately, and encouraged her to confront Yadlosky to hopefully bring an end to the harassment and its physical and emotional toll, did Minarsky finally do so.

Rather than view this merely as Minarsky's idle delay in reporting, a jury could consider the aggravating effect of prolonged, agonizing harassment as a way to credit Minarsky's fear of worsening her situation.

Appellees argue that Minarsky's behavior was unreasonable, given her knowledge of the County's anti-harassment policy and her failure to use the policy, by pointing to the line in Minarsky's email to Yadlosky, "I don't want to go to Sylvia. I would rather resolve this ourselves." A. 170. While Appellees characterize this as evidence

[17] Minarsky: "I relayed to him that I was concerned about, if I quit, Tom [will do] this to the next person. . . . How do I quit, knowing that [Yadlosky is] going to continue this? How do I get him to understand that it's wrong?" A. 157:20–21, 22–24.

Minarsky deliberately refrained from using the policy's protections, Minarsky averred in her deposition that it was her way of informing Yadlosky that she *would* resort to the harassment policy if his conduct did not change.[18] Whether this evidence negates the reasonableness of Minarsky's non-reporting is for the jury, not us, to decide.

In sum, Minarsky has produced several pieces of evidence of her fear that sounding the alarm on her harasser would aggravate her work environment or result in her termination. A jury could consider this evidence and find her reaction to be objectively reasonable. We therefore cannot uphold the District Court's conclusion that Minarsky's behavior was unreasonable as a matter of law.

Thus, we will vacate the District Court's Order granting summary judgment in favor of the County and remand for further proceedings consistent with this opinion.

## V. Supplemental Jurisdiction

Minarsky appeals the District Court's ruling not to exercise supplemental jurisdiction over her sole state-law claim of assault against Yadlosky. Because we vacate the dismissal of the hostile work environment claim under Title VII of the Civil Rights Act, on remand, the District Court will have a federal claim once again. The Court can therefore choose to exercise supplemental jurisdiction over the state-law claim, and thus we vacate the dismissal of the assault

[18] "That was my way of saying I hadn't gone to the Chief Clerk but, if I need to, I will." A. 115:22–23.

claim, as well. *See Trinity Indus., Inc. v. Chi. Bridge & Iron Co.*, 735 F.3d 131, 140–41 (3d Cir. 2013).

## VI. Conclusion

For the foregoing reasons, the judgment of the District Court is vacated and the case is remanded for further proceedings consistent with this opinion.

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# The Man Behind the Curtain: How Mandatory Arbitration Impedes the Advancement of LGBTQ+ Rights

Devon M. Loerch

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# The Man Behind the Curtain: How Mandatory Arbitration Impedes the Advancement of LGBTQ+ Rights

*Devon M. Loerch*[*]

## I. INTRODUCTION

Following a number of transformative decisions issued by the Supreme Court of the United States,[1] arbitration has become a popular method of dispute resolution nationwide.[2] Time and time again, the Supreme Court has permitted the inclusion of mandatory arbitration clauses in consumer and employment contracts,[3] and as a result, these clauses have become ubiquitous over the past thirty years.[4] During that time frame, as mandatory arbitration was steadily becoming more prevalent,[5] advocacy for the Lesbian, Gay, Bisexual, Transgender, and Queer ("LGBTQ+")[6] community was also growing.[7] The LGBTQ+ community and its allies have continued to fight for equal protections, especially with respect to employment rights.[8]

Supreme Court decisions in *Price Waterhouse v. Hopkins*[9] and *Oncale v. Sundowner Offshore Services, Inc.*[10] played a major role in LGBTQ+ Americans'

* B.S. and B.A., University of Missouri, 2015; J.D., University of Missouri School of Law, 2019; M.B.A., University of Missouri, Robert J. Trulaske, Sr. College of Business, 2019. The author would like to thank Professor Rafael Gely and the entire Journal of Dispute Resolution staff for their guidance and encouragement in writing this Comment.

1. Michael L. Rustad et al., *An Empirical Study of Predispute Mandatory Arbitration Clauses in Social Media Terms of Service Agreements*, 34 U. ARK. LITTLE ROCK L. REV. 643, 676 (2012).

2. Arbitration has been an accepted method of dispute resolution for thousands of years. Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1631 (2005). While used since colonial times, arbitration did not gain its modern popularity until after Congress enacted the Federal Arbitration Act in 1925. *See*, *e.g.*, JEROLD S. AUERBACH, JUSTICE WITHOUT LAW? 32–33, 43–44, 101–14 (1983) (examining arbitration as it existed in colonial America); William Catron Jones, *Three Centuries of Commercial Arbitration in New York: A Brief Survey*, 1956 WASH. U. L.Q. 193, 194 (1956) (examining uses of arbitration in New York, beginning with the Dutch West India Company in the 1600s, and concluding that "arbitration has been an important means of deciding disputes since the earliest days of European settlement in New York in the seventeenth century.").

3. Rustad, *supra* note 1.

4. Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POLICY INST. (Apr. 6, 2018), https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/.

5. *Id.*

6. This Comment will use the acronym "LGBTQ+" for lesbian, gay, bisexual, transgender, and queer. While the plus is not expressly written in the acronym, it "is intended as an all–encompassing representation of sexual orientations and gender identities." *Glossary of Terms*, BLOOMINGTON PRIDE, https://bloomingtonpride.org/glossary (last visited Nov. 6, 2019).

7. Jared Odessky, *LGBTQ+ Workers Are Winning Their Rights. But Because of Their Forced Arbitration, They Can't Use Them.*, NAT'L EMP'T LAW PROJECT (June 15, 2018), https://www.nelp.org/blog/LGBTQ+–workers-winning-rights-forced-arbitration-cant-use/.

8. *Id.*

9. *See* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), *superseded by statute*, 42 U.S.C. § 2000e–2 (1991).

10. *See* Oncale v. Sundowner Offshore Serv., Inc., 523 U.S. 75 (1998).

fight to be free from employment discrimination.[11] In *Price Waterhouse*, the Court recognized that prohibited sex discrimination under Title VII of the Civil Rights Act of 1964 ("Title VII")[12] encompasses discrimination based on sex stereotypes, including assumptions or expectations about how an individual of a certain gender should dress or behave.[13] Subsequently, in *Oncale*, the Court determined that Title VII's prohibition of sex discrimination also applies in cases of same–sex harassment.[14] Though neither plaintiff was a member of the LGBTQ+ community, both *Price Waterhouse* and *Oncale* have proven to be pivotal for LGBTQ+ individuals who rely on these decisions in cases of employment discrimination.[15] In *Oncale*, Justice Scalia famously wrote that "statutory provisions often go beyond the principal evil to cover reasonably comparative evils, and it is ultimately the provisions of our laws rather than the principle concerns of our legislators by which

11. *Cf. Price Waterhouse*, 490 U.S. at 228; *Oncale*, 523 U.S. at 75 (establishing precedent in *Price Waterhouse* and *Oncale* that has led to numerous federal court decisions supporting the premise that Title VII's prohibition of sex discrimination encompasses sexual orientation and gender identity). *See generally* Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339 (7th Cir. 2017) (en banc); Muhammad v. Caterpillar, Inc., 767 F.3d 694 (7th Cir. 2014); Latta v. Otter, 771 F.3d 456 (9th Cir. 2014); Boutillier v. Hartford Pub. Sch., 221 F. Supp. 3d 255 (D. Conn. 2016); U.S. Equal Opportunity Comm'n v. Scott Med. Health Ctr., 217 F. Supp. 3d 834 (W.D. Pa. 2016); Winstead v. Lafayette Cty. Bd. Of Cty. Comm'rs, 197 F. Supp. 3d 1334 (N.D. Fla. 2016); Videckis v. Pepperdine Univ., 150 F. Supp. 3d 1151 (C.D. Cal. 2015); Isaacs v. Felder Serv., LLC, 143 F. Supp. 3d 1190 (M.D. Ala. 2015); Strong v. Grambling State Univ., 159 F. Supp. 3d 697 (W.D. La. 2015); Hall v. BNSF Ry. Co., 2014 WL 4719007 (W.D. Wash. Sept. 22, 2014); Terveer v. Billington, 34 F. Supp. 3d 100 (D.D.C. 2014); Koren v. Ohio Bell Tel. Co., 894 F. Supp. 2d 1032 (N.D. Ohio 2012); Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212 (D. Or. 2002); Centola v. Potter, 183 F. Supp. 2d 403 (D. Mass. 2002); Chavez v. Credit Nation Auto Sales, LLC, 641 F. App'x 883 (11th Cir. 2016); Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011); Barnes v. Cincinnati, 401 F.3d 729 (6th Cir. 2005); Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004); Rosa v. Parks W. Bank & Tr. Co., 214 F.3d 213 (1st Cir. 2000); Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000); Baker v. Aetna Life Ins., 228 F. Supp. 3d 764 (N.D. Tex. 2017); Mickens v. General Elec. Co., 2016 WL 7015665 (W.D. Ky. Nov. 29, 2016); Roberts v. Clark Cty. Sch. Dist., 215 F. Supp. 3d 1001 (D. Nev. 2016); Doe v. Arizona., 2016 WL 1089743 (D. Ariz. Mar. 21, 2016); Fabian v. Hospital of Cent. Conn., 172 F. Supp. 3d 509 (D. Conn. 2016); Lewis v. High Point Reg'l Health Sys., 79 F. Supp. 3d 588 (E.D.N.C. 2015); Finkle v. Howard Cty., 12 F. Supp. 3d 780 (D. Md. 2014); Parris v. Keystone Foods, LLC, 959 F. Supp. 2d 1291 (N.D. Ala. 2013); Radtke v. Miscellaneous Drivers & Helpers Union Local No. 638, 867 F. Supp. 2d 1023 (D. Minn. 2012); Schroer v. Billington, 577 F. Supp. 2d 293 (D.D.C. 2008); Lopez v. River Oaks Imaging & Diagnostic Grp., Inc., 542 F. Supp. 2d 653 (S.D. Tex. 2008); Mitchell v. Axcan Scandipharm, Inc., 2006 WL 456173 (W.D. Pa. Feb. 17, 2006); Tronetti v. TLC HealthNet Lakeshore Hosp., 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003); Creed v. Family Express Corp., 2007 WL 2265630 (N.D. Ind. Aug. 3, 2007); Miles v. New York Univ., 979 F. Supp. 248 (S.D.N.Y. 1997).

12. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2(a) (1991) [hereinafter Title VII] (amended in 2009) (prohibiting employers from "refus[ing] to hire or . . . discharg[ing] 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," and prohibiting employment discrimination on the basis of sex, including the hiring and termination of employees and discrimination "with respect to [an individual's] compensation, terms, conditions, or privileges of employment.").

13. *Price Waterhouse*, 490 U.S. at 235 (telling plaintiff, among other things, that she needed to "walk more femininely, talk more femininely, [and] dress more femininely" in order to secure a partnership).

14. *Oncale*, 523 U.S. at 79–82.

15. *See* Mark Joseph Stern, *Thank Scalia for the Revolutionary EEOC Workplace Discrimination Decision*, SLATE (July 17, 2015, 1:08 PM), https://slate.com/human-interest/2015/07/scalia-and-the-eeoc-how-oncale-made-sexual-orientation-discrimination-illegal.html; Matt Schudel, *Ann Hopkins, Who Won Supreme Court Gender–Bias Case After Being Denied a Promotion, Dies at 74*, WASH. POST (July 18, 2018), https://www.washingtonpost.com/local/obituaries/ann-hopkins-who-won-supreme-court-gender-bias-case-after-being-denied-a-promotion-dies-at-74/2018/07/18/eb70f81a-8a99-11e8-8aea-86e88ae760d8_story.html.

we are governed."[16] This statement is of monumental importance to LGBTQ+ plaintiffs, who assert they are protected by the plain language of statutes that forbid sex discrimination even though legislators may not have had LGBTQ+ persons in mind when the statutes were enacted. Unfortunately, mandatory arbitration clauses, especially those within employment contracts, have played an often–overlooked role in diluting the progress of the LGBTQ+ movement and the hard–won protections recognized over the last several decades.[17]

This Comment will examine how the enforcement of mandatory arbitration clauses has impacted LGBTQ+ individuals' ability to vindicate their rights. Section II of this Comment explores the history of LGBTQ+ rights and important legal victories. Section III discusses the Federal Arbitration Act ("FAA"), including its history, the legislative intent behind the statute, its modern interpretation, and the implications it has on the rights of LGBTQ+ employees. Section IV assesses the prevalence of arbitration and its consequences. Finally, Section V examines how mandatory arbitration clauses have stalled the progression of LGBTQ+ rights, as well as the necessity of supplemental legislative action to protect LGBTQ+ employees.

## II. A BRIEF HISTORY OF LGBTQ+ RIGHTS

LGBTQ+ relationships have been criminalized sporadically throughout the Western world since the 1500s.[18] For example, Paragraph 175 of the German Imperial Code outlawed LGBTQ+ relations,[19] and a proposed Virginia law endorsed by Thomas Jefferson[20] punished LGBTQ+ relations with mutilation.[21] Similarly, sodomy laws[22] remained in force for centuries,[23] and prior to their invalidation by the Supreme Court in the early 2000s,[24] fourteen states still had sodomy statutes that forbade and criminally sanctioned LGBTQ+ relations.[25] Had

16. *Oncale*, 523 U.S. at 79.

17. Odessky, *supra* note 7.

18. *See* Michael Levy, *Gay Rights Movement*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/gay-rights-movement (last visited June 20, 2019).

19. *See Paragraph 175*, THE U.S. HOLOCAUST MEM'L MUSEUM (1990), https://www.ushmm.org/learn/students/learning-materials-and-resources/homosexuals-victims-of-the-nazi-era/paragraph-175; *see also Paragraph 175: The Nazi Persecution of Gays*, LESBIAN NEWS (Oct. 13, 2016), http://www.lesbiannews.com/paragraph-175-nazi-persecution-gays/.

20. *See generally Brief Biography of Thomas Jefferson*, THOMAS JEFFERSON FOUND., https://www.monticello.org/thomas-jefferson/brief-biography-of-jefferson/ (last visited Nov. 8, 2019) (Thomas Jefferson was the third President of the United States who, prior to his presidency, served as a legislator from Virginia and helped draft the American Declaration of Independence).

21. *Timeline of LGBT History in Virginia and the U.S.*, VA. DEP'T OF HISTORIC RES., https://www.dhr.virginia.gov/wp-content/uploads/2018/09/LGBTQ_Timeline-Virginia-and-US.pdf (last visited Nov. 8, 2019).

22. *See generally Why Sodomy Laws Matter*, AM. CIVIL LIBERTIES UNION FOUND., https://www.aclu.org/other/why-sodomy-laws-matter (last visited Nov. 8, 2019) (sodomy statutes aim to outlaw numerous sexual acts); WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 161 (1999) (sodomy laws often target sexual relationship between individuals of the same sex).

23. ESKRIDGE, *supra* note 22 (many of the state statues that were in effect until 2003 were inherited from the colonial laws established in the 1600s).

24. Lawrence v. Texas, 539 U.S. 558 (2003).

25. *See 12 States Still Ban Sodomy a Decade After Court Ruling*, USA TODAY (Apr. 21, 2014, 6:42 PM), https://www.usatoday.com/story/news/nation/2014/04/21/12-states-ban-sodomy-a-decade-after-court-ruling/7981025/ (the fourteen states that still had sodomy laws on their books in 2003 were Alabama, Florida, Idaho, Kansas, Louisiana, Michigan, Mississippi, Missouri, North Carolina,

it not been for the efforts of LGBTQ+ persons and their allies, it is possible laws such as this—realities of the not–so–distant past—might have persisted through today.

### *A. The Beginning of LGBTQ+ Advocacy*

Advocacy for the LGBTQ+ community began blossoming around the end of the Nineteenth Century.[26] The Scientific–Humanitarian Committee ("Committee"),[27] which is credited as being the world's first LGBTQ+ organization, was formed in the late 1880s.[28] The Committee developed a presence in a multitude of major European cities[29] and was comprised of individuals from the LGBTQ+ community, as well as ally scientists and medical professionals.[30] The Committee's dedication to LGBTQ+ advocacy centered on scientific and medical research that showed sexual orientation and gender identity are not "choices" but, rather, are intrinsic to a person's being.[31]

The Committee garnered a large following in the decades after its formation and made substantial progress for the LGBTQ+ community.[32] The Committee's growth in Europe inspired Henry Gerber, a German immigrant, to establish the Society for Human Rights ("Society") in Illinois.[33] Upon its founding in 1924, the Society became the first LGBTQ+ rights organization in the United States.[34] Gerber, influenced by the Committee's progress, began publishing *Friendship and Freedom*, the United States' first LGBTQ+ newsletter, that same year.[35] Shortly after the Society was founded, Gerber's home was raided by the Chicago Police Department.[36] Gerber was arrested, and everything associated with *Friendship and*

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Oklahoma, South Carolina, Texas, Utah, and Virginia); *see* Lou Chibbaro Jr., *Sodomy Laws Remain on Books in 17 States, Including Md. & Va.*, WASH. BLADE (Apr. 17, 2013, 5:00 PM), https://www.washingtonblade.com/2013/04/17/sodomy-laws-remain-on-books-in-17-states-including-md-and-va/.

26. *See* Levy, *supra* note 18 (citing Lord Alfred "Bosie" Douglas, Oscar Wilde's partner, who wrote a poem entitled "Two Loves" in 1880 that later spurred a movement around the world by boldly declaring: "I[, homosexuality,] am the love that dare not speak its name.").

27. The organization was founded in Berlin, Germany in the late 1800s and known as "Wissenschaftlich–humanitäres Komitee," or WhK, which translates to "Science–Humanitarian Committee." *Lost in History: The Scientific–Humanitarian Committee*, LESBIAN NEWS, http://www.lesbiannews.com/history-scientific-humanitarian-committee/ (last visited Nov. 8, 2019) [hereinafter *Lost in History*].

28. Dustin Goltz, *Lesbian, Gay, Bisexual, Transgender, and Queer Movements*, *in* 1 BATTLEGROUND: WOMEN, GENDER, AND SEXUALITY 291, 292 (Amy Lind & Stephanie Brzuzy eds., 2008) (characterizing the committee as having carried out "the first advocacy for homosexual and transgender rights").

29. *Lost in History*, *supra* note 27. Over its tenure, the Committee helped establish approximately one–hundred gay bars and cafés throughout Berlin, Germany and dozens in Vienna, Austria. The Committee also increased the visibility of LGBTQ+ nightlife in Paris, France and encouraged LGBTQ+ individuals to congregate in "gay districts" in Florence, Italy and other smaller European cities. *Id.*

30. *Id.*

31. *Id.* The Committee voiced its advocacy through the group's motto: "justice through science." *Id.*

32. *Id.*

33. *LGBTQ Activism: The Henry Gerber House, Chicago, Illinois*, NAT'L PARK SERV. (Feb. 18, 2018), https://www.nps.gov/articles/lgbtq-activism-henry-gerber-house-chicago-il.htm [hereinafter *LGBTQ Activism: The Henry Gerber House*].

34. *#7: First Gay Rights Group in the US (1924)*, CHI. TRIBUNE (Nov. 19, 2013), https://www.chicagotribune.com/business/blue-sky/chi-top-20-countdown-innovation-07-bsi-htmlstory.html.

35. *LGBTQ Activism: The Henry Gerber House*, *supra* note 33.

36. *Id.*

*Freedom* was seized.[37] Numerous other Society members were also arrested, ultimately leading to the demise of the Society.[38] Police departments throughout the United States conducted similar raids on countless LGBTQ+ establishments during the Twentieth Century.[39]

By the 1950s, the United States had ushered in one of its most socially conservative periods of the century, and police raids against LGBTQ+ businesses became even more frequent.[40] While the decade is commonly associated with the "Red Scare,"[41] this period was also characterized by the "Lavender Scare."[42] Numerous state governments, along with the federal government, began investigating individuals deemed a threat to national security simply because they were suspected of being part of the LGBTQ+ community.[43] During the Lavender Scare, thousands of LGBTQ+ employees were fired on the basis of their sexual orientation or gender identity.[44]

Ironically, the discriminatory actions of employers and the government brought visibility to the once–hidden LGBTQ+ community.[45] Increased awareness, in turn, led to the organization of advocacy groups and demonstrations dedicated to political and social consciousness.[46] For example, the LGBTQ+ community fought back against the raiding of the Stonewall Inn by police in 1969.[47] The "Stonewall Riots,"

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37. This included Gerber's personal typewriter, as well as the uncirculated copies of the newsletter that were later destroyed by police. BETSY KUHN, GAY POWER! THE STONEWALL RIOTS AND THE GAY RIGHTS MOVEMENT 1969 13 (2011); JIM KEPNER, ROUGH NEWS, DARING VIEWS: 1950S' PIONEER GAY PRESS JOURNALISM 8 (1998).

38. *LGBTQ Activism: The Henry Gerber House*, *supra* note 33. Gerber's work with the Society is regarded as a precursor to the LGBTQ+ rights movement, and he has been repeatedly recognized for his contributions to the LGBTQ+ community. HENRY GERBER ON GOVERNORS ISLAND, NYC LGBT HISTORIC SITES PROJECT, https://www.nyclgbtsites.org/site/henry-gerber-on-governors-island/ (last visited Nov. 8, 2019).

39. Jacob Ogles, *30 Infamous Police Raids of Gay Bars and Bath Houses*, ADVOCATE (Feb. 2, 2018), https://www.advocate.com/politics/2018/2/02/30-infamous-police-raids-gay-bars-and-bathhouses.

40. *Id.*

41. *Second Red Scare*, OHIO HISTORY CONNECTION, http://www.ohiohistorycentral.org/w/Second_Red_Scare (last visited Nov. 8, 2019).

42. Beth Sherouse, *LGBT History Month: Why LGBT History Matters*, HUMAN RIGHTS CAMPAIGN (Oct. 31, 2014), https://www.hrc.org/blog/lgbt-history-month-why-lgbt-history-matters; *see generally* THE LAVENDER SCARE, https://www.thelavenderscare.com (last visited Nov. 8, 2019).

43. Sherouse, *supra* note 42.

44. *Id.*

45. *Id.*

46. *Id.* Two organizations, the Mattachine Society and the Daughters of Bilitis ("DOB"), thrived during this time. Both organizations were at the forefront of the gay rights movement and dedicated to fostering a welcoming community, educating the general public, encouraging members to seek leadership roles in society, and assisting those who had been victimized. DOB was created as a social alternative to lesbian bars, which were considered illegal. As such, DOB events were often subject to raids and police harassment. *Id.* at 41. *See generally* JONATHAN KATZ, GAY AMERICAN HISTORY (1976); MARCIA GALLO, DIFFERENT DAUGHTERS: A HISTORY OF THE DAUGHTERS OF BILITIS AND THE RISE OF THE LESBIAN RIGHTS MOVEMENT (2006).

47. The Stonewall Inn opened in Greenwich Village in 1967. *Stonewall Riots*, HISTORY, https://www.history.com/topics/gay-rights/the-stonewall-riots (last visited Nov. 8, 2019). The gay bar was a place of refuge where members of the LGBTQ+ community could express themselves openly without fear of criminal repercussions. Unannounced raids of gay bars were the norm in the 1960s, and the Stonewall Inn was not notified of a raid that was to take place in the early morning hours of June 28, 1969. On that date, the New York City Police, armed with a warrant, openly beat patrons of the bar and arrested thirteen people. Patrons of the bar and residents of Greenwich Village grew increasingly agitated as the events unfolded. When a police officer hit a patron over the head, she encouraged the remaining individuals outside the bar to act. Fed up with the police harassment and the discrimination they faced regularly,

as the event is commonly remembered, became one of the turning points in the fight for LGBTQ+ rights in the United States.[48]

### *B. Landmark Legal Victories for the LGBTQ+ Community*

The United States has evolved considerably on the issue of LGBTQ+ rights since the Stonewall Riots—most notably in the last two decades.[49] The decisions rendered by the Supreme Court in *Lawrence v. Texas*,[50] *United States v. Windsor*,[51] and *Obergefell v. Hodges*[52] are undoubtedly historic. The Supreme Court, however, has not weighed in on whether discrimination against LGBTQ+ individuals constitutes sex discrimination under Title VII—the explicit federal protections against employment discrimination. At least, *not yet*. The Court heard oral arguments for *Zarda v. Altitude Express, Inc.*,[53] *Bostock v. Clayton County, Georgia*,[54] and *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*[55] on October 8, 2019.[56] Combined, the outcome of these cases will determine whether LGBTQ+ individuals are protected under Title VII's prohibition of sex discrimination.

Historically, the rights of LGBTQ+ individuals have been fragmented, ranging in degrees of protection and varying from state to state.[57] The protections afforded to LGBTQ+ individuals in the workplace also vary widely from one state to the next.[58] Thirty–three states have provided some measure of workplace protection to

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the individuals began throwing coins, bottles, and other objects at the officers. Minutes later, a full–blow riot had ensued—one that would last for days and involve thousands of people. While the riots at Stonewall Inn were not singlehandedly responsible for beginning the gay rights movement, they represented a pivotal moment in LGBTQ+ advocacy and activism, and numerous gay rights organizations were formed shortly thereafter. *Id.* For more information on the Stonewall Riots of 1969, see STONEWALL FOREVER: A LIVING MONUMENT TO 50 YEARS OF PRIDE, https://stonewallforever.org (last visited Nov. 8, 2019).

48. *Stonewall Riots*, *supra* note 47.

49. *See* Lawrence v. Texas, 539 U.S. 558, 558 (2003) (invalidating fourteen states' sodomy laws and holding such laws to be a constitutional violation of a person's right to privacy); United States v. Windsor, 570 U.S. 744 (2013) (holding that Section 3 of the Defense of Marriage Act ("DOMA"), which restricted the federal interpretation of "marriage" and "spouse" to opposite–sex couples, was a due process violation); Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (holding that the fundamental right to marry is guaranteed to same–sex couples under the Due Process and Equal Protection Clauses of the Fourteenth Amendment).

50. *Lawrence*, 539 U.S. at 558.

51. *Windsor*, 570 U.S. at 744.

52. *Obergefell*, 135 S. Ct. at 2584.

53. Zarda v. Altitude Express, 855 F.3d 76 (2d Cir. 2017), *on reh'g en banc sub nom.*, 883 F.3d 100 (2d Cir. 2018), *cert. granted sub nom.*, 139 S. Ct. 1599 (2019).

54. Bostock v. Clayton Cty., Ga., 723 F. App'x 964 (11th Cir. 2018), *cert. granted sub nom.*, 139 S. Ct. 1599 (2019).

55. R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, 884 F.3d 560 (6th Cir. 2018), *cert. granted in part sub nom.*, 139 S. Ct. 1599 (2019).

56. *ABA Asks Supreme Court to Ensure That Title VII Covers LGBT Employees*, A.B.A. (July 3, 2019), https://www.americanbar.org/news/abanews/aba-news-archives/2019/07/aba-asks-supreme-court-to-ensure-that-title-vii-covers-lgbt-empl/ [hereinafter *A.B.A. Asks*].

57. *State Maps of Laws & Policies*, HUMAN RIGHTS CAMPAIGN, https://www.hrc.org/state-maps (last visited Nov. 8, 2019).

58. *State Maps of Laws & Policies: Employment*, HUMAN RIGHTS CAMPAIGN, https://www.hrc.org/state-maps/employment (last visited Nov. 8, 2019).

members of the LGBTQ+ community.[59] To this day, however, members of the LGBTQ+ community are not afforded any explicit federal protection prohibiting discrimination in the workplace based on sexual orientation or gender identity[60]—though advocates argue they are already protected by Title VII's prohibition of sex discrimination. The Supreme Court will either affirm or deny that contention in *Zarda*, *Bostock*, and *Harris Funeral Homes*.

The map below, created and maintained by Lambda Legal,[61] depicts the protections, if any, provided in each state.[62] Of the thirty–three states that provide protections to members of the LGBTQ+ community, only twenty provide protections for *all* members.[63] Those twenty states[64] prohibit employment discrimination based on sexual orientation *and* gender identity[65] in the public *and* private sectors.[66] Meanwhile, over half of the states permit employers to discriminate against a portion of the LGBTQ+ community in some fashion, providing protections on the basis of sexual orientation but not gender identity, or vice versa.[67]

59. *In Your State—Workplace*, LAMBDA LEGAL, https://www.lambdalegal.org/states-regions/in-your-state (last visited Nov. 8, 2019) (the remaining seventeen states do not offer LGBTQ+ employees any express protections).

60. *What You Should Know About EEOC & the Enforcement Protections for LGBT Workers*, EEOC, https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm (last visited Nov. 8, 2019) (interpreting Title VII to prohibit discrimination against LGBTQ+ employees; however, the EEOC's decisions, while persuasive, may not be binding on the courts).

61. Lambda Legal is a non–profit organization dedicated to obtaining the "full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and everyone living with HIV through impact litigation, education and public policy work." *About Us*, LAMBDA LEGAL, https://www.lambdalegal.org/about-us (last visited Nov. 8, 2019).

62. The author has created a table that depicts the information collected by Lambda Legal; the table shows the legal landscape in each state—whether the state has any protections for LGBTQ+ individuals; if so, whether those protections are based on sexual orientation, gender identity, or both; and whether those protections exist in the public and/or private sector. *See* Appendix, *infra* Section VII.

63. *In Your State—Workplace*, *supra* note 59.

64. Those twenty states include: California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New Mexico, New York, Oregon, Rhode Island, Utah, Vermont, and Washington. *Id.*

65. It is important to note that sexual orientation and gender identity do *not* describe the same concepts, and the terms cannot be used interchangeably. A person's sexual orientation describes their "enduring physical, romantic, and/or emotional attraction to another person." *GLAAD Media Reference Guide—Transgender*, GLAAD, https://www.glaad.org/reference/transgender (last visited Nov. 8, 2019). A person's gender identity, on the other hand, is an "internal, deeply held sense of their gender. For many transgender people, their own internal gender identity does not match the sex they were assigned at birth. Most people have a gender identity of man or woman (or boy or girl). For some people, their gender identity does not fit neatly into one of those two choices." Further, a person's gender identity is different from their gender expression. A person's gender expression is comprised of "[e]xternal manifestations of gender, expressed through a person's name, pronouns, clothing, haircut, behavior, voice, and/or body characteristics. Society identifies these cues as masculine and feminine, although what is considered masculine or feminine changes over time and varies by culture. Typically, transgender people seek to align their gender expression with their gender identity, rather than the sex they were assigned at birth." *Id.*

66. *In Your State—Workplace*, *supra note 59.*

67. *Id.*

*State–Based Protections*


Some states provide protections to all LGBTQ+ individuals employed in the public sector but none to LGBTQ+ individuals employed in the private sector.[68] For example, Kentucky, Montana, Michigan, North Carolina, Ohio, Pennsylvania, and Virginia protect LGBTQ+ employees working in the public sector from discrimination based on sexual orientation and gender identity. Yet, those same states provide no such protections to those working in the private sector. Likewise, some states protect only certain LGBTQ+ individuals in the public sector by prohibiting discrimination based on sexual orientation but do not prohibit such discrimination in the private sector, nor do they prohibit discrimination based on gender identity.[69] Wisconsin, for example, prohibits discrimination based on sexual orientation, but it does not protect employees from discrimination based on gender

68. *Id.*
69. *Id.*

identity. Therefore, in Wisconsin, any transgender[70] or non–binary[71] individual can be openly discriminated against by an employer, while their gay, lesbian, and bisexual counterparts[72] are afforded protections.

To avoid the complexities among the states' varying protections, LGBTQ+ individuals have sought recourse for workplace discrimination under federal law.[73] Following the Supreme Court's decision in *Price Waterhouse v. Hopkins*,[74] LGBTQ+ individuals were then able to pursue legal remedies for employment discrimination.[75] In *Price Waterhouse*, Ann Hopkins brought suit against a national accounting firm, Price Waterhouse,[76] after being denied a promotion for failing to conform to traditional societal expectations of femininity.[77] Hopkins was passed over for the promotion because she did not walk, talk, or dress femininely enough.[78] The Court found that Price Waterhouse's reasoning for denying Hopkins the promotion was a clear sign that the firm was "responding adversely to her because she was a woman."[79]

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70. "Transgender [is] an umbrella term for people whose gender identity and/or gender expression differs from what is typically associated with the sex they were assigned at birth. People under the transgender umbrella may describe themselves using one or more of a wide variety of terms—including transgender . . . Many transgender people are prescribed hormones by their doctors to bring their bodies into alignment with their gender identity. Some undergo surgery as well. But not all transgender people can or will take those steps, and a transgender identity is not dependent upon physical appearance or medical procedures." *GLAAD Media Reference Guide—Transgender*, *supra* note 65. The term transgender is not synonymous with transsexual or gender non–conforming. The term transsexual is "[a]n older term that originated in the medical and psychological communities. [It is s]till preferred by some people who have permanently changed—or seek to change—their bodies through medical interventions, including but not limited to hormones and/or surgeries. Unlike transgender, transsexual is *not* an umbrella term. Many transgender people do not identify as transsexual and prefer the word transgender." Moreover, "[g]ender non–conforming [is] a term used to describe some people whose gender expression is different from conventional expectations of masculinity and femininity. Please note that not all gender non–conforming people identify as transgender; nor are all transgender people gender non–conforming. Many people have gender expressions that are not entirely conventional—that fact alone does not make them transgender. Many transgender men and women have gender expressions that are conventionally masculine or feminine. Simply being transgender does not make someone gender non–conforming. [Therefore, the] term [gender non–conforming, like the term transsexual] is not a synonym for transgender . . . and should only be used if someone self–identifies as gender non–conforming." *Id.*

71. "Non–binary and/or genderqueer [are t]erms used by some people who experience their gender identity and/or gender expression as falling outside the categories of man and woman. They may define their gender as falling somewhere in between man and woman, or they may define it as wholly different from these terms. The term is not a synonym for *transgender* or *transsexual* and should only be used if someone self–identifies as non–binary and/or genderqueer." *Id.*

72. The author recognizes that there are numerous other sexual orientations beyond those listed. For more information, see *LGBTQIA Resource Center*, U.C. DAVIS, https://lgbtqia.ucdavis.edu/educated/glossary (last visited Oct. 13, 2019).

73. Taylor Payne, *A Narrow Escape: Transcending the GID Exclusion in the Americans with Disabilities Act*, 83 MO. L. REV. 799, 814 (2018).

74. 490 U.S. 228 (1989).

75. Sasha Buchert, *Price Waterhouse v. Hopkins at Thirty*, ALL. FOR JUSTICE (May 1, 2019), https://www.afj.org/blog/price-waterhouse-v-hopkins-at-thirty.

76. In 1989, the accounting firm now known as PwC was named Price Waterhouse. *History & Milestones*, PWC, https://www.pwc.com/us/en/about-us/pwc-corporate-history.html (last visited Oct. 13, 2019). In 1998, Price Waterhouse merged with Coopers & Lybrand to create PricewaterhouseCoopers. While the firm has shortened its brand name to PwC, it legally remains PricewaterhouseCoopers. *Id.*

77. *Price Waterhouse*, 490 U.S. at 235.

78. *Id.*

79. Payne, *supra* note 73, at 815.

The Supreme Court's decision in *Price Waterhouse* shifted the legal landscape for LGBTQ+ individuals.[80] By holding the accounting firm impermissibly discriminated against Hopkins, "[t]he Court recognized that discrimination based on failure to conform to gender stereotypes is an actionable form of sex discrimination."[81] Members of the LGBTQ+ community have since utilized Title VII to address discrimination in the workplace and have asked courts throughout the United States to recognize that discrimination based on sexual orientation and gender identity "constitutes impermissible sex discrimination under Title VII."[82]

The United States Court of Appeals for the Second, Sixth, Seventh, and Eleventh Circuits have issued holdings regarding Title VII's definition of sex discrimination.[83] In April 2017, the Seventh Circuit rendered its decision in *Hively v. Ivy Tech Community College of Indiana*.[84] There, the Court held sex discrimination includes discrimination based upon sexual orientation.[85] That same year, the Second Circuit heard *Zarda v. Altitude Express*.[86] Originally, the three–judge panel in *Zarda* declined to recognize that discrimination on the basis of sexual orientation falls within the purview of Title VII's prohibition on sex discrimination.[87] The following year, however, the Second Circuit, sitting *en banc*, reversed its previous decision.[88]

The Second Circuit's holding in *Zarda* deepened the extant circuit split on whether Title VII affords protection to gay, lesbian, and bisexual individuals.[89] While the Seventh and Second Circuits have held "Title VII's prohibition against discrimination on the basis of sex in employment already encompasses sexual orientation,"[90] the United States Court of Appeals for the Eleventh Circuit held the opposite in *Evans v. Georgia Regional Hospital*.[91] In *Evans*, the Court refused to include discrimination on the basis of sexual orientation within Title VII's definition of sex discrimination.[92]

Some federal appellate courts "have explicitly ruled that federal laws prohibiting sex discrimination also prohibit discrimination on gender identity or

80. *Id.* at 814.
81. *Id.* at 815.
82. *Id.* at 814.
83. Odessky, *supra* note 7.
84. Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339 (7th Cir. 2017).
85. *Id.* at 351 ("[T]he common–sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex[] persuade[s] us that the time has come to overrule our previous cases that have endeavored to find and observe that line.").
86. Zarda v. Altitude Express, 855 F.3d 76 (2d Cir. 2017), *on reh'g en banc sub nom.*, 883 F.3d 100 (2d Cir. 2018), *cert. granted sub nom.*, 139 S. Ct. 1599 (2019).
87. Michelle E. Phillips, Richard I. Greenberg, & Christopher M. Repole, *Title VII Bars Discrimination Based on Sexual Orientation, Second Circuit Rules*, JACKSON LEWIS (Feb. 27, 2018), https://www.jacksonlewis.com/publication/title-vii-bars-discrimination-based-sexual-orientation-second-circuit-rules.
88. *Id.*
89. *Id.*
90. Odessky, *supra* note 7.
91. Phillips, Greenberg, & Repole, *supra* note 87; Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1255 (11th Cir. 2017), *cert. denied*, 138 S. Ct. 557 (2017).
92. *Evans*, 850 F.3d at 1255.

[gender] expression as well."[93] In its decisions in *Smith v. City of Salem*[94] and *Barnes v. City of Cincinnati*,[95] the United States Court of Appeals for the Sixth Circuit recognized protections for transgender employees under Title VII.[96] More recently, in *R.G. & G.R. Funeral Homes v. EEOC*, the Sixth Circuit held that an employer's decision to fire a transitioning,[97] transgender individual violated Title VII.[98] The United States Court of Appeals for the First, Seventh, and Ninth Circuits have also provided protections for transgender individuals that fall outside of the scope of Title VII.[99] States have issued similar opinions. For example, in 2019, the Supreme Court of Missouri held that it is unlawful under state law for employers to discriminate against individuals who do not conform to gender stereotypes.[100]

Based on these decisions and numerous others, the judiciary appears to be trending towards protecting LGBTQ+ individuals in the workplace.[101] This trend,

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93. *Background: Where We Stand in the Courts*, FREEDOM FOR ALL AMS., https://www.freedomforallamericans.org/litigation-tracker/background/ (last visited Oct. 13, 2019).

94. Smith v. City of Salem, 378 F.3d 566, 575 (6th Cir. 2004) ("[D]iscrimination against a plaintiff who is . . . transgender . . . is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex–stereotypical terms, did not act like a woman."); *Background: Where We Stand in the Courts*, *supra* note 93.

95. Barnes v. City of Cincinnati, 401 F.3d 729 (6th Cir. 2005) (holding that the transgender plaintiff stated a claim for sex discrimination "by alleging discrimination . . . for [their] failure to conform to sex stereotypes"); *Background: Where We Stand in the Courts*, *supra* note 93.

96. *Background: Where We Stand in the Courts*, *supra* note 93.

97. While the term "transition" is traditionally thought to encompass only a physical change, it is actually a "complex process that occurs over a long period of time. [A person's t]ransition can include some or all of the following personal, medical, and legal steps: telling one's family, friends, and co-workers; using a different name and new pronouns; dressing differently; changing one's name and/or sex on legal documents; hormone therapy; and possibly (though not always) one or more types of surgery. The exact steps involved in transition vary from person to person." *GLAAD Media Reference Guide—Transgender*, *supra* note 63.

98. R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, 884 F.3d 560 (6th Cir. 2018), *cert. granted in part sub nom.*, 139 S. Ct. 1599 (2019).

99. Rosa v. Park W. Bank & Tr. Co., 214 F.3d 213 (1st Cir. 2000); Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000) (determining Gender Motivated Violence Act parallels the sex discrimination standard of Title VII). *See* Whitaker v. Kenosha County School Board; *see also* Videckis v. Pepperdine Univ., 150 F. Supp. 3d 1151 (C.D. Cal. 2015) (holding that sex discrimination includes sexual orientation discrimination "because it involved treatment that would not have occurred but for the individual's sex."); Miles v. New York Univ., 979 F. Supp. 248, 249–50 (S.D.N.Y. 1997) (holding that a transgender female student could proceed with a claim that she was sexually harassed in violation of Title IX). The Seventh Circuit has also held that transgender students are protected under Title IX of the Education Amendments of 1972 ("Title IX"). Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034 (7th Cir. 2017), *cert. dismissed sub nom.*, 138 S. Ct. 1260 (2018).

100. *See* Lampley v. Missouri Comm'n on Human Rights, 570 S.W.3d 16 (Mo. 2019). While Missouri does not expressly prohibit discrimination based on sexual orientation, it has held that discrimination based on sex stereotypes is a form of sex discrimination prohibited under the Missouri Human Rights Act. *Id.* The Supreme Court of Missouri has also remanded a case that had been dismissed by a lower court, permitting R.M.A., a transgender man, to pursue a claim that his former high school had discriminated against him in the use of a public accommodation on the grounds of his sex. *See* R.M.A. by Appleberry v. Blue Springs R–IV Sch. Dist., 568 S.W.3d 420 (Mo. 2019), *reh'g denied* (Apr. 2, 2019).

101. Following *Price Waterhouse* and *Oncale*, numerous federal courts have held the purview of Title VII's prohibition of sex discrimination encompasses sexual orientation and transgender status. Boutillier v. Hartford Pub. Sch., 221 F. Supp. 3d 255 (D. Conn. 2016) (concluding that "straightforward statutory interpretation and logic dictate that sexual orientation cannot be extricated from sex; the two are necessarily intertwined in a manner that, when viewed under the Title VII paradigm set forth by the Supreme Court, place sexual orientation discrimination within the penumbra of sex discrimination."); Winstead v. Lafayette Cty. Bd. of Cty. Comm'rs, 197 F. Supp. 3d 1334 (N.D. Fla. 2016) ("To hold that Title VII's prohibition on discrimination 'because of sex' includes a prohibition on discrimination based

however, could be upended by forthcoming decisions of the Supreme Court of the United States.[102] On April 22, 2019, the Court announced it had granted petitions for certiorari[103] in *Altitude Express v. Zarda*,[104] *Bostock v. Clayton County, Georgia*,[105] and *R.G. & G.R. Harris Funeral Homes Inc. v. EEOC*.[106] In *Zarda* and *Bostock*, which were heard together, the Court will determine whether Title VII's prohibition of sex discrimination includes discrimination based on sexual orientation.[107] In *Harris Funeral Homes*, the Court will address the parallel question of whether Title VII protects transgender employees from discrimination.[108] In short, the Court will soon be answering whether gay, lesbian,

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on an employee's homosexuality or bisexuality or heterosexuality does not require judicial activism or tortured statutory construction. It requires close attention to the text of Title VII, common sense, and an understanding that '[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.'"); Hall v. BNSF Ry. Co., 2014 WL 4719007 (W.D. Wash. Sept. 22, 2014) (the Court found that an employee's challenge of an employer's policy providing health insurance to opposite–sex spouses but not same–sex spouses was sufficient to allege sex discrimination under Title VII); Koren v. Ohio Bell Tel. Co., 894 F. Supp. 2d 1032 (N.D. Ohio 2012) (denying defendant's motion for summary judgment of plaintiff's claims that his supervisor discriminated against him on the basis of sex stereotypes after learning plaintiff married his husband and took his last name and holding that the plaintiff's claim fell within the purview of Title VII as sex discrimination); Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002) (recognizing that a manager's belief that women should only be attracted to and date men and subsequent harassment of the plaintiff based upon that belief is a sufficient claim for a violation of Title VII); Centola v. Potter, 183 F. Supp. 2d 403 (D. Mass. 2002) ("Sexual orientation harassment is often, if not always, motivated by a desire to enforce heterosexually defined gender norms. In fact, stereotypes about homosexuality are directly related to our stereotype about the proper roles of men and women."); Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011) (holding that the defendant impermissibly discriminated against the plaintiff on the basis of her sex because she is transgender); Roberts v. Clark Cty. Sch. Dist., 215 F. Supp. 3d 1001 (D. Nev. 2016) (holding that denying a transgender employee's ability to use any bathroom at the workplace was impermissible sex discrimination under Title VII); Fabian v. Hosp. of Central Conn., 172 F. Supp. 3d 509 (D. Conn. 2016) (holding that *Price Waterhouse* eliminated the narrow interpretation of Title VII's plain language that previously excluded sex discrimination claims by transgender individuals, citing supportive rulings by the Sixth, Ninth, and Eleventh Circuits); Lewis v. High Point Reg'l Health Sys., 79 F. Supp. 3d 588 (E.D.N.C. 2015) (denying the employer's motion to dismiss and allowing plaintiff's transgender discrimination claim to proceed under Title VII); Schroer v. Billington, 577 F. Supp. 2d 293 (D.D.C. 2008) (stating an employer's offer of employment and rescission of the offer upon discovery the prospective employee was to begin treatment for gender dysphoria and undergo gender affirming surgery was literal discrimination on the basis of sex and impermissible); Lopez v. River Oaks Imaging & Diagnostic Grp., Inc., 542 F. Supp. 2d 653 (S.D. Tex. 2008) (determining that the transgender plaintiff had an actionable claim under Title VII after her employer rescinded her job offer after learning she is transgender).

102. *Supreme Court Agrees to Hear Cases Determining Extent of Title VII Protection for LGBT Workers*, NAT'L LAW REVIEW (Apr. 25, 2019), https://www.natlawreview.com/article/supreme-court-agrees-to-hear-cases-determining-extent-title-vii-protection-lgbt.

103. *Id.*

104. Zarda v. Altitude Express, 855 F.3d 76 (2d Cir. 2017), *on reh'g en banc sub nom.*, 883 F.3d 100 (2d Cir. 2018), *cert. granted sub nom.*, 139 S. Ct. 1599 (2019).

105. Bostock v. Clayton Cty., Ga., 723 F. App'x 964 (11th Cir. 2018), *cert. granted sub nom.*, 139 S. Ct. 1599 (2019).

106. R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, 884 F.3d 560 (6th Cir. 2018), *cert. granted in part sub nom.*, 139 S. Ct. 1599 (2019).

107. Vin Gurrieri, *High Court to Consider Whether Title VII Covers LGBT Bias*, LAW 360 (Apr. 22, 2019), https://www.law360.com/articles/1107325/high-court-to-consider-whether-title-vii-covers-lgbt-bias.

108. *Id.*

bisexual, and transgender individuals are protected under Title VII.[109] These decisions will have a tremendous impact on the lives of LGBTQ+ Americans.

## III. INCREASING PRESENCE OF ARBITRATION AGREEMENTS IN EMPLOYMENT CONTRACTS

Congress enacted the FAA in order to provide an enforceable alternative to litigation and ensure the validity of arbitration agreements.[110] The FAA was intended to reach only parties with similar bargaining power who knowingly and voluntarily agree to arbitrate.[111] Further, the act was constructed narrowly because Congress intended to limit its reach: "When [a] Senator raised a concern that arbitration contracts might be 'offered on a take–it–or–leave–it basis to captive customers or employees,' the Senator was reassured by the bill's supporters that they did not intend to cover such situations."[112] In other words, Congress intended to restrict the FAA to any "contract evidencing a transaction involving commerce."[113] As anticipated, the corporate world embraced arbitration.[114] Businesses found that arbitration was more efficient, less expensive, and thus more desirable than traditional litigation.[115] Shortly thereafter, an "encroachment of arbitration agreements [infiltrated] the realm of the private citizen."[116] Many businesses began routinely incorporating arbitration agreements into labor and employment contracts, thus expanding the use of arbitration into employment disputes.[117] The expansive use of arbitration agreements has since continued. Moreover, the Supreme Court of the United States has acted on the belief that the FAA was intended to be "a national policy favoring arbitration."[118] Thus, the Court has interpreted the FAA broadly, despite the intentions of Congress.[119]

The Supreme Court recently reaffirmed its deference to the arbitration process in *Henry Schein v. Archer & White Sales*.[120] In *Henry Schein*, the Court ruled that courts must enforce contracts that delegate to an arbitrator the question of whether a dispute is arbitrable in the first place.[121] The Court also held delegation clauses are enforceable even if a party "claims that the argument for arbitration is 'wholly groundless.'"[122] The decision in *Henry Schein*, like the decisions rendered in *AT&T*

109. *A.B.A. Asks*, *supra* note 56.
110. Gregg Weiner, Christian Reigstad, & Dielai Yang, *Recent Rulings Reaffirm Courts' High Degree of Deference to Arbitration Process*, N.Y. LAW JOURNAL (Mar. 15, 2019), https://www.law.com/newyorklawjournal/2019/03/15/recent-rulings-reaffirm-courts-high-degree-of-deference-to-arbitration-process/?cmp_share.
111. Sternlight, *supra* note 2, at 1636.
112. Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L. Q. 637, 647 (1996) (citing Hearing on S. 4213 and S. 4214 before the Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess. 9–11 (1923)).
113. Sternlight, *supra* note 2, at 1636; 9 U.S.C. § 2 (1947).
114. Rustad, *supra* note 1, at 676.
115. *Id.* at 665.
116. *Id.* at 676.
117. *Id.* at 645.
118. Southland Corp. v. Keating, 465 U.S. 1, 10 (1984); Weiner, Reigstad, & Yang *supra* note 110.
119. Rustad, *supra* note 1, at 675.
120. Weiner, Reigstad, & Yang, *supra* note 110; Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524 (2019).
121. Weiner, Reigstad, & Yang, *supra* note 110.
122. *Henry Schein, Inc.*, 139 S. Ct. at 524.

*Mobility, LLC v. Concepcion*,[123] *American Express Co. v. Italian Colors Restaurant*,[124] and *Epic Systems Corp. v. Lewis*,[125] further solidified the use of arbitration in the United States, directly contradicting legislative history and congressional intent.[126]

No decision, however, has been as transformative as that rendered in *Gilmer v. Interstate/Johnson Lane Corp*.[127] In *Gilmer*, the Supreme Court held that employees could be forced to arbitrate discrimination claims against their employers.[128] The decision shocked the nation,[129] as many people—employers and employees alike—believed public policy disfavoring mandatory arbitration would prevent the Court from compelling employees to arbitrate, of all things, discrimination claims.[130]

After the *Gilmer* decision, businesses began integrating mandatory arbitration clauses into contracts in a wide array of contexts, a practice previously avoided for fear that such clauses would not be enforced.[131] Over time, the use of mandatory arbitration clauses became universal, making it nearly impossible for consumers to bring contract, tort, or invasion of privacy claims against large corporations without

123. "In *AT&T Mobility LLC v. Concepcion*, the Supreme Court held that the Federal Arbitration Act required the enforcement of class action waivers in consumer arbitration agreements, even though the waivers at issue were deemed unconscionable under state law." *Arbitration and Class Actions—National Labor Relations Act—District Court Enforces Class Action Waiver in Employment Arbitration Agreement.—Morvant v. P.F. Chang's China Bistro, Inc.*, 126 HARV. L. REV. 1122 (2013). Vincent and Liza Concepcion bought cellphones from AT&T Mobility, LCC ("AT&T") after seeing an advertisement offering free cellphones. AT&T did not charge the couple for the cellphones but *did* charge them $30.22 in sales tax. The Concepcions brought suit against AT&T as part of a class action, alleging that AT&T had fraudulently advertised its cellphones as "free." AT&T filed a motion to compel the Concepcions to arbitrate their dispute with the company, citing the service agreement that required all disputes to be resolved by arbitration and prohibited class action arbitration. The district court denied AT&T's motion, relying on *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005), in which the Supreme Court of California held that an adhesion contract between a consumer and a company with superior bargaining power was unenforceable when that contract included an arbitration clause requiring a waiver of class actions. The Ninth Circuit affirmed, and the Supreme Court of the United States granted certiorari. Upon review, the Court held that the Federal Arbitration Act ("FAA") preempts any state law that conflicts with it. Because California's case law was interfering with arbitration by permitting parties to consumer adhesion contracts to demand class arbitrations when damages were predictably small, the Court held *Discover Bank* was an obstacle to execution of the FAA. As a result, the *Discover Bank* rule —and any other state rules or laws in conflict with the FAA—are preempted by the FAA. *See* AT&T Mobility, LLC v. Concepcion, 131 S. Ct. 1740 (2011).

124. *See* American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013) (holding that the exorbitant price of arbitration is not a sufficient reason for an arbitration clause prohibiting class actions to be deemed unenforceable).

125. The Supreme Court of the United States has determined how the FAA and the National Labor Relations Act ("NLRA") co–exist when employment contracts prohibit employees from using collective arbitration. *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018) (holding that employment contracts that include arbitration agreements requiring individual arbitration are enforceable under the FAA regardless of the allowances set out within the NLRA).

126. David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WISC. L. REV. 33, 76 (1997).

127. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

128. Sternlight, *supra* note 2, at 1637.

129. *Id.*

130. *Id.* at 1638.

131. *Id.*

utilizing arbitration.[132] The pervasive use of mandatory arbitration clauses[133] is also visible in today's employment agreements.[134]

The Economic Policy Institute[135] estimates the number of American employees who have signed mandatory arbitration clauses is approximately sixty–million.[136] In other words, over half of the American workforce has signed away their ability to vindicate their rights in court.[137] This was, plainly, not the aim of Congress.[138] Congress did not intend for arbitration to be imposed involuntarily or used as a means for stripping away employees' opportunities to pursue litigation.[139] Yet, the predominate effect of many mandatory arbitration clauses in employment contracts is the elimination of employee rights such as the right to a jury trial.[140]

## IV. THE MODERN PREVALENCE OF ARBITRATION AND WHY IT MATTERS

Before the Supreme Court issued its decision in *Gilmer v. Interstate/Johnson Lane Corp.*[141] in 1991, employers preferred litigating employment disputes over arbitrating them.[142] Following *Gilmer*, that preference changed.[143] By 1995, seventy–eight percent of Fortune 500 companies were willing to have an arbitrator solve employment disputes.[144] Today, eighty percent of Fortune 100 companies *mandate* their employees arbitrate any employment dispute.[145]

Employers of all sizes are now following in the country's largest companies' footsteps.[146] Today, employers commonly integrate mandatory arbitration clauses into employment contracts[147] that require employees to waive their right to a jury trial and class action suits.[148] Such agreements are generally required before an

132. Rustad, *supra* note 1, at 675.
133. Colvin, *supra* note 4.
134. Odessky, *supra* note 7.
135. The Economic Policy Institute is a nonprofit, nonpartisan organization that was created in order to include the needs of low– and middle–income workers in economic policy discussions across the country. *About*, ECON. POLICY INST., https://www.epi.org/about/ (last visited Nov. 8, 2019).
136. Colvin, *supra* note 4.
137. Odessky, *supra* note 7. In other words, over half of "private–sector non–union employees" cannot utilize their rights.
138. Sternlight, *supra* note 2, at 1631.
139. *Id.*
140. Rustad, *supra* note 1, at 675; Schwartz, *supra* note 127, at 126.
141. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 20 (1991).
142. Donna Meredith Matthews, *Employment Law After Gilmer: Compulsory Arbitration of Statutory Antidiscrimination Rights*, 18 BERKELEY J. EMP. & LAB. L. 347, 354 (1997).
143. *Id.*
144. *Id.*
145. Megan Leonhardt, *Getting Screwed at Work? The Sneaky Way You May Have Given up Your Right to Sue*, MONEY (Sept. 27, 2017), http://money.com/money/4958168/big-companies-mandatory-arbitration-cant-sue/.
146. *Id.*
147. Imre S. Szalai & John D. Wessel, *The Widespread Use of Workplace Arbitration Among American Top 100 Companies*, THE EMP. RIGHTS ADVOCACY INST. FOR LAW & POL'Y (Mar. 2018), http://employeerightsadvocacy.org/wp-content/uploads/2018/03/NELA-Institute-Report-Widespread-Use-of-Workplace-Arbitration-March-2018.pdf; Vail Kohnert–Yount, Jared Odessky, & Sejal Singh, *No, Companies That Force Workers to Sign Away Their Right to Sue Are Not LGBTQ–Friendly*, SLATE (Jan. 23, 2019), https://slate.com/news-and-politics/2019/01/human-rights-campaign-corporate-equality-index-arbitration-lgbtq.html.
148. Kohnert–Yount, Odessky, & Singh, *supra* note 147.

employer will permit a new employee to begin working.[149] Moreover, many employers are now requiring current employees to agree to amendments in their existing employment contracts or, alternatively, sign separate arbitration agreements.[150] Modern employment requirements like these have caused over half of the employment disputes in the last decade to be mandatorily arbitrated.[151]

Mandatory arbitration is detrimental to employees for numerous reasons.[152] Arbitration, unlike litigation, generally lacks sufficient discovery, meaning an employee seeking to bring a claim against their[153] employer oftentimes does not have access to enough evidence to make a viable claim.[154] Arbitration also removes procedural safeguards afforded to employees in a jury trial.[155] Moreover, employers typically choose the arbitrator without the input of employees, meaning arbitrators are incentivized to rule in favor of the employer to increase their chances of being chosen to arbitrate for that organization again in the future.[156] Employees are also more likely to lose their claim when it is arbitrated rather than litigated.[157] Research has consistently shown that arbitrators are more likely to rule against an employee than judges or juries[158] and less likely to fully compensate the small amount of employees who prevail.[159] In essence, the deck is stacked against an employee before the cards are even dealt, and LGBTQ+ employees are often at an even further disadvantage than their non–LGBTQ+ peers.

## V. MANDATORY ARBITRATION IMPEDES THE ADVANCEMENT OF LGTBQ+ RIGHTS

Over the last thirty years, the Supreme Court of the United States has stripped American employees of their rights. The Court has held: employees can be required to arbitrate despite an inequity of bargaining power and resources;[160] the excessive cost of arbitration is not a sufficient reason for an arbitration clause prohibiting class actions to be deemed unenforceable;[161] employers can expressly prohibit employees from bringing class arbitrations in employment disputes despite the National Labor Relations Act's protections;[162] arbitration agreements must explicitly call for class

149. Szalai & Wessel, *supra* note 147.
150. *Id.*
151. *Id.*
152. Genie Harrison, *Forced Arbitration Is Bad News for Employees, California Stats Show*, BLOOMBERG LAW (Aug. 15, 2019, 3:01 AM), https://news.bloomberglaw.com/daily-labor-report/insight-forced-arbitration-is-bad-news-for-employees-california-stats-show.
153. The author recognizes the singular "they" and will use "they" and "their" instead of "he" or "she" to be inclusive of all gender identities. For more information, see *Words We're Watching*, MERRIAM–WEBSTER, https://www.merriam-webster.com/words-at-play/singular-nonbinary-they (last updated 2019).
154. Odessky, *supra* note 7.
155. *Id.*
156. *Id.*
157. Szalai & Wessel, *supra* note 147.
158. *Id.*; Kohnert–Yount, Odessky, & Singh, *supra* note 147. The Economic Policy Institute estimates that workers subject to mandatory arbitration win only fifty–nine percent as often as they would in federal court and only thirty–eight percent as often as in state court.
159. Szalai & Wessel, *supra* note 147.
160. AT&T Mobility, LLC v. Concepcion, 131 S. Ct. 1740, 1740 (2011).
161. *See* American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304, 2304 (2013).
162. *See generally* 29 U.S.C. § 151–62 (1947).

arbitrations in order for the process to be utilized;[163] and contracts that delegate to an arbitrator the question of whether a dispute is arbitrable are enforceable.[164]

### *A. Obstacles Facing LGBTQ+ Employees*

While the Supreme Court's decisions regarding employment disputes and arbitration have impacted the American workforce as a whole, the decision in *Gilmer* was particularly devastating to LGBTQ+ employees.[165] There, the Court "mandated the enforcement of clauses in individual employment contracts requiring the submission of [all] claims exclusively to arbitration," including discrimination or other civil rights claims.[166] This is problematic because arbitrators are not always required to apply governing law.[167] Therefore, an arbitrator does not have to abide by a particular jurisdiction's determination that discrimination based upon sexual orientation or gender identity is within the purview of Title VII's protections. As a result, LGBTQ+ individuals can be openly discriminated against by their employer despite protections in certain jurisdictions.

A ruling recently handed down by the National Labor Relations Board ("NLRB") has also allowed employers to rescind job offers or terminate an existing job if an individual fails to accept the terms laid out in an employment contract.[168] This ruling, coupled with the Supreme Court's holdings in *Lamps Plus* and *Henry Schein* pose problems for unemployed Americans. These cases are especially challenging for LGBTQ+ individuals,[169] who statistically experience higher rates of unemployment than the general American public.[170] In other words, it is unlikely that an LGBTQ+ individual would turn down a job mandating arbitration or refuse to sign an amended mandatory arbitration clause.[171] To further complicate matters, it is estimated that twenty–five percent of LGBTQ+ Americans are currently living

163. *See* Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407 (2019).

164. Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 524 (2019); Weiner, Reigstad, & Yang, *supra* note 110.

165. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 20 (1991).

166. Odessky, *supra* note 7; *see also Gilmer*, 500 U.S. at 20.

167. *Arbitration*, A.B.A, https://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses/arbitration/ (last visited Nov. 8, 2019).

168. *Shifting Arbitration Pact Being Sued Is Legal, NLRB Says*, LAW 360 (Aug. 14, 2019, 4:54 PM), https://www.law360.com/employment/articles/1188714. The National Labor Relations Board recently handed down a decision that will now allow employers to change mandatory arbitration agreements *after* securing employee agreement and threaten to fire any employee who refuses to sign an amended mandatory arbitration agreement. Changes can include barring employees from opting into class actions and can be implemented by an employer in response to a suit brought by its employees. *Id.*

169. The United States Census Bureau ("Census Bureau") estimated that the United States' population would reach 327,167,434 in 2018. The Census Bureau estimates that 22.4% of the population is under the age of eighteen, meaning approximately seventy–three million Americans are minors, and 254 million Americans are adults. *QuickFacts*, U.S. CENSUS BUREAU (July 1, 2018), https://www.census.gov/quickfacts/fact/table/US/AGE295218. In 2017, a Gallup report found that approximately 4.5% of American adults self–identify as LGBTQ+. Thus, there are approximately eleven–and–a–half million LGBTQ+ Americans. Frank Newport, *In U.S., Estimate of LGBT Population Rises to 4.5%*, GALLUP (May 22, 2018), https://news.gallup.com/poll/234863/estimate-lgbt-population-rises.aspx.

170. *Socioeconomic Indicators: LGBT Proportions of Population: U.S.*, WILLIAMS INST., https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT#economic (last visited Nov. 8, 2019) [hereinafter *Socioeconomic Indicators*]. While only five percent of the American public is unemployed, nine percent of LGBTQ+ Americans are unemployed. *Id.*

171. Odessky, *supra* note 7.

below the poverty line, earning less than $25,000 annually.[172] Many studies have shown LGBTQ+ Americans are not as financially secure as the general American public,[173] so it is improbable they would or even *could* incur the expense of bringing an employment discrimination claim.[174] The Supreme Court has also essentially dismantled the possibility of sharing costs by severely limiting class actions and class arbitration.[175] Without the opportunity to bring representative claims, LGBTQ+ employees are left with the sole option of individually arbitrating an employment discrimination claim in an expensive process that does not respect precedent.[176]

### *B. The Potential Impact of the Supreme Court's Upcoming Decisions*

To definitively establish that discrimination based on sexual orientation and gender identity constitute impermissible sex discrimination under Title VII, the Supreme Court needs to explicitly say so in *Zarda*, *Bostock*, and *Harris Funeral Homes*. If the Supreme Court does so hold, the LGBTQ+ community will finally be protected in the workplace under federal law. Alternatively, if the Supreme Court declines to include sexual orientation discrimination and gender identity discrimination within Title VII's definition of sex discrimination, it is crucial that the legislature pass the Equality Act to protect LGBTQ+ employees from all types of discrimination. Likewise, the Forced Arbitration Injustice Repeal Act of 2019 ("FAIR Act")[177] must also be passed to ensure those rights do not become fundamentally meaningless during the age of mandatory arbitration.

172. *LGBT Demographic Data Interactive*, WILLIAMS INST. (Jan. 2019), https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT#about-the-data.

173. *See id*.; *see* Kohnert–Yount, Odessky, & Singh, *supra* note 147.

174. Odessky, *supra* note 7.

175. *Id*.; Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018) (the Supreme Court held that the FAA permits class action waivers—meaning the Court has recognized an employer's authority to require employees give up the opportunity to pursue class litigation). Accordingly, the Court will permit employers to expressly prohibit employees from bringing class arbitrations in employment disputes. *See* Liz Kramer, *Justice Gorsuch Delivered . . . A Win for Class Arbitration Waivers*, ARBITRATION NATION (May 22, 2018), https://www.arbitrationnation.com/justice-gorsuch-delivered-win-class-arbitration-waivers/. The Court also stated that no existing labor laws preclude these waivers' enforceability despite the protections set forth by the National Labor Relations Act in "other concerted activities for the purpose of . . . other mutual aid or protection." 29 U.S.C. § 157 (1947). This is commonly referred to as the catchall provision of the NLRA. Sarah Hamilton, *SCOTUS Holds Class Arbitration Waivers Do Not Violate the NLRA*, HUNTON EMP. & LABOR PERSPECTIVES (May 23, 2018), https://www.huntonlaborblog.com/2018/05/articles/supreme-court-cases/scotus-holds-class-action-waivers-not-violate-nlra/. Many advocates believed this provision provided employees with the right to class actions and class arbitrations, but the Court disagreed. *See Epic Sys. Corp.*, 138 S. Ct. at 1625 (the Court held that the failure to include arbitration or class actions expressly indicates that catchall provision of the NLRA should bow to the FAA's requirement to "respect and enforce agreements to arbitrate."). Subsequently the Court ruled that arbitration agreements must explicitly call for class arbitrations for the process to be invoked. *See* Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1416–17 (2019).

176. Kohnert–Yount, Odessky, & Singh, *supra* note 147; *see also* Deanne Katz, *Is Litigation Actually Cheaper Than Arbitration?*, FINDLAW (Dec. 7, 2012, 9:32 AM), https://blogs.findlaw.com/in_house/2012/12/is-litigation-actually-cheaper-than-arbitration.html.

177. H.R. 1423, 116th Cong. (U.S. 2019).

Numerous versions of the Equality Act and bills with similar intentions have been introduced over the years.[178] For example, in 2017, Senator Jeff Merkley proposed an amendment to the Civil Rights Act of 1964 to include the prohibition of "discrimination on the basis of sex, gender identity, and sexual orientation."[179] That specific bill was co–sponsored by forty–two other Senators and referred to the Senate Judiciary Committee.[180] Despite the co–sponsorship, the bill has not garnered any traction.[181] Representative David Cicilline introduced another version of the Equality Act in 2019.[182] This version of the Equality Act also intends to amend Title VII by expressly prohibiting discrimination based on sexual orientation and gender identity.[183] Unlike its predecessors, Representative Cicilline's Equality Act received a hearing in front of the House Judiciary Committee.[184] Following the hearing, the House Judiciary Committee made a historic decision, voting to advance the Equality Act to the full House of Representatives.[185] On May 17, 2019, the House of Representatives voted on the Equality Act, and it was passed in a 236 to 173 vote.[186] The Equality Act has since been received by the Senate.[187] Upon receipt, the Senate referred it to its own Judiciary Committee.[188]

The Equality Act may become critical following the decisions to be rendered in *Zarda*, *Bostock*, and *Harris Funeral Homes*. If the Court finds that Title VII's prohibition of sex discrimination, as written, does not encompass discrimination based upon sexual orientation or gender identity, the legislature can circumvent the Court's statutory interpretation by passing the Equality Act. By doing so, Congress would be solidifying protections for the LGBTQ+ community by *expressly* prohibiting discrimination on the basis of sexual orientation and gender identity. In short, Congress could ensure the protections afforded to the LGBTQ+ community under Title VII would no longer be open to statutory interpretation.

Even if the Supreme Court holds that Title VII's definition of "sex discrimination" includes sexual orientation discrimination and gender identity discrimination or Congress passes the Equality Act, LGBTQ+ employees will not be completely protected from employment discrimination unless the FAIR Act[189] is also passed by Congress. If the FAIR Act is not passed, the rights of LGBTQ+ employees may be disregarded in employment disputes being resolved in arbitration

178. *See generally* H.R. 14752, 93d Cong. (U.S. 1976); H.R. 3185, 114th Cong. (U.S. 2015); S. 1858, 114th Cong. (U.S. 2015); H.R. 2282, 115th Cong. (U.S. 2017); S. 1006, 115th Cong. (U.S. 2017); H.R. 4636, 103d Cong. (U.S. 1994); S. 2238, 103d Cong. (1994); H.R. 1863, 104th Cong. (U.S. 1995); S. 932, 104th Cong. (U.S. 1995); S. 2056, 104th Cong. (U.S. 1996); H.R. 1858, 105th Cong. (U.S. 1997); S. 869, 105th Cong. (U.S. 1997); H.R. 2355, 106th Cong. (U.S. 1999); S. 1276, 106th Cong. (U.S. 1999); H.R. 2692, 107th Cong. (U.S. 2001); S. 1284, 107th Cong. (U.S. 2001); H.R. 3285, 108th Cong. (U.S. 2003); S. 1705, 108th Cong. (U.S. 2003); H.R. 2015, 110th Cong. (U.S. 2007); H.R. 3685, 110th Cong. (U.S. 2007); H.R. 3017, 111th Cong. (U.S. 2009); H.R. 2981, 111th Cong. (U.S. 2009); S. 1584, 111th Cong. (U.S. 2009); H.R. 1397, 112th Cong. (U.S. 2011); S. 811, 112th Cong. (U.S. 2011); H.R. 1755, 113th Cong. (U.S. 2013); S. 815, 113th Cong. (U.S. 2013).
179. S. 1006, 115th Cong. (U.S. 2017).
180. *Id.*
181. *Id.*
182. H.R. 5, 116th Cong. (U.S. 2019).
183. *Id.*
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. H.R. 5, 116th Cong. (U.S. 2019).
189. H.R. 1423, 116th Cong. (U.S. 2019).

because, as previously noted, the process does not require that governing law be applied.

Like the Equality Act, the FAIR Act has been introduced in various bills. A similar bill, the Arbitration Fairness Act ("Fairness Act"), was proposed in 2017.[190] The Fairness Act attempted to amend the FAA by prohibiting a "pre[–]dispute arbitration agreement from being valid or enforceable if it requires arbitration of an employment . . . or a civil rights dispute."[191] Yet, the bill has not received much attention since its introduction and reference to the Subcommittee on Regulatory Reform, Commercial and Antitrust Law in 2017.[192]

Some scholars argue the Fairness Act failed to garner attention because its proposed amendment to the FAA did not extend far enough.[193] Interestingly, Justice Neil Gorsuch implies the same throughout the majority opinion in *Epic Systems*.[194] There, Justice Gorsuch acknowledges that the policy debate surrounding mandatory arbitration is robust[195] and explores, numerous times throughout the opinion, the possibility that the FAA could be flawed.[196] He states: "You might wonder if the balance Congress struck in 1925 between arbitration and litigation should be revisited in light of more contemporary developments."[197] Justice Gorsuch also maintains, however, that the Court is bound by established precedent and must "rigidly enforce arbitration agreements."[198] Some have interpreted these statements to mean that Justice Gorsuch, while bound by precedent, encourages Congress to amend the FAA in order appease the public.[199] Justice Ruth Bader Ginsburg agrees with that sentiment.[200] In her dissent in *Epic Systems*, she expressly states that Congress is the branch of government responsible for an amendment:[201] "Congressional correction of the Court's elevation of the FAA over workers' rights to act in concert is urgently in order."[202]

Representative Henry Johnson is attempting this congressional correction by amending the FAA through the FAIR Act. Representative Johnson introduced the FAIR Act in February 2019 shortly after the *Epic Systems* decision was issued.[203] On September 19, 2019, the House of Representatives voted on the FAIR Act, and it was passed in a 225 to 186 vote.[204] If enacted, as stated above, the FAIR Act would amend the FAA to prohibit pre–dispute, *mandatory* arbitration agreements from being valid or enforceable if arbitration is compelled in an employment or

190. H.R. 1374, 115th Cong. (U.S. 2017).
191. *Id.*
192. *Id.*
193. Kohnert–Yount, Odessky, & Singh, *supra* note 147.
194. *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1612 (2018).
195. Kramer, *supra* note 175.
196. *Id.*
197. *See Epic Sys. Corp.*, 138 S. Ct. at 1621–22.
198. Kramer, *supra* note 175.
199. *See Epic Sys. Corp.*, 138 S. Ct. at 1632 (Justice Gorsuch also opined that the Court "is not free to substitute its preferred economic policies for those chosen by the people's representatives."). The implication of Gorsuch's statement is that it is Congress's responsibility to amend the FAA in order to appease the public's appetite.
200. Kramer, *supra* note 175; *Epic Sys. Corp.*, 138 S. Ct. at 1633 (Ginsburg, J., dissenting).
201. Kramer, *supra* note 175.
202. *Epic Sys. Corp.*, 138 S. Ct. at 1633 (Ginsburg, J., dissenting).
203. H.R. 1423, 116th Cong. (U.S. 2019).
204. Alexia Fernández Campbell, *The House Just Passed a Bill That Would Give Millions of Workers the Right to Sue Their Boss*, VOX (Sept. 20, 2019, 11:30 AM), https://www.vox.com/identities/2019/9/20/20872195/forced-mandatory-arbitration-bill-fair-act.

civil rights claim.[205] By passing the FAIR Act, Congress would be directly circumventing the Court's holding in *Gilmer v. Interstate/Johnson Lane Corp.*, meaning any employee wanting to *litigate* a discrimination claim against their employer would be permitted to do so. Because litigation is the only way to ensure that governing law is applied, the FAIR Act's enactment would ensure that the current protections the LGBTQ+ community has will be applied as intended. Moreover, Congress would be ensuring future protections are afforded to the LGBTQ+ community at a time when they may need them most.

## VI. CONCLUSION

The Supreme Court of the United States has handed down a series of cases sanctioning the use of mandatory arbitration clauses in contexts not originally intended by Congress. The Court's decision in *Gilmer*, in particular, provided the corporate world with the opportunity to begin integrating mandatory arbitration clauses into contracts that affect private citizens in their roles as consumers and employees.[206] The increased prevalence of mandatory arbitration clauses coincided with the recognition of rights for the LGBTQ+ community.[207] The implementation of such mandatory arbitration clauses in employment contracts has been to the detriment of the LGBTQ+ community, hindering their ability to vindicate their rights.

The employment protections currently enjoyed by LGBTQ+ workers in various pockets of the country—and employment rights that may be recognized in the future at the national level, including those the Supreme Court may recognize under Title VII in *Zarda*, *Bostock*, and *Harris Funeral Homes*[208]—will remain fundamentally meaningless unless the FAA is amended to prohibit employment discrimination claims from being mandatorily arbitrated. Without such an amendment, Congress will leave American employees with a single avenue to resolve a dispute with their employer: individual arbitration.

205. *Id.*
206. Sternlight, *supra* note 2, at 1638.
207. Odessky, *supra* note 7.
208. The author understands that it is unclear how the Supreme Court will rule in these cases. At the very least, however, the Court's decision to hear these cases in the first place demonstrates the increasing national attention paid to LGBTQ+ rights—which, in turn, may prompt more courts and state legislatures to address LGBTQ+ rights. Perhaps Congress will even take up the scope of Title VII as it relates to LGBTQ+ workers. In that event, the number of LGBTQ+ workers who are forced to arbitrate employment discrimination claims will directly influence the continuing LGBTQ+ rights movement.

## VII. APPENDIX

| State | No State Law Protecting LGBTQ+ Employees | State Law[209] Protections Prohibiting Discrimination on the Basis of Sexual Orientation | | State Law Protections Prohibiting Discrimination on the Basis of Gender Identity | |
|---|---|---|---|---|---|
| | | Protections in the Public Sector Only | Protections in Both Public and Private Sectors | Protections in the Public Sector Only | Protections in Both Public and Private Sectors |
| Ala. | X | | | | |
| Alaska[210] | | X | | | |
| Ariz.[211] | | X | | | |
| Ark. | X | | | | |
| Cal.[212] | | | X | | X |
| Col.[213] | | | X | | X |
| Conn.[214] | | | X | | X |
| Del.[215] | | | X | | X |
| Fla. | X | | | | |
| Ga. | X | | | | |
| Haw.[216] | | | X | | X |
| Idaho | X | | | | |
| Ill.[217] | | | X | | X |
| Ind.[218] | | X | | | |
| Iowa[219] | | | X | | X |
| Kan. | X | | | | |
| Ky.[220] | | X | | X | |
| La.[221] | | X | | | |
| Me.[222] | | | X | | X |
| Md.[223] | | | X | | X |
| Mass.[224] | | | X | | X |
| Mich.[225] | | X | | X | |
| Minn.[226] | | | X | | X |
| Miss. | X | | | | |
| Mo. | X | | | | |
| Mont.[227] | | X | | X | |

209. For purposes of this Comment, this chart also includes actions taken by gubernatorial executive order.
210. ALASKA ADMIN. Order No. 195 (Mar. 5, 2002).
211. Ariz. Exec. Order No. 2003–22 (June 21, 2003); ARIZ. REV. STAT. ANN. § 41–1463 (West 2010).
212. CAL. GOV'T CODE §§ 12920, 12940 (1980).
213. COLO. REV. STAT. §§ 24–34–301, 24–34–401, 24–34–402 (West 2017).
214. CONN. GEN. STAT. ANN. §§ 46a–60, 46a–81c (West 2019).
215. DEL. CODE ANN. tit. 19, § 711 (West 2016).
216. HAW. REV. STAT. ANN. §§ 368–1, 378–2.
217. 775 ILL. COMP. STAT. ANN. 5/1–102, 5/1–103 (West 2019).
218. IND. CODE ANN. § 22–9–1–2 (West 2014).
219. IOWA CODE ANN. § 216.6 (West 2018).
220. KY. REV. STAT. ANN. §§ 344.040–344.070 (West 2019); Ky. Exec. Order No. 2008–473 (June 2, 2008).
221. LA. STAT. ANN. § 23:332 (West 2014).
222. ME. REV. STAT. tit. 5, §§ 4553, 4571–4576 (West 2019).
223. MD. STATE GOV'T CODE ANN. § 20–606.
224. MASS. GEN. LAWS ANN. ch. 151B, §§ 3, 4 (West 2019).
225. MICH. COMP. LAWS ANN. § 333.20201, 21761 (West 2017); Mich. Exec. Directive No. 2003–24 (Dec. 23, 2003).
226. MINN. STAT. ANN. §§ 363A.02, 363A.03 (West 2019).
227. MONT. CODE ANN. § 49–2–303 (West 2011).

| | | | | | |
|---|---|---|---|---|---|
| Neb. | X | | | | |
| Nev.[228] | | | X | | X |
| N.H.[229] | | | X | X | |
| N.J.[230] | | | X | | X |
| N.M.[231] | | | X | | X |
| N.Y.[232] | | | X | | X |
| N.C.[233] | | X | | X | |
| N.D. | X | | | | |
| Ohio[234] | | X | | X | |
| Okla. | X | | | | |
| Or.[235] | | | X | | X |
| Pa.[236] | | X | | X | |
| R.I.[237] | | | X | | X |
| S.C. | X | | | | |
| S.D. | X | | | | |
| Tenn. | X | | | | |
| Tex. | X | | | | |
| Utah[238] | | | X | | X |
| Vt.[239] | | | X | | X |
| Va.[240] | | X | | X | |
| Wash.[241] | | | X | | X |
| W. Va. | X | | | | |
| Wis.[242] | | | X | | |
| Wyo. | X | | | | |

228. NEV. REV. STAT. ANN. §§ 338.125, 610.185, 613.330, 613.340, 613.405 (West 2018).
229. N.H. REV. STAT. ANN. §§ 354–A:6, 21–I:42, 21–I:52, 21–I:58 (West 2018).
230. *Id.*
231. N.M. STAT. ANN. § 28–1–7.
232. N.Y. EXEC. L. § 296 (West 2019).
233. N.C. GEN. STAT. ANN. § 143–422.2 (West 2017).
234. Ohio Exec. Order No. 2011–05K (Jan. 21, 2011).
235. S.B. 2, 74th Leg. Assemb., Reg. Sess. (Ore. 2007).
236. Pa. Exec. Order No. 2003–10 (Aug. 28, 2003).
237. R.I. Gen. Laws §§ 28–5–5, 28–5–7.
238. UTAH CODE ANN. § 34A–5–106 (West 2016).
239. VT. STAT. ANN. tit. 21, § 495 (West 2007).
240. VA. CODE ANN. §§ 2.2–3901, 36–96.3 (2002).
241. WASH. REV. CODE ANN. §§ 49.60.010 (West 2007), 49.60.030(1) (West 2009), 49.60.040(15) (West 2019).
242. WIS. STAT. §§ 106.50, 106.52, 111.31, 224.77, 230.18 (2001).

NELP NATIONAL EMPLOYMENT LAW PROJECT

*by Jared Odessky*

LGBTQ workers have many milestones to celebrate this Pride Month. While more work lies ahead, twenty-one states and Washington, D.C. now explicitly protect against employment discrimination based on both sexual orientation and gender identity. And despite little movement on the federal Equality Act (https://www.congress.gov/bill/115th-congress/senate-bill/1006), two federal circuits (https://www.nytimes.com/2018/02/26/nyregion/gender-discrimination-civil-rights-lawsuit-zarda.html) recently held that Title VII's prohibition against discrimination on the basis of sex in employment already encompasses sexual orientation. The issue seems poised to reach the Supreme Court in the near future.

Unfortunately, the discrimination protections LGBTQ advocates have fought for may be of little use to many workers, since the expansion of LGBTQ employment rights has coincided with workers' diminishing access to the court system at the hands of forced arbitration.

## SINCE THE 1980S LGBTQ RIGHTS HAVE BLOSSOMED—BUT SO HAVE FORCED ARBITRATION CLAUSES

In the 1980s, Wisconsin and Massachusetts became the first two states to protect workers in the private sector against discrimination based on sexual orientation, followed by Connecticut and Hawaii in 1991. That same year, the Supreme Court ruled in *Gilmer v. Interstate/Johnson Lane* (https://www.law.cornell.edu/supremecourt/text/500/20) that the Federal Arbitration Act (FAA) mandated the enforcement of clauses in individual employment contracts requiring the submission of claims exclusively to arbitration, even for civil rights claims.

Throughout the 1990s, a slow march of states added protections against employment discrimination based on sexual orientation. Then, in the early 2000s, a small wave of states such as California and Rhode Island also broadened protections to include gender identity.

Roused by *Gilmer*, forced arbitration was also on the rise, though: The percentage of workers forced to sign contracts with arbitration clauses grew from a little over 2 percent in 1992 to nearly a quarter in the early 2000s. In 2001, the Supreme Court cemented *Gilmer* in *Circuit City Stores, Inc. v. Adams*, holding that the FAA's exception for "contracts of employment" extended only to transportation workers.

In the nearly two decades since, the country has witnessed a dramatic expansion of LGBTQ rights, including in employment. But so too for forced arbitration. A recent report from the Economic Policy Institute estimated (https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/) that 60 million workers—that's 56 percent of private-sector non-union employees—have now signed away their rights to go to court.

## FORCED ARBITRATION STACKS THE DECK AGAINST LGBTQ WORKERS

Forced arbitration stacks the deck against employees who try to bring discrimination claims. Unlike litigation, arbitration often lacks discovery that allows employees to access enough evidence for a viable claim and eliminates the procedural safeguard of trial by jury. An employer typically hand-picks

an arbitrator, who is incentivized to rule in favor of the employer (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1324411) if she wants to be selected again in the future.

Many arbitration clauses in employment contracts also contain class action waivers, which were upheld by the Supreme Court last month in *Epic Systems v. Lewis* (https://www.law.cornell.edu/supremecourt/text/16-285). Class actions allow employees to pool costs and spread the risk of retaliation. Without them, employees who go through arbitration individually to allege discrimination not only have targets on their backs, but must represent themselves or pay their own legal costs.

For LGBTQ employees, arbitration's ascendance means that hard-won rights are at risk of becoming empty victories. Fortunately, there are steps that both employers and employees can take to restore them.

## WORKERS AND EMPLOYERS CAN MAKE LEGAL RIGHTS REAL FOR LGBTQ WORKERS

Employers that broadcast LGBTQ-friendly policies but require employees to sign contracts with arbitration clauses should swiftly drop them. The Human Rights Campaign's 2018 Corporate Equality (https://assets2.hrc.org/files/assets/resources/CEI-2018-FullReport.pdf?_ga=2.118525065.184318658.1528221164-1556418071.1528221164) Index heralded the adoption of non-discrimination policies for sexual orientation by an impressive 91 percent of surveyed employers and for gender identity by 83 percent. But real support for LGBTQ rights also requires support for the vindication of those rights in court.

LGBTQ employees should urge Congress to adopt not only the Equality Act, but also the Arbitration Fairness Act (AFA) (https://www.congress.gov/bill/115th-congress/senate-bill/2591/text). The AFA would bar the enforceability of pre-dispute arbitration agreements in employment, civil rights, consumer, and antitrust disputes, correcting the Supreme Court's ahistorical reading of the Federal Arbitration Act. In states where LGBTQ employment rights are on the books, advocates can urge lawmakers to experiment with innovative enforcement legislation that isn't affected by forced arbitration. One example is California's Labor Code Private Attorneys General Act (http://www.labor.ca.gov/Private_Attorneys_General_Act.htm), which enables employees to bring suits on behalf of the state against employers in violation of state law. Because the state is not a party to the employment contract with the forced arbitration clause, the suit is not prohibited.

LGBTQ employees can also join with their coworkers to organize unions. A strong collective voice at work is the best way to make LGBTQ workers' rights heard. If a workplace is unionized, employers also can't unilaterally impose forced arbitration clauses. At the bargaining table and through fair grievance procedures, unions have been able to win pioneering victories (https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/janus_v_american_federation_amicus_final_to_be_filed.pdf) for LGBTQ employees, often laying the groundwork for later statutory protections.

While the movement for LGBTQ employment rights must continue until workers are protected against discrimination in every state, the battle must not be confined to the fight for rights alone. Ending forced arbitration will ensure that LGBTQ workers can not only win their rights on paper, but also see them realized when it counts.

SLATE
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JURISPRUDENCE

# No, Companies That Force Workers to Sign Away Their Right to Sue Are Not LGBTQ-Friendly

BY VAIL KOHNERT-YOUNT, JARED ODESSKY, AND SEJAL SINGH

JAN 23, 2019 • 4:26 PM


Revelers hold a Human Rights Campaign flag at the 36th Annual Capital Pride celebration in 2011. Ted Eytan/Flickr

In 2018, a record-breaking 609 major employers received perfect scores from the nation's largest and most visible LGBTQ rights organization for their inclusion of LGBTQ workers. The Human Rights Campaign lauded corporations like Walmart, CVS, Chevron, Verizon, and Amazon for internal policies prohibiting discrimination on the basis of sexual orientation and gender identity. These changes might be worth applauding—if those companies didn't also force workers to sign away their right to sue if they experience the very discrimination and harassment that nondiscrimination policies seek to stamp out.

The HRC will soon release its influential 2019 Corporate Equality Index, which scores companies on their corporate nondiscrimination policies for LGBTQ employees. But the index's often-controversial criteria has a curious flaw: It doesn't consider whether companies require employees to sign contracts with "forced arbitration clauses," a legal loophole that waives workers' right to sue over illegal treatment at work, like being denied overtime wages or getting fired for being queer or trans.

Any employee who signs a forced arbitration agreement is legally obligated to settle her case before a private third-party arbitrator. This individual is often hand-picked and paid by the defending company to the tune of $1,000 to $2,000 a day. These arbitration "agreements" are anything but. Forced arbitration clauses are often buried deep in the legal fine print of employment contracts. Even if workers know that they're waiving their rights, people who refuse to sign on the dotted line risk losing their jobs. As one company put it in a mass email to employees, "I understand that if I continue to work at Epic, I will be deemed to have accepted this Agreement." Workers could either agree or quit.

The Economic Policy Institute estimates that workers subject to mandatory arbitration win only 59 percent as often as they would in federal court and only 38 percent as often as in state court. Arbitration clauses frequently also require workers to waive their right to participate in class-action lawsuits—making the cost of hiring a lawyer to pursue a discrimination claim prohibitive for most LGBTQ people, nearly a quarter of whom live in poverty. Many workers, knowing they have little chance of succeeding in arbitration, choose never to bring claims at all. In other words, the field is tilted against workers before the game is even played.

On top of all that, arbitration is a highly secretive process. Forced arbitration clauses are often accompanied by nondisclosure agreements. Decisions are very rarely published, and arbitration awards are virtually unreviewable by courts. The #MeToo movement has exposed how forced arbitration and nondisclosure agreements have silenced survivors of sexual harassment and assault and shielded companies with a long history of covering up harassment and discrimination from accountability. (See: Fox News). Forced arbitration has the same impacts on LGBTQ people. A queer secretary who's denied a promotion because she doesn't dress "femininely" enough, a nonbinary pharmacist who's fired after they announce plans to transition, and a trans delivery driver whose health insurance plan illegally excludes gender-affirming care all have a right to sue—but if they've been forced to sign a mandatory arbitration agreement, neither the public nor the courts are likely ever to hear about it.

Over the past 25 years, the Supreme Court has upheld these unfair agreements in a line of increasingly disturbing cases. To justify its decisions, the court cited the Federal Arbitration Act, a federal law that makes arbitration agreements enforceable by courts. When Congress passed the FAA in 1925, arbitration was seen as a less costly alternative to litigation for businesses with relatively equal bargaining power. It was never intended to be used in employment or consumer contracts. But as the Supreme Court shifted right, it expanded the FAA to cover a broad range of contracts between large companies and regular people.

In a 2001 case involving a gay man harassed about his sexual orientation on the job, the court extended the FAA to cover virtually all workers. Saint Clair Adams was working as a computer salesman at Circuit City Stores when he overheard his colleagues making sexual remarks about a female customer. When Adams urged them to stop, one co-worker accused him of being gay. Adams stayed silent, but he soon found himself the target of a barrage of jokes about his rumored sexuality. Even his supervisor joined in. Adams filed suit against Circuit City in California, where state law protects workers against anti-gay discrimination and harassment on the job. But his employer sought to quash Adams' suit, relying on a clause buried in Adams' six-page job application agreeing to settle all claims "*exclusively* by final and binding *arbitration*." Adams took his case all the way to the Supreme Court, which then read the FAA to include nearly all employment contracts.

The decision caused a rapid expansion of arbitration, as employers realized they could effectively block their workers from bringing successful suits. In 1992, only 2 percent of nonunion employees in the private sector had signed arbitration agreements. By 2018, an estimated 56 percent had been forced to sign away their right to go to court, whether they know it or not. As LGBTQ workers have finally secured hard-won rights in state legislatures and federal courts, we've been steadily losing the power to enforce them. Consider Tim Chevalier, a transgender Google engineer who reports that he was fired after reporting harassment on the company's internal messaging system. HRC gave Google a perfect 100 score on its Corporate Equality Index, in large part because the company prohibits precisely this kind of discrimination. But when Chevalier attempted to enforce those rights in state court, Google invoked a forced arbitration clause to keep him out of a fair forum.

Can Google really be considered an LGBTQ-friendly firm if its trans employees can't even avail themselves of their hard-won rights in a court of law? HRC's Corporate Equality Index is supposed to help LGBTQ people figure out where they can work with dignity. To achieve that mission, future iterations should consider whether companies used forced arbitration to sweep discrimination under the rug.

Forced arbitration may be legal. But the Human Rights Campaign demands that companies do more than merely comply with the law by dinging companies that lack diversity councils or give philanthropic dollars to discriminatory organizations. LGBTQ advocates should know as well as anyone that justice may require more than the law does. Just years ago, few courts would recognize our federal right to be free from discrimination at work, and it may not be long before the Supreme Court reads us out of the Civil Rights Act again.

LGBTQ workers need and deserve a federal LGBTQ nondiscrimination law and sweeping changes to the Federal Arbitration Act so that huge corporations can't bully the little guy into signing away his rights. But we can't simply wait for a White House less hostile to our rights. That's why HRC's Corporate Equality Index must stop giving top marks to companies using forced arbitration. LGBTQ-friendly policies on the books mean little if employees can't meaningfully enforce their rights. Moving forward, employers who claim to be LGBTQ-friendly must drop their arbitration policies. And if they do not, it's essential that HRC use its power to hold them to account.

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# The Supreme Court's Latest Arbitration Decision is a Victory for Queer Workers

by Jared Odessky | Jan 16, 2019 | Arbitration & Class Action, Supreme Court

Yesterday the Supreme Court ruled in *New Prime v. Oliveira* that transportation workers, both employees and independent contractors, can sidestep forced arbitration and sue their bosses in court. The decision has big implications for America's truckers and drivers, among the most common professions in the country. But it's also a surprising win for LGBTQ workers.

Whether or not they know it, tens of millions of American workers have signed agreements with their employers to bring workplace claims exclusively through private arbitration. There's a reason why employers like arbitration: it stacks the deck in their favor. Employees must bring their claims before private arbitrators, who are usually chosen by employers and

incentivized to rule in employers' favor if they want to be picked again. And arbitration lacks several of litigation's crucial components, such as a jury and often discovery.

In a series of decisions, the Supreme Court has relied on the Federal Arbitration Act to hold these unfair agreements enforceable. But Section 1 of the Act has an essential carveout for "contracts of employment of seamen, railroad employees, or any other class of workers." In 2001, the Court read this provision to exempt the contracts of "transportation workers" from the Act's broad mandate of enforceability. Hoping to get around this exception, many employers in the transportation industry simply misclassified their workers as independent contractors, who they argued could not have "contracts of employment." Yesterday, however, the Court ruled that the Act exempts all transportation workers, however they are classified.

What does this have to do with LGBTQ workers? Queer people make up a growing part of the transportation industry, and trucking in particular. In her new book *Semi Queer: Inside the World of Gay, Trans, and Black Truck Drivers*, Anne Balay details why LGBTQ people have turned to work on the road. Because of discrimination, queer truck drivers often cannot find sustainable work elsewhere. And they're less likely to face harassment in a job that is much more solitary than a traditional workplace. Along the way, many queer workers have found that they actually enjoy the work.

Still, LGBTQ people in the trucking industry are also among the most exploited by it. Because they're limited in their job options, queer truckers are often willing to accept the poorest working conditions. As tightening regulations on drivers have reduced pay and pushed straight and cisgender workers with better options out of the industry, LGBTQ people, along with other marginalized workers, have filled the gap. When misclassified as independent contractors, drivers have also been denied basic protections such as minimum wage, overtime compensation, family and medical leave,

unemployment insurance, and, of course, protections against discrimination and harassment. And because most drivers have signed arbitration agreements, they have been blocked from challenging their conditions in a fair forum.

Yesterday's decision ensures that LGBTQ truck drivers, no matter how they're classified, can have their day in court. Unfortunately, queer people who work in other industries are not so lucky. As activists work to secure LGTBQ employment protections, their advocacy cannot be focused on rights alone. We must urge lawmakers to amend the Federal Arbitration Act to exempt workers in all industries from a process built to fail them.

**JARED ODESSKY**

Tags: Federal Arbitration Act, forced arbitration, LGBTQ, New Prime v. Oliveira, transportation

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OnLabor is a blog devoted to workers, unions, and their politics. We interpret our subject broadly to include the current crisis in the traditional union movement (why union decline is happening and what it means for our society); the new and contested forms of worker organization that are filling the labor union gap; how work ought to be structured and managed; how workers ought to be represented and compensated; and the appropriate role of government – all three branches – in each of these issues.

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We hold that the Funeral Home does not qualify for the ministerial exception to Title VII; the Funeral Home's religious exercise would not be substantially burdened by continuing to employ Stephens without discriminating against her on the basis of sex stereotypes; the EEOC has established that it has a compelling interest in ensuring the Funeral Home complies with Title VII; and enforcement of Title VII is necessarily the least restrictive way to achieve that compelling interest. We therefore REVERSE the district court's grant of summary judgment in the Funeral Home's favor and GRANT summary judgment to the EEOC on the unlawful-termination claim.

### a. Ministerial Exception

We turn first to the "ministerial exception" to Title VII, which is rooted in the First Amendment's religious protections, and which "preclude[s] application of [employment discrimination laws such as Title VII] to claims concerning the employment relationship between a religious institution and its ministers." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC,* 565 U.S. 171, 188, 132 S.Ct. 694, 181 L.Ed.2d 650 (2012). "[I]n order for the ministerial exception to bar an employment discrimination claim, the employer must be a religious institution and the employee must have been a ministerial employee." *Conlon v. InterVarsity Christian Fellowship/USA,* 777 F.3d 829, 833 (6th Cir. 2015) (quoting *Hollins v. Methodist Healthcare, Inc.,* 474 F.3d 223, 225 (6th Cir. 2007)). "The ministerial exception is a highly circumscribed doctrine. It grew out of the special considerations raised by the employment claims of clergy, which `concern[] internal church discipline, faith, and organization, all of which are governed by ecclesiastical rule, custom, and law.'" *Gen. Conf. Corp. of Seventh-Day Adventists v. McGill,* 617 F.3d 402, 409 (6th Cir. 2010) (quoting *Hutchison v. Thomas,* 789 F.2d 392, 396 (6th Cir. 1986)) (alteration in original).

Public Advocate of the United States and its fellow amici argue that the ministerial exception applies in this case because (1) the exception applies both to religious and non-religious entities, and (2) Stephens is a ministerial employee. Public Advocate Br. at 20-24. Tellingly, however, the Funeral Home contends that the Funeral Home "is not a religious organization" and therefore, "the ministerial exception has no application" to this case. Appellee Br. at 35. Although the Funeral Home has not waived the ministerial-exception

[884 F.3d 582]

defense by failing to raise it, *see Conlon,* 777 F.3d at 836 (holding that private parties may not "waive the First Amendment's ministerial exception" because "[t]his constitutional protection is... structural"), we agree with the Funeral Home that the exception is inapplicable here.

As we made clear in *Conlon,* the ministerial exception applies only to "religious institution[s]." *Id.* at 833. While an institution need not be "a church, diocese, or synagogue, or an entity operated by a traditional religious organization," *id.* at 834 (quoting *Hollins,* 474 F.3d at 225), to qualify for the exception, the institution must be "marked by clear or obvious religious characteristics," *id.* at 834 (quoting *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.,* 363 F.3d 299, 310 (4th Cir. 2004)). In accordance with these principles, we have previously determined that the InterVarsity Christian Fellowship/USA ("IVCF"), "an evangelical campus mission," constituted a religious organization for the purposes of the ministerial exception. *See id.* at 831, 833. IVCF described itself on its website as "faith-based religious organization" whose "purpose `is to establish and advance at colleges and universities witnessing communities of students and faculty who follow Jesus as Savior and Lord.'" *Id.* at 831 (citation omitted). In addition, IVCF's website notified potential employees that it has the right to "hir[e] staff based on their religious beliefs so that all staff share the same religious commitment." *Id.* (citation omitted). Finally, IVCF required all employees "annually [to] reaffirm their agreement with IVCF's Purpose Statement and Doctrinal Basis." *Id.*

The Funeral Home, by comparison, has virtually no "religious characteristics." Unlike the campus mission in *Conlon,* the Funeral Home does not purport or seek to "establish and advance" Christian values. *See id.* As the EEOC notes, the Funeral Home "is not affiliated with any church; its articles of incorporation do not avow any religious purpose; its employees are not required to hold any particular religious views; and it employs and serves individuals of all religions." Appellant Reply Br. at 33-34 (citing R. 61 (Def.'s Counter Statement of Disputed Facts ¶¶ 25-27, 30, 37) (Page ID #1832-35)). Though the Funeral Home's mission statement declares that "its highest priority is to honor God in all that we do as a company and as individuals," R. 55 (Def.'s Statement of Facts ¶ 21) (Page ID #1686), the Funeral Home's sole public displays of faith, according to Rost, amount to placing "Daily Bread" devotionals and "Jesus Cards" with scriptural references in public places in the funeral homes, which clients may pick up if they wish, *see* R. 51-3 (Rost 30(b)(6) Dep. at 39-40) (Page ID #652). The Funeral Home does not decorate its rooms with "religious figures" because it does not want to "offend[] people of different religions." R. 61 (Def.'s Counter Statement of Disputed Facts ¶ 33) (Page ID # 1834). The Funeral Home is open every day, including on Christian holidays. *Id.* at 88-89 (Page ID #659-60). And while the employees are paid for federally recognized holidays, Easter is not a paid holiday. *Id.* at 89 (Page ID #660).

Nor is Stephens a "ministerial employee" under *Hosanna-Tabor.* Following *Hosanna-Tabor,* we have identified four factors to assist courts in assessing whether an employee is a minister covered by the exception: (1) whether the employee's title "conveys a religious — as opposed to secular — meaning"; (2) whether the title reflects "a significant degree of religious training" that sets the employee "apart from laypersons"; (3) whether the employee serves "as an ambassador of the faith"

[884 F.3d 583]

and serves a "leadership role within [the] church, school, and community"; and (4) whether the employee performs "important religious functions ... for the religious organization." *Conlon,* 777 F.3d at 834-35. Stephens's title — "Funeral Director" — conveys a purely secular function. The record does not reflect that Stephens has any religious training. Though Stephens has a public-facing role within the funeral home, she was not an "ambassador of [any] faith," and she did not perform "important religious functions," *see id.* at 835; rather, Rost's description of funeral directors' work identifies mostly secular tasks — making initial contact with the deceased's families, handling the removal of the remains to the funeral home, introducing other staff to the families, coaching the families through the first viewing, greeting the guests, and coordinating the families' "final farewell," R. 53-3 (Rost Aff. ¶¶ 14-33) (Page ID #930-35). The only responsibilities assigned to Stephens that could be construed as religious in nature were, "on limited occasions," to "facilitate" a family's clergy selection, "facilitate the first meeting of clergy and family members," and "play a role in building the family's confidence around the role the clergy will play, clarifying what type of religious message is desired, and integrating the clergy into the experience." *Id.* ¶ 20 (Page ID #932-33). Such responsibilities are a far cry from the duties ascribed to the employee in *Conlon,* which "included assisting others to cultivate `intimacy with God and growth in Christ-like character through personal and corporate spiritual disciplines.'" 777 F.3d at 832. In short, Stephens was not a ministerial employee and the Funeral Home is not a religious institution, and therefore the ministerial exception plays no role in this case.

### b. Religious Freedom Restoration Act

Congress enacted RFRA in 1993 to resurrect and broaden the Free Exercise Clause jurisprudence that existed before the Supreme Court's decision in *Employment Division v. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), which overruled the approach to analyzing Free Exercise Clause claims set forth by *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). *See City of Boerne v. Flores,* 521 U.S. 507, 511-15, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). To that end, RFRA precludes the government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability," unless the government "demonstrates that application of the burden to the person — (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1. RFRA thus contemplates a two-step burden-shifting analysis: First, a claimant must demonstrate that complying with a generally applicable law would substantially burden his religious exercise. Upon such a showing, the government must then establish that applying the law to the burdened individual is the least restrictive means of furthering a compelling government interest.

The questions now before us are whether (1) we ought to remand this case and preclude the Funeral Home from asserting a RFRA-based defense in the proceedings below because Stephens, a non-governmental party, joined this action as an intervenor on appeal; (2) if not, whether the Funeral Home adequately demonstrated that it would be substantially burdened by the application of Title VII in this case; (3) if so, whether the EEOC nevertheless demonstrated that application of a such a burden to the Funeral Home furthers a compelling governmental interest; and (4) if so, whether the application of such a

[884 F.3d 584]

burden constitutes the least restrictive means of furthering that compelling interest. We address each inquiry in turn.

### i. Applicability of the Religious Freedom Restoration Act

We have previously made clear that "Congress intended RFRA to apply only to suits in which the government is a party." *Seventh-Day Adventists,* 617 F.3d at 410. Thus, if Stephens had initiated a private lawsuit against the Funeral Home to vindicate her rights under Title VII, the Funeral Home would be unable to invoke RFRA as a defense because the government would not have been party to the suit. *See id.* Now that Stephens has intervened in this suit, she argues that the case should be remanded to the district court with instructions barring the Funeral Home from asserting a RFRA defense to her individual claims. Intervenor Br. at 15. The EEOC supports Stephens's argument. EEOC Reply Br. at 31.

The Funeral Home, in turn, argues that the question of RFRA's applicability to Title VII suits between private parties "is a new and complicated issue that has never been a part of this case and has never been briefed by the parties." Appellee Br. at 34. Because Stephens's intervention on appeal was granted, in part, on her assurances that she "seeks only to raise arguments already within the scope of this appeal," D.E. 23 (Stephens Reply in Support of Mot. to Intervene at 8); *see also* D.E. 28-2 (March 27, 2017 Order at 2), the Funeral Home insists that permitting Stephens to argue now in favor of remand "would immensely prejudice the Funeral Home and undermine the Court's reasons for allowing Stephens's intervention in the first place," Appellee Br. at 34-35 (citing *Illinois Bell Tel. v. FCC,* 911 F.2d 776, 786 (D.C. Cir. 1990)).

The Funeral Home is correct. Stephens's reply brief in support of her motion to intervene insists that "no party to an appeal may broaden the scope of litigation beyond the issues raised before the district court." D.E. 23 (Stephens Reply in Support of Mot. to Intervene at 8) (citing *Thomas v. Arn,* 474 U.S. 140, 148, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985)). Though the district court noted in a footnote that "the Funeral Home could not assert a RFRA defense if Stephens had filed a Title VII suit on Stephens's own behalf," *R.G. & G.R. Harris Funeral Homes, Inc.,* 201 F.Supp.3d at 864 n.23, this argument was not briefed by the parties at the district-court level. Thus, in accordance with Stephens's own brief, she should not be permitted to argue for remand before this court.

Stephens nevertheless insists that "intervenors... are permitted to present different arguments related to the principal parties' claims." Intervenor Reply Br. at 14 (citing *Grutter v. Bollinger,* 188 F.3d 394, 400-01 (6th Cir. 1999)). But in *Grutter,* this court determined that proposed intervenors ought to be able to present particular "defenses of affirmative action" that the principal party to the case (a university) might be disinclined to raise because of "internal and external institutional pressures." 188 F.3d at 400. Allowing intervenors to present particular defenses on the merits to judiciable claims is different than allowing intervenors to change the procedural course of litigation by virtue of their intervention.

Moreover, we typically will not consider issues raised for the first time on appeal unless they are "presented with sufficient clarity and completeness and [their] resolution will materially advance the process of th[e] ... litigation." *Pinney Dock & Transp. Co. v. Penn Cent. Corp.,* 838 F.2d 1445, 1461 (6th Cir. 1988) (citation

[884 F.3d 585]

omitted). The merits of a remand have been addressed only in passing by the parties, and thus have not been discussed with "sufficient clarity and completeness" to enable us to entertain Stephens's claim. [8]

### ii. Prima Facie Case Under RFRA

To assert a viable defense under RFRA, a religious claimant must demonstrate that the government action at issue "would (1) substantially burden (2) a sincere (3) religious exercise." *Gonzales v. O Centro Espírita Beneficente União do Vegetal,* 546 U.S. 418, 428, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006). In reviewing such a claim, courts must not evaluate whether asserted "religious beliefs are mistaken or insubstantial." *Burwell v. Hobby Lobby Stores, Inc.,* ____ U.S. ____, 134 S.Ct. 2751, 2779, 189 L.Ed.2d 675 (2014). Rather, courts must assess "whether the line drawn reflects `an honest conviction.'" *Id.* (quoting *Thomas v. Review Bd. of Ind. Emp't Sec. Div.,* 450 U.S. 707, 716, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981)). In addition, RFRA, as amended by the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), protects "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A).

The EEOC argues that the Funeral Home's RFRA defense must fail because "RFRA protects religious exercise, not religious beliefs," Appellant Br. at 41, and the Funeral Home has failed to "identif[y] how continuing to employ Stephens after, or during, her transition would interfere with any religious `action or practice,'" *id.* at 43 (quoting *Kaemmerling v. Lappin,* 553 F.3d 669, 679 (D.C. Cir. 2008)). The Funeral Home, in turn, contends that the "very operation of [the Funeral Home] constitutes protected religious exercise" because Rost feels compelled by his faith to "serve grieving people" through the funeral home, and thus "[r]equiring [the Funeral Home] to authorize a male funeral director to wear the uniform for female funeral directors would

directly interfere with — and thus impose a substantial burden on — [the Funeral Home's] ability to carry out Rost's religious exercise of caring for the grieving." Appellee Br. at 38.

If we take Rost's assertions regarding his religious beliefs as sincere, which all parties urge us to do, then we must treat Rost's running of the funeral home as a religious exercise — even though Rost does not suggest that ministering to grieving mourners by operating a funeral home is a tenet of his religion, more broadly. *See United States v. Sterling,* 75 M.J. 407, 415 (C.A.A.F. 2016) (noting that conduct that "was claimed to be religiously motivated at least in part ... falls within RFRA's expansive definition of `religious exercise'"), *cert. denied,* ____ U.S. ____, 137 S.Ct. 2212, 198 L.Ed.2d 657 (2017). The question then

**[884 F.3d 586]**

becomes whether the Funeral Home has identified any way in which continuing to employ Stephens would substantially burden Rost's ability to serve mourners. The Funeral Home purports to identify two burdens. "First, allowing a funeral director to wear the uniform for members of the opposite sex would often create distractions for the deceased's loved ones and thereby hinder their healing process (and [the Funeral Home's] ministry)," and second, "forcing [the Funeral Home] to violate Rost's faith ... would significantly pressure Rost to leave the funeral industry and end his ministry to grieving people." Appellee Br. at 38. Neither alleged burden is "substantial" within the meaning of RFRA.

The Funeral Home's first alleged burden — that Stephens will present a distraction that will obstruct Rost's ability to serve grieving families — is premised on presumed biases. As the EEOC observes, the Funeral Home's argument is based on "a view that Stephens is a `man' and would be perceived as such even after her gender transition," as well as on the "assumption that a transgender funeral director would so disturb clients as to `hinder healing.'" Appellant Reply Br. at 19. The factual premises underlying this purported burden are wholly unsupported in the record. Rost testified that he has never seen Stephens in anything other than a suit and tie and does not know how Stephens would have looked when presenting as a woman. R. 54-5 (Rost 30(b)(6) Dep. at 60-61) (Page ID #1362). Rost's assertion that he believes his clients would be disturbed by Stephens's appearance during and after her transition to the point that their healing from their loved ones' deaths would be hindered, *see* R. 55 (Def.'s Statement of Facts ¶ 78) (Page ID #1697), at the very least raises a material question of fact as to whether his clients would actually be distracted, which cannot be resolved in the Funeral Home's favor at the summary-judgment stage. *See Tree of Life Christian Sch. v. City of Upper Arlington,* 823 F.3d 365, 371-72 (6th Cir. 2016) (holding that this court "cannot *assume* ... a fact" at the summary judgment stage); *see also Guess? Inc. v. United States,* 944 F.2d 855, 858 (Fed. Cir. 1991) (in case where manufacturer's eligibility for certain statutory refund on import tariffs turned on whether foreign customers preferred U.S.-made jeans more than foreign-made jeans, court held that the manufacturer's averred *belief* regarding foreign customers' preferences was not conclusive; instead, there remained a genuine dispute of material fact as to foreign customers' *actual* preferences). Thus, even if we were to find the Funeral Home's argument legally cognizable, we would not affirm a finding of substantial burden based on a contested and unsupported assertion of fact.

But more to the point, we hold as a matter of law that a religious claimant cannot rely on customers' presumed biases to establish a substantial burden under RFRA. Though we have seemingly not had occasion to address the issue, other circuits have considered whether and when to account for customer biases in justifying discriminatory employment practices. In particular, courts asked to determine whether customers' biases may render sex a "bona fide occupational qualification" under Title VII have held that "it would be totally anomalous ... to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid." *Diaz v. Pan Am. World Airways, Inc.,* 442 F.2d 385, 389 (5th Cir. 1971); *see also Bradley v. Pizzaco of Nebraska, Inc.,* 7 F.3d 795, 799 (8th Cir. 1993) (holding grooming policy for pizza deliverymen that had disparate impact on African-American employees was not justified by customer preferences for clean-shaven

**[884 F.3d 587]**

deliverymen because "[t]he existence of a beard on the face of a delivery man does not affect in any manner Domino's ability to make or deliver pizzas to their customers"); *Fernandez v. Wynn Oil Co.,* 653 F.2d 1273, 1276 (9th Cir. 1981) (rejecting claim that promoting a female employee would "`destroy the essence' of [the defendant's] business" — a theory based on the premise that South American clients would not want to work with a female vice-president — because biased customer preferences did not make being a man a "bona fide occupational qualification" for the position at issue). District courts within this circuit have endorsed these out-of-circuit opinions. *See, e.g., Local 567 Am. Fed'n of State, Cty., & Mun. Emps. v. Mich. Council 25, Am. Fed'n of State, Cty., & Mun. Emps.,* 635 F.Supp. 1010, 1012 (E.D. Mich. 1986) (citing *Diaz,* 442 F.2d 385, and *Weeks v. Southern Bell Telephone & Telegraph Co.,* 408 F.2d 228 (5th Cir. 1969), for the proposition that "[a]ssertions of sex-based employee classification cannot be made on the basis of stereotypes or customer preferences").

Of course, cases like *Diaz, Fernandez,* and *Bradley* concern a different situation than the one at hand. We could agree that courts should not credit customers' prejudicial notions of what men and women can do when considering whether sex constitutes a "bona fide occupational qualification" for a given position while nonetheless recognizing that those same prejudices have practical effects that would substantially burden Rost's religious practice (i.e., the operation of his business) in this case. But the Ninth Circuit rejected similar reasoning in *Fernandez,* and we reject it here. In *Fernandez,* the Ninth Circuit held that customer preferences could not transform a person's gender into a relevant consideration for a particular position *even if* the record supported the idea that the employer's business would suffer from promoting a woman because a large swath of clients would refuse to work with a female vice-president. *See* 653 F.2d at 1276-77. Just as the *Fernandez* court refused to treat discriminatory promotion practices as critical to an employer's business, notwithstanding any evidence to that effect in the record, so too we refuse to treat discriminatory policies as essential to Rost's business — or, by association, his religious exercise.

The Funeral Home's second alleged burden also fails. Under *Holt v. Hobbs,* ____ U.S. ____, 135 S.Ct. 853, 190 L.Ed.2d 747 (2015), a government action that "puts [a religious practitioner] to th[e] choice" of "`engag[ing] in conduct that seriously violates [his] religious beliefs' [or]... fac[ing] serious" consequences constitutes a substantial burden for the purposes of RFRA. *See id.* at 862 (quoting *Hobby Lobby,* 134 S.Ct. at 2775). Here, Rost contends that he is being put to such a choice, as he either must "purchase female attire" for Stephens or authorize her "to dress in female attire *while representing* [the Funeral Home] and serving the bereaved," which purportedly violates Rost's religious beliefs, or else face "significant[] pressure... to leave the funeral industry and end his ministry to grieving people." Appellee Br. at 38-39 (emphasis in original). Neither of these purported choices can be considered a "substantial burden" under RFRA.

First, though Rost currently provides his male employees with suits and his female employees with stipends to pay for clothing, this benefit is not legally required and Rost does not suggest that the benefit is religiously compelled. *See* Appellant Br. at 49 ("[T]he EEOC's suit would require only that *if* Rost provides a clothing benefit to his male employees, he provide a comparable benefit (which could be in-kind, or in cash) to his female employees.");

**[884 F.3d 588]**

R. 54-2 (Rost Aff.) (Page ID 1326-37) (no suggestion that clothing benefit is religiously motivated). In this regard, Rost is unlike the employers in *Hobby Lobby,* who rejected the idea that they could simply refuse to provide health care altogether and pay the associated penalty (which would allow them to avoid providing access to contraceptives in violation of their beliefs) because they felt religiously compelled to provide their employees with health

insurance. *See* 134 S.Ct. at 2776. And while "it is predictable that the companies [in *Hobby Lobby*] would face a competitive disadvantage in retaining and attracting skilled workers" if they failed to provide health insurance, *id.* at 2777, the record here does not indicate that the Funeral Home's clothing benefit is necessary to attract workers; in fact, until the EEOC commenced the present action, the Funeral Home did not provide any sort of clothing benefit to its female employees. Thus, Rost is not being forced to choose between providing Stephens with clothing or else leaving the business; this is a predicament of Rost's own making.

Second, simply permitting Stephens to wear attire that reflects a conception of gender that is at odds with Rost's religious beliefs is not a substantial burden under RFRA. We presume that the "line [Rost] draw[s]" — namely, that permitting Stephens to represent herself as a woman would cause him to "violate God's commands" because it would make him "directly involved in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift," R. 54-2 (Rost Aff. ¶¶ 43, 45) (Page ID #1334-35) — constitutes "an honest conviction." *See Hobby Lobby,* 134 S.Ct. at 2779 (quoting *Thomas,* 450 U.S. at 716, 101 S.Ct. 1425). But we hold that, as a matter of law, tolerating Stephens's understanding of her sex and gender identity is not tantamount to supporting it.

Most circuits, including this one, have recognized that a party can sincerely believe that he is being coerced into engaging in conduct that violates his religious convictions without actually, as a matter of law, being so engaged. Courts have recently confronted this issue when non-profit organizations whose religious beliefs prohibit them "from paying for, providing, or facilitating the distribution of contraceptives," or in any way "be[ing] complicit in the provision of contraception" argued that the Affordable Care Act's opt-out procedure — which enables organizations with religious objections to the contraceptive mandate to avoid providing such coverage by either filling out a form certifying that they have a religious objection to providing contraceptive coverage or directly notifying the Department of Health and Human Services of the religious objection — substantially burdens their religious practice. *See Eternal Word Television Network, Inc. v. Sec'y of U.S. Dep't of Health & Human Servs.,* 818 F.3d 1122, 1132-33, 1143 (11th Cir. 2016).

Eight of the nine circuits to review the issue, including this court, have determined that the opt-out process does not constitute a substantial burden. *See id.* at 1141 (collecting cases); *see also Mich. Catholic Conf. & Catholic Family Servs. v. Burwell,* 807 F.3d 738 (6th Cir. 2015), *cert. granted, judgment vacated sub nom. Mich. Catholic Conf. v. Burwell,* _____ U.S. _____, 136 S.Ct. 2450, 195 L.Ed.2d 261 (2016). [9] The courts reached this conclusion by examining the Affordable Care Act's provisions and determining that it was the statute — and not the employer's act of opting out — that "entitle[d] plan participants and

[884 F.3d 589]

beneficiaries to contraceptive coverage." *See, e.g., Eternal Word,* 818 F.3d at 1148-49. As a result, the employers' engagement with the opt-out process, though legally significant in that it leads the government to provide the organizations' employees with access to contraceptive coverage through an alternative route, does not mean the employers are facilitating the provision of contraceptives in a way that violates their religious practice. *See id.*

We view the Funeral Home's compliance with antidiscrimination laws in much the same light. Rost may sincerely believe that, by retaining Stephens as an employee, he is supporting and endorsing Stephens's views regarding the mutability of sex. But as a matter of law, bare compliance with Title VII — without actually assisting or facilitating Stephens's transition efforts — does not amount to an endorsement of Stephens's views. As much is clear from the Supreme Court's Free Speech jurisprudence, in which the Court has held that a statute requiring law schools to provide military and nonmilitary recruiters an equal opportunity to recruit students on campus was not improperly compelling schools to endorse the military's policies because "[n]othing about recruiting suggests that law schools agree with any speech by recruiters," and "students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.,* 547 U.S. 47, 65, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006) (citing *Bd. of Ed. of Westside Cmty. Schs. (Dist. 66) v. Mergens,* 496 U.S. 226, 250, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990) (plurality opinion)); *see also Rosenberger v. Rector & Visitors of the Univ. of Va.,* 515 U.S. 819, 841-42, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) (being required to provide funds on an equal basis to religious as well as secular student publications does not constitute state university's support for students' religious messages). Similarly, here, requiring the Funeral Home to refrain from firing an employee with different religious views from Rost does not, as a matter of law, mean that Rost is endorsing or supporting those views. Indeed, Rost's own behavior suggests that he sees the difference between employment and endorsement, as he employs individuals of any or no faith, "permits employees to wear Jewish head coverings for Jewish services," and "even testified that he is *not* endorsing his employee's religious beliefs by employing them." Appellant Reply Br. at 18-19 (citing R. 61 (Def.'s Counter Statement of Disputed Facts ¶¶ 31, 37, 38) (Page ID #1834-36); R. 51-3 (Rost Dep. at 41-42) (Page ID #653)). [10]

At bottom, the fact that Rost sincerely believes that he is being compelled to make such an endorsement does not make it so. *Cf. Eternal Word,* 818 F.3d at 1145 ("We reject a framework that takes away from courts the responsibility to decide what action the government requires and leaves that answer entirely to the religious adherent. Such a framework improperly substitutes religious belief for legal analysis regarding the operation of federal law."). Accordingly, requiring Rost to comply with Title VII's proscriptions on discrimination

[884 F.3d 590]

does not substantially burden his religious practice. The district court therefore erred in granting summary judgment to the Funeral Home on the basis of its RFRA defense, and we REVERSE the district court's decision on this ground. As Rost's purported burdens are insufficient as a matter of law, we GRANT summary judgment to the EEOC with respect to the Funeral Home's RFRA defense.

### iii. Strict Scrutiny Test

Because the Funeral Home has not established that Rost's religious exercise would be substantially burdened by requiring the Funeral Home to comply with Title VII, we do not need to consider whether the EEOC has adequately demonstrated that enforcing Title VII in this case is the least restrictive means of furthering a compelling government interest. However, in the interest of completeness, we reach this issue and conclude that the EEOC has satisfied its burden. We therefore GRANT summary judgment to the EEOC with regard to the Funeral Home's RFRA defense on the alternative grounds that the EEOC's enforcement action in this case survives strict scrutiny.

#### (a) Compelling Government Interest

Under the "to the person" test, the EEOC must demonstrate that its compelling interest "is satisfied through application of the challenged law [to] ... the particular claimant whose sincere exercise of religion is being substantially burdened." *Gonzales,* 546 U.S. at 430-31, 126 S.Ct. 1211 (citing 42 U.S.C. §

2000bb-1(b)). This requires "look[ing] beyond broadly formulated interests justifying the general applicability of government mandates and scrutiniz[ing] the asserted harm of granting specific exemptions to particular religious claimants." *Id.* at 431, 126 S.Ct. 1211.

As an initial matter, the Funeral Home does not seem to dispute that the EEOC "has a compelling interest in the `elimination of workplace discrimination, including sex discrimination.'" Appellee Br. at 41 (quoting Appellant Br. at 51). [11] However, the Funeral Home criticizes the EEOC for "cit[ing] a general, broadly formulated interest" to support enforcing Title VII in this case. *Id.* According to the Funeral Home, the relevant inquiry is whether the EEOC has a "specific interest in forcing [the Funeral Home] to allow its male funeral directors to wear the uniform for female funeral directors while on the job." *Id.* The EEOC instead asks whether its interest in "eradicating employment discrimination" is furthered by ensuring that Stephens does not suffer discrimination (either on the basis of sex-stereotyping or her transgender status), lose her livelihood, or face the emotional pain and suffering of being effectively told "that as a transgender woman she is not valued or able to make workplace contributions." Appellant Br. at 52, 54 (citing *Lusardi v. McHugh,* EEOC DOC 0120133395, 2015 WL 1607756, at *1 (E.E.O.C. Apr. 1, 2015)). Stephens similarly argues that "Title VII serves a compelling interest in eradicating all the forms of invidious employment discrimination proscribed by the statute," and points to studies demonstrating that transgender people have experienced particularly high rates of "bodily harm, violence, and discrimination because of their transgender status." Intervenor Br. at 21, 23-25.

[884 F.3d 591]

The Funeral Home's construction of the compelling-interest test is off-base. Rather than focusing on the EEOC's claim — that the Funeral Home terminated Stephens because of her proposed gender nonconforming behavior — the Funeral Home's test focuses instead on its defense (discussed above) that the Funeral Home merely wishes to enforce an appropriate workplace uniform. But the Funeral Home has not identified any cases where the government's compelling interest was framed as its interest in disturbing a company's workplace policies. For instance, in *Hobby Lobby,* the issue, which the Court ultimately declined to adjudicate, was whether the government's "interest in guaranteeing cost-free access to the four challenged contraceptive methods" was compelling — not whether the government had a compelling interest in requiring closely held organizations to act in a way that conflicted with their religious practice. *See* 134 S.Ct. at 2780.

The Supreme Court's analysis in cases like *Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), and *Holt* guides our approach. In those cases, the Court ultimately determined that the interests *generally* served by a given government policy or statute would not be "compromised" by granting an exemption to a particular individual or group. *See Holt,* 135 S.Ct. at 863. Thus, in *Yoder,* the Court held that the interests furthered by the government's requirement of compulsory education for children through the age of sixteen (i.e., "to prepare citizens to participate effectively and intelligently in our open political system" and to "prepare[] individuals to be self-reliant and self-sufficient participants in society") were not harmed by granting an exemption to the Amish, who do not need to be prepared "for life in modern society" and whose own traditions adequately ensure self-sufficiency. 406 U.S. at 221-22, 92 S.Ct. 1526. Similarly, in *Holt,* the Court recognized that the Department of Corrections has a compelling interest in preventing prisoners from hiding contraband on their persons, which is generally effectuated by requiring prisoners to adhere to a strict grooming policy, but the Court failed to see how the Department's "compelling interest in staunching the flow of contraband into and within its facilities ... would be seriously compromised by allowing an inmate to grow a ½-inch beard." 135 S.Ct. at 863.

Here, the same framework leads to the opposite conclusion. Failing to enforce Title VII against the Funeral Home means the EEOC would be allowing a particular person — Stephens — to suffer discrimination, and such an outcome is directly contrary to the EEOC's compelling interest in combating discrimination in the workforce. *See, e.g., United States v. Burke,* 504 U.S. 229, 238, 112 S.Ct. 1867, 119 L.Ed.2d 34 (1992) ("[I]t is beyond question that discrimination in employment on the basis of sex ... is, as ... this Court consistently has held, an invidious practice that causes grave harm to its victims."). [12] In this regard, this case is

[884 F.3d 592]

analogous to *Eternal Word,* in which the Eleventh Circuit determined that the government had a compelling interest in requiring a particular nonprofit organization with religious objections to the Affordable Care Act's contraceptive mandate to follow the procedures associated with obtaining an accommodation to the Act because

> applying the accommodation procedure to the plaintiffs in these cases furthers [the government's] interests because the accommodation ensures that the plaintiffs' female plan participants and beneficiaries — who may or may not share the same religious beliefs as their employer — have access to contraception without cost sharing or additional administrative burdens as the ACA requires.

818 F.3d at 1155 (emphasis added). The *Eternal Word* court reasoned that "[u]nlike the exception made in *Yoder* for Amish children," who would be adequately prepared for adulthood even without compulsory education, the "poor health outcomes related to unintended or poorly timed pregnancies apply to the plaintiffs' female plan participants or beneficiaries and their children just as they do to the general population." *Id.* Similarly, here, the EEOC's compelling interest in eradicating discrimination applies with as much force to Stephens as to any other employee discriminated against based on sex.

It is true, of course, that the specific harms the EEOC identifies in this case, such as depriving Stephens of her livelihood and harming her sense of self-worth, are simply permutations of the generic harm that is always suffered in employment discrimination cases. But *O Centro*'s "to the person" test does not mean that the government has a compelling interest in enforcing the laws only when the failure to enforce would lead to uniquely harmful consequences. Rather, the question is whether "the asserted harm of granting specific exemptions to particular religious claimants" is sufficiently great to require compliance with the law. *O Centro,* 546 U.S. at 431, 126 S.Ct. 1211. Here, for the reasons stated above, the EEOC has adequately demonstrated that Stephens has and would suffer substantial harm if we exempted the Funeral Home from Title VII's requirements.

Finally, we reject the Funeral Home's claim that it should receive an exemption, notwithstanding any harm to Stephens or the EEOC's interest in eradicating discrimination, because "the constitutional guarantee of free exercise[,] effectuated here via RFRA ... [,] is a higher-order right that necessarily supersedes a conflicting statutory right," Appellee Br. at 42. This point warrants little discussion. The Supreme Court has already determined that RFRA does not, in fact, "effectuate... the First Amendment's guarantee of free exercise," *id.,* because it sweeps more broadly than the Constitution demands. *See Boerne,* 521 U.S. at 532, 117 S.Ct. 2157. And in any event, the Supreme Court has expressly recognized that compelling interests can, at times, override religious beliefs — even those that are squarely protected by the Free Exercise Clause. *See Cutter v. Wilkinson,* 544 U.S. 709, 722, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005) ("We do not read RLUIPA to elevate accommodation of religious observances over an institution's need to maintain order and safety. Our decisions indicate that an accommodation must be measured so that it does not override other

[884 F.3d 593]

significant interests."). We therefore decline to hoist automatically Rost's religious interests above other compelling governmental concerns. The

undisputed record demonstrates that Stephens has been and would be harmed by the Funeral Home's discriminatory practices in this case, and the EEOC has a compelling interest in eradicating and remedying such discrimination.

### (b) Least Restrictive Means

The final inquiry under RFRA is whether there exist "other means of achieving [the government's] desired goal without imposing a substantial burden on the exercise of religion by the objecting part[y]." *Hobby Lobby,* 134 S.Ct. at 2780 (citing 42 U.S.C. §§ 2000bb-1(a), (b)). "The least-restrictive-means standard is exceptionally demanding," *id.* (citing *Boerne,* 521 U.S. at 532, 117 S.Ct. 2157), and the EEOC bears the burden of showing that burdening the Funeral Home's religious exercise constitutes the least restrictive means of furthering its compelling interests, *see id.* at 2779. Where an alternative option exists that furthers the government's interest "equally well," *see id.* at 2782, the government "must use it," *Holt,* 135 S.Ct. at 864 (quoting *United States v. Playboy Entm't Grp., Inc.,* 529 U.S. 803, 815, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000)). In conducting the least-restrictive-alternative analysis, "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Hobby Lobby,* 134 S.Ct. at 2781 n.37 (quoting *Cutter,* 544 U.S. at 720, 125 S.Ct. 2113). Cost to the government may also be "an important factor in the least-restrictive-means analysis." *Id.* at 2781.

The district court found that requiring the Funeral Home to adopt a gender-neutral dress code would constitute a less restrictive alternative to enforcing Title VII in this case, and granted the Funeral Home summary judgment on this ground. According to the district court, the Funeral Home engaged in illegal sex stereotyping only with respect to "the clothing Stephens [c]ould wear at work," and therefore a gender-neutral dress code would resolve the case because Stephens would not be forced to dress in a way that conforms to Rost's conception of Stephens's sex and Rost would not be compelled to authorize Stephens to dress in a way that violates Rost's religious beliefs. *R.G. & G.R. Harris Funeral Homes, Inc.,* 201 F.Supp.3d at 861, 863.

Neither party endorses the district court's proposed alternative, and for good reason. The district court's suggestion, although appealing in its tidiness, is tenable only if we excise from the case evidence of sex stereotyping in areas other than attire. Though Rost does repeatedly say that he terminated Stephens because she "wanted to *dress* as a woman" and "would no longer *dress* as a man," *see* R. 54-5 (Rost 30(b)(6) Dep. at 136-37) (Page ID #1372) (emphasis added), the record also contains uncontroverted evidence that Rost's reasons for terminating Stephens extended to other aspects of Stephens's intended presentation. For instance, Rost stated that he fired Stephens because Stephens "was no longer going to *represent himself* as a man," *id.* at 136 (Page ID #1372) (emphasis added), and Rost insisted that Stephens presenting as a female would disrupt clients' healing process because female clients would have to "share a bathroom with a man dressed up as a woman," *id.* at 74, 138-39 (Page ID #1365, 1373). The record thus compels the finding that Rost's concerns extended beyond Stephens's attire and reached Stephens's appearance and behavior more generally.

At the summary-judgment stage, where a court may not "make credibility determinations,

[884 F.3d 594]

weigh the evidence, or draw [adverse] inferences from the facts," *Terry Barr Sales Agency, Inc. v. All-Lock Co.,* 96 F.3d 174, 178 (6th Cir. 1996) (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)), the district court was required to account for the evidence of Rost's non-clothing-based sex stereotyping in determining whether a proposed less restrictive alternative furthered the government's "stated interests equally [as] well," *Hobby Lobby,* 134 S.Ct. at 2782. Here, as the evidence above shows, merely altering the Funeral Home's dress code would not address the discrimination Stephens faced because of her broader desire "to represent [her]self as a [wo]man." R. 54-5 (Rost 30(b)(6) Dep. at 136) (Page ID #1372). Indeed, the Funeral Home's counsel conceded at oral argument that Rost would have objected to Stephens's coming "to work presenting clearly as a woman and acting as a woman," regardless of whether Stephens wore a man's suit, because that "would contradict [Rost's] sincerely held religious beliefs." *See* Oral Arg. at 46:50-47:46.

The Funeral Home's proposed alternative — to "permit businesses to allow the enforcement of sex-specific dress codes for employees who are public-facing representatives of their employer, so long as the dress code imposes equal burdens on the sexes and does not affect employee dress outside of work," Appellee Br. at 44-45 — is equally flawed. The Funeral Home's suggestion would do nothing to advance the government's compelling interest in preventing and remedying discrimination against Stephens based on her refusal to conform at work to stereotypical notions of how biologically male persons should dress, appear, behave, and identify. Regardless of whether the EEOC has a compelling interest in combating sex-specific dress codes — a point that is not at issue in this case — the EEOC does have a compelling interest in ensuring that the Funeral Home does not discriminate against its employees on the basis of their sex. The Funeral Home's proposed alternative sidelines this interest entirely. [13]

The EEOC, Stephens, and several amici argue that searching for an alternative to Title VII is futile because enforcing Title VII is itself the least restrictive way to further EEOC's interest in eradicating discrimination based on sex stereotypes from the workplace. *See, e.g.,* Appellant Br. at 55-61; Intervenor Br. at 27-33. We agree.

To start, the Supreme Court has previously acknowledged that "there may be instances in which a need for uniformity precludes the recognition of exceptions to generally applicable laws under RFRA." *O Centro,* 546 U.S. at 436, 126 S.Ct. 1211. The Court highlighted *Braunfeld v. Brown,* 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961), as an example of a case where the "need for uniformity" trumped "claims for religious exemptions."

[884 F.3d 595]

*O Centro,* 546 U.S. at 435, 126 S.Ct. 1211. In *Braunfeld,* the plurality "denied a claimed exception to Sunday closing laws, in part because ... [t]he whole point of a `uniform day of rest for all workers' would have been defeated by exceptions." *O Centro,* 546 U.S. at 435, 126 S.Ct. 1211 (quoting *Sherbert,* 374 U.S. at 408, 83 S.Ct. 1790 (discussing *Braunfeld*)). *Braunfeld* thus serves as a particularly apt case to consider here, as it too concerned an attempt by an employer to seek an exemption that would elevate its religious practices above a government policy designed to benefit employees. If the government's interest in a "uniform day of rest for all workers" is sufficiently weighty to preclude exemptions, *see O Centro,* 546 U.S. at 435, 126 S.Ct. 1211, then surely the government's interest in uniformly eradicating discrimination against employees exerts just as much force.

The Court seemingly recognized Title VII's ability to override RFRA in *Hobby Lobby,* as the majority opinion stated that its decision should not be read as providing a "shield" to those who seek to "cloak[] as religious practice" their efforts to engage in "discrimination in hiring, for example on the basis of race." 134 S.Ct. at 2783. As the *Hobby Lobby* Court explained, "[t]he Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal." *Id.* We understand this to mean that enforcement actions brought under Title VII, which aims to "provid[e] an equal opportunity to participate in the workforce without regard to race" and an array of other protected traits, *see id.,* will necessarily defeat RFRA defenses to discrimination made illegal by Title VII. The district court reached the opposite conclusion, reasoning that *Hobby Lobby* did not suggest that "a RFRA defense can never prevail as a

defense to Title VII" because "[i]f that were the case, the majority would presumably have said so." *R.G. & G.R. Harris Funeral Homes, Inc.,* 201 F.Supp.3d at 857. But the majority *did* say that anti-discrimination laws are "precisely tailored" to achieving the government's "compelling interest in providing an equal opportunity to participate in the workforce" without facing discrimination. *Hobby Lobby,* 134 S.Ct. at 2783.

As Stephens notes, at least two district-level federal courts have also concluded that Title VII constitutes the least restrictive means for eradicating discrimination in the workforce. *See Redhead v. Conf. of Seventh-Day Adventists,* 440 F.Supp.2d 211, 222 (E.D.N.Y. 2006) (holding that "the Title VII framework is the least restrictive means of furthering" the government's interest in avoiding discrimination against non-ministerial employees of religious organization), *adhered to on reconsideration,* 566 F.Supp.2d 125 (E.D.N.Y. 2008); *EEOC v. Preferred Mgmt. Corp.,* 216 F.Supp.2d 763, 810-11 (S.D. Ind. 2002) ("[I]n addition to finding that the EEOC's intrusion into [the defendant's] religious practices is pursuant to a compelling government interest," — i.e., "the eradication of employment discrimination based on the criteria identified in Title VII" — "we also find that the intrusion is the least restrictive means that Congress could have used to effectuate its purpose.").

We also find meaningful Congress's decision not to include exemptions within Title VII to the prohibition on sex-based discrimination. As both the Supreme Court and other circuits have recognized, "[t]he very existence of a government-sanctioned exception to a regulatory scheme that is purported to be the least restrictive means can, in fact, demonstrate that other, less-restrictive alternatives could exist." *McAllen Grace Brethren Church v. Salazar,* 764 F.3d 465,

[884 F.3d 596]

475 (5th Cir. 2014) (citing *Hobby Lobby,* 134 S.Ct. at 2781-82); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 547, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) ("It is established in our strict scrutiny jurisprudence that `a law cannot be regarded as protecting an interest of the highest order... when it leaves appreciable damage to that supposedly vital interest unprohibited.'" (omission in original) (quoting *Fla. Star v. B.J.F.,* 491 U.S. 524, 541-42, 109 S.Ct. 2603, 105 L.Ed.2d 443 (1989) (Scalia, J., concurring))). Indeed, a driving force in the *Hobby Lobby* Court's determination that the government had failed the least-restrictive-means test was the fact that the Affordable Care Act, which the government sought to enforce in that case against a closely held organization, "already established an accommodation for nonprofit organizations with religious objections." *See* 134 S.Ct. at 2782. Title VII, by contrast, does not contemplate any exemptions for discrimination on the basis of sex. Sex may be taken into account only if a person's sex "is a bona fide occupational qualification reasonably necessary to the normal operation of [a] particular business or enterprise," 42 U.S.C. § 2000e-2(e)(1) — and in that case, the preference is no longer discriminatory in a malicious sense. Where the government has developed a comprehensive scheme to effectuate its goal of eradicating discrimination based on sex, including sex stereotypes, it makes sense that the only way to achieve the scheme's objectives is through its enforcement.

State courts' treatment of RFRA-like challenges to their own antidiscrimination laws is also telling. In several instances, state courts have concluded that their respective antidiscrimination laws survive strict scrutiny, such that religious claimants are not entitled to exemptions to enforcement of the state prohibitions on discrimination with regard to housing, employment, medical care, and education. *See State v. Arlene's Flowers, Inc.,* 187 Wn.2d 804, 389 P.3d 543, 565-66 (2017) (collecting cases), *petition for cert. filed Arlene's Flowers, Inc. v. Washington,* 86 U.S.L.W. 3047(July14017)). These holdings support the notion that antidiscrimination laws allow for fewer exceptions than other generally applicable laws.

As a final point, we reject the Funeral Home's suggestion that enforcing Title VII in this case would undermine, rather than advance, the EEOC's interest in combating sex stereotypes. According to the Funeral Home, the EEOC's requested relief reinforces sex stereotypes because the agency essentially asks that Stephens "be able to dress in a stereotypical feminine manner." *R.G. & G.R. Funeral Homes, Inc.,* 201 F.Supp.3d at 863 (emphasis omitted). This argument misses the mark. Nothing in Title VII or this court's jurisprudence requires employees to reject their employer's stereotypical notions of masculinity or femininity; rather, employees simply may not be discriminated against for a failure to conform. *See Smith,* 378 F.3d at 572 (holding that a plaintiff makes out a prima facie case for discrimination under Title VII when he pleads that "his *failure to conform* to sex stereotypes concerning how a man should look and behave was the driving force behind" an adverse employment action (emphasis added)). Title VII protects both the right of male employees "to c[o]me to work with makeup or lipstick on [their] face[s]," *Barnes,* 401 F.3d at 734, and the right of female employees to refuse to "wear dresses or makeup," *Smith,* 378 F.3d at 574, without any internal contradiction.

In short, the district court erred in finding that EEOC had failed to adopt the least restrictive means of furthering its compelling interest in eradicating discrimination in the workplace. Thus, even if we

[884 F.3d 597]

agreed with the Funeral Home that Rost's religious exercise would be substantially burdened by enforcing Title VII in this case, we would nevertheless REVERSE the district court's grant of summary judgment to the Funeral Home and hold instead that requiring the Funeral Home to comply with Title VII constitutes the least restrictive means of furthering the government's compelling interest in eradicating discrimination against Stephens on the basis of sex. Thus, even assuming Rost's religious exercise is substantially burdened by the EEOC's enforcement action in this case, we GRANT summary judgment to the EEOC on the Funeral Home's RFRA defense on this alternative ground.

## C. Clothing-Benefit Discrimination Claim

The district court erred in granting summary judgment in favor of the Funeral Home on the EEOC's discriminatory clothing-allowance claim. We long ago held that the scope of the complaint the EEOC may file in federal court in its efforts to enforce Title VII is "limited to the scope of the EEOC investigation reasonably expected to grow out of the charge of discrimination." *EEOC v. Bailey Co.,* 563 F.2d 439, 446 (6th Cir. 1977) (quoting inter alia, *Tipler v. E. I. duPont deNemours & Co.,* 443 F.2d 125, 131 (6th Cir. 1971)), *disapproved of on other grounds by Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978). The EEOC now urges us to hold that *Bailey* is incompatible with subsequent Supreme Court precedent and therefore no longer binding on this court. Because we believe that the EEOC may properly bring a clothing-allowance claim under *Bailey,* we need not decide whether *Bailey* has been rendered obsolete.

In *Bailey,* a white female employee charged that her employer failed to promote her on account of her sex, generally failed to promote women because of their sex, failed to pay equally qualified women as well as men, and failed to recruit and hire black women because of their race. *Id.* at 442. While investigating these claims, the EEOC found there was no evidence to support the complainant's charges of sex discrimination, but there was reasonable cause to believe the company had racially discriminatory hiring and promotion practices. In addition, the EEOC learned that the employer had seemingly refused to hire one applicant on the basis of his religion. After failed efforts at conciliation, the EEOC initiated a lawsuit against the employer alleging both racial and religious discrimination. We held that the EEOC lacked authority to bring an enforcement action regarding alleged religious discrimination because "[t]he portion of the EEOC's complaint incorporating allegations of religious discrimination exceeded the scope of the EEOC

investigation of [the defendant employer] reasonably expected to grow out of [the original] charge of sex and race discrimination." *Id.* at 446. We determined, however, that the EEOC was authorized to bring race discrimination claims against the employer because the original charge alleged racial discrimination against black applicants and employees and the charging party — a white woman — had standing under Title VII to file such a charge with the EEOC because she "may have suffered from the loss of benefits from the lack of association with racial minorities at work." *Id.* at 452 (citations omitted).

As we explained in *Bailey,* the EEOC may sue for matters beyond those raised directly in the EEOC's administrative charge for two reasons. First, limiting the EEOC complaint to the precise grounds listed in the charge of discrimination would undercut Title VII's "effective functioning" because laypersons "who are unfamiliar

[884 F.3d 598]

with the niceties of pleading and are acting without the assistance of counsel" submit the original charge. *Id.* at 446 (quoting *Tipler,* 443 F.2d at 131). Second, an initial charge of discrimination does not trigger a lawsuit; it instead triggers an EEOC investigation. The matter evolves into a lawsuit only if the EEOC is unable "to obtain voluntary compliance with the law.... Thus it is obvious that the civil action is much more intimately related to the EEOC investigation than to the words of the charge which originally triggered the investigation." *Id.* at 447 (quoting *Sanchez v. Standard Brands, Inc.,* 431 F.2d 455, 466 (5th Cir. 1970)).

At the same time, however, we concluded in *Bailey* that allowing the EEOC to sue for matters beyond those reasonably expected to arise from the original charge would undermine Title VII's enforcement process. In particular, we understood that an original charge provided an employer with "notice of the allegation, an opportunity to participate in a complete investigation of such allegation, and an opportunity to participate in meaningful conciliation discussions should reasonable cause be found following the EEOC investigation." *Id.* at 448. We believed that the full investigatory process would be short-circuited, and the conciliation process thereby threatened, if the EEOC did not file a separate charge and undertake a separate investigation when facts are learned suggesting an employer may have engaged in "discrimination of a type other than that raised by the individual party's charge and unrelated to the individual party." *Id.*

The EEOC now insists that *Bailey* is no longer good law after the Supreme Court's decision in *General Telephone Company of the Northwest, Inc. v. EEOC,* 446 U.S. 318, 100 S.Ct. 1698, 64 L.Ed.2d 319 (1980). In *General Telephone,* the Supreme Court held that Rule 23 of the Federal Rules of Civil Procedure, which governs class actions, does not apply to enforcement actions initiated by the EEOC. *Id.* at 331, 100 S.Ct. 1698. As part of its reasoning, the Court found that various requirements of Rule 23 — such as the requirement that "the claims or defenses of the representative parties [must be] typical of the claims or defenses of the class," FED. R. CIV. P. 23(a)(3) — are incompatible with the EEOC's enforcement responsibilities under Title VII:

> The typicality requirement is said to limit the class claims to those fairly encompassed by the named plaintiff's claims. If Rule 23 were applicable to EEOC enforcement actions, it would seem that the Title VII counterpart to the Rule 23 named plaintiff would be the charging party, with the EEOC serving in the charging party's stead as the representative of the class. Yet the Courts of Appeals have held that EEOC enforcement actions are not limited to the claims presented by the charging parties. Any violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint are actionable. The latter approach is far more consistent with the EEOC's role in the enforcement of Title VII than is imposing the strictures of Rule 23, which would limit the EEOC action to claims typified by those of the charging party.

*Gen. Tel.,* 446 U.S. at 330-31, 100 S.Ct. 1698 (internal citations omitted). The EEOC argues that this passage directly contradicts the holding in *Bailey,* in which we rejected the EEOC's argument that it "can investigate evidence of any other discrimination called to its attention during the course of an investigation." *See* 563 F.2d at 446.

Though there may be merit to the EEOC's argument, *see EEOC v. Kronos*

[884 F.3d 599]

*Inc.,* 620 F.3d 287, 297 (3d Cir. 2010) (citing *General Telephone* for the proposition that "[o]nce the EEOC begins an investigation, it is not required to ignore facts that support additional claims of discrimination if it uncovers such evidence during the course of a reasonable investigation of the charge" (citing *Gen. Tel.,* 446 U.S. at 331, 100 S.Ct. 1698)), we need not resolve *Bailey*'s compatibility with *General Telephone* at this time because our holding in *Bailey* does not preclude the EEOC from bringing a clothing-allowance-discrimination claim in this case.

First, the present case is factually distinguishable from *Bailey.* In *Bailey,* the court determined that allegations of religious discrimination were outside the scope of an investigation "reasonably related" to the original charge of sex and race discrimination because, in part, "[t]he evidence presented at trial by the EEOC to support its allegations of religious discrimination did not involve practices affecting [the original charger]." 563 F.2d at 447. Here, by contrast, Stephens would have been directly affected by the Funeral Home's allegedly discriminatory clothing-allowance policy had she not been terminated, as the Funeral Home's current practice indicates that she would have received either no clothing allowance or a less valuable clothing allowance once she began working at the Funeral Home as a woman. [14] And, unlike the EEOC's investigation of religious discrimination in *Bailey,* the EEOC's investigation into the Funeral Home's discriminatory clothing-allowance policy concerns precisely the same type of discrimination — discrimination on the basis of sex — that Stephens raised in her initial charge.

Second, we have developed a broad conception of the sorts of claims that can be "reasonably expected to grow out of the initial charge of discrimination." *See Bailey,* 563 F.2d at 446. As we explained in *Davis v. Sodexho,* 157 F.3d 460 (6th Cir. 1998), "where facts related with respect to the charged claim would prompt the EEOC to investigate a different, uncharged claim, the plaintiff is not precluded from bringing suit on that claim." *Id.* at 463. And we have also cautioned that "EEOC charges must be liberally construed to determine whether ... there was information given in the charge that reasonably should have prompted an EEOC investigation of [a] separate type of discrimination." *Leigh v. Bur. of State Lottery,* 1989 WL 62509, at *3 (6th Cir. June 13, 1989) (Table) (citing *Bailey,* 563 F.2d at 447). Here, Stephens alleged that she was fired after she shared her intention to present and dress as a woman because the Funeral Home "management [told her that it] did not believe the public would be accepting of [her] transition" from male to female. R. 63-2 (Charge of Discrimination at 1) (Page ID #1952). It was reasonable to expect, in light of this allegation, that the EEOC would investigate the Funeral Home's employee-appearance requirements and expectations, would learn about the Funeral Home's sex-specific dress code, and would thereby uncover the Funeral Home's seemingly discriminatory clothing-allowance policy. As much is clear from our decision in *Farmer v. ARA Services, Inc.,* 660 F.2d 1096 (6th Cir. 1981), in which "we held that the plaintiffs could bring equal pay claims alleging that their union discriminated in negotiating pay scales for different job designations, despite the fact that the plaintiffs' EEOC charge alleged only that the union failed to

[884 F.3d 600]

represent them in securing the higher paying job designations." *Weigel v. Baptist Hosp. of E. Tenn.,* 302 F.3d 367, 380 (6th Cir. 2002) (citing *Farmer*

660 F.2d at 1105). As we recognized then, underlying the *Farmer* plaintiffs' claim was an implicit allegation that the plaintiffs were as qualified and responsible as the higher-paid employees, and this fact "could reasonably be expected to lead the EEOC to investigate why different job designations that required the same qualifications and responsibilities used disparate pay scales." *Id.* By the same token, Stephens's claim that she was fired because of her planned change in appearance and presentation contains an implicit allegation that the Funeral Home requires its male and female employees to look a particular way, and this fact could (and did) reasonably prompt the EEOC to investigate whether these appearance requirements imposed unequal burdens — in this case, fiscal burdens — on its male and female employees.

We therefore REVERSE the district court's grant of summary judgment to the Funeral Home on the EEOC's discriminatory-clothing-allowance claim and REMAND with instructions to consider the merits of the EEOC's claim.

## III. CONCLUSION

Discrimination against employees, either because of their failure to conform to sex stereotypes or their transgender and transitioning status, is illegal under Title VII. The unrefuted facts show that the Funeral Home fired Stephens because she refused to abide by her employer's stereotypical conception of her sex, and therefore the EEOC is entitled to summary judgment as to its unlawful-termination claim. RFRA provides the Funeral Home with no relief because continuing to employ Stephens would not, as a matter of law, substantially burden Rost's religious exercise, and even if it did, the EEOC has shown that enforcing Title VII here is the least restrictive means of furthering its compelling interest in combating and eradicating sex discrimination. We therefore REVERSE the district court's grant of summary judgment in favor of the Funeral Home and GRANT summary judgment to the EEOC on its unlawful-termination claim. We also REVERSE the district court's grant of summary judgment on the EEOC's discriminatory-clothing-allowance claim, as the district court erred in failing to consider the EEOC's claim on the merits. We REMAND this case to the district court for further proceedings consistent with this opinion.

## FootNotes

1. We refer to Stephens using female pronouns, in accordance with the preference she has expressed through her briefing to this court.

2. All facts drawn from Def.'s Statement of Facts (R. 55) are undisputed. *See* R. 64 (Pl.'s Counter Statement of Disputed Facts) (Page ID #2066-88).

3. *See also* Appellee Br. at 16 ("It is a helpful exercise to think about *Price Waterhouse* and imagine that there was a dress code imposed which obligated Ms. Hopkins to wear a skirt while her male colleagues were obliged to wear pants. Had she simply been fired for wearing pants rather than a skirt, the case would have ended there — both sexes would have been equally burdened by the requirement to comply with their respective sex-specific standard. But what the firm could not do was fire her for being aggressive or macho when it was tolerating or rewarding the behavior among men — and when it did, it relied on a stereotype to treat her disparately from the men in the firm.").

4. Moreover, discrimination because of a person's transgender, intersex, or sexually indeterminate status is no less actionable than discrimination because of a person's identification with two religions, an unorthodox religion, or no religion at all. And "religious identity" can be just as fluid, variable, and difficult to define as "gender identity"; after all, both have "a deeply personal, internal genesis that lacks a fixed external referent." Sue Landsittel, *Strange Bedfellows? Sex, Religion, and Transgender Identity Under Title VII,* 104 NW. U. L. REV. 1147, 1172 (2010) (advocating for "[t]he application of tests for religious identity to the problem of gender identity [because it] produces a more realistic, and therefore more appropriate, authentication framework than the current reliance on medical diagnoses and conformity with the gender binary").

5. On the other hand, there is also evidence that Stephens was fired only because of her nonconforming appearance and behavior at work, and not because of her transgender identity. *See* R. 53-6 (Rost Dep. at 136-37) (Page ID #974) (At his deposition, when asked whether "the reason you fired [Stephens], was it because [Stephens] claimed that he was really a woman; is that why you fired [Stephens] or was it because he claimed — or that he would no longer dress as a man," Rost answered: "That he would no longer dress as a man," and when asked, "if Stephens had told you that he believed that he was a woman, but would only present as a woman outside of work, would you have terminated him," Rost answered: "No.").

6. We acknowledge that *Barnes v. City of Cincinnati,* 401 F.3d 729 (6th Cir. 2005), read *Smith* as focusing on "look and behav[ior]." *Id.* at 737 ("By alleging that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind defendant's actions, Smith stated a claim for relief pursuant to Title VII's prohibition of sex discrimination."). That is not surprising, however, given that only "look and behavior," not status, were at issue in *Barnes.*

7. Oddly, the *Vickers* court appears to have recognized that its new "observable-at-work" requirement cannot be squared with earlier precedent. Immediately after announcing this new requirement, the *Vickers* court cited *Smith* for the proposition that "a plaintiff hoping to succeed on a claim of sex stereotyping [must] show that he `fails to act *and/or identify with* his or her gender'" — a proposition that is necessarily broader than the narrow rule *Vickers* sought to announce. 453 F.3d at 764 (citing *Smith,* 378 F.3d at 575) (emphasis added). The *Vickers* court also seemingly recognized *Barnes* as binding authority, *see id.* (citing *Barnes*), but portrayed the decision as "affirming [the] district court's denial of defendant's motion for summary judgment as a matter of law on discrimination claim where pre-operative male-to-female transsexual was demoted based on his `ambiguous sexuality and his practice of dressing as a woman' and his co-workers' assertions that he was `not sufficiently masculine.'" *Id.* This summary is accurate as far as it goes, but it entirely omits the discussion in *Barnes* of discrimination against the plaintiff based on "his practice of dressing as a woman *outside of work.*" 401 F.3d at 738 (emphasis added).

8. For a similar reason, we decline to consider the argument raised by several amici that reading RFRA to "permit a religious accommodation that imposes material costs on third parties or interferes with the exercise of rights held by others" would violate the Establishment Clause of the First Amendment. *See* Private Rights/Public Conscience Br. at 15; *see also id.* at 5-15; Americans United Br. at 6-15. Amici may not raise "issues or arguments [that] ... `exceed those properly raised by the parties.'" *Shoemaker v. City of Howell,* 795 F.3d 553, 562 (6th Cir. 2015) (quoting *Cellnet Commc'ns, Inc. v. FCC,* 149 F.3d 429, 433 (6th Cir. 1998)). Although Stephens notes that the Establishment Clause "requires the government and courts to account for the

harms a religious exemption to Title VII would impose on employees," Intervenor Br. at 26, no party to this action presses the broad constitutional argument that amici seek to present. We therefore will not address the merits of amici's position.

9. Though a number of these decisions have been vacated on grounds that are not relevant to this case, their reasoning remains useful here.

10. Even ignoring any adverse inferences that might be drawn from the incongruity between Rost's earlier deposition testimony and the Funeral Home's current litigation position, as we must do when considering whether summary judgment is appropriate in the EEOC's favor, we conclude as a matter of law that Rost does not express "support[] [for] the idea that sex is a changeable social construct rather than an immutable God-given gift" by continuing to hire Stephens, *see* R. 54-2 (Rost Aff. ¶¶ 43, 45) (Page ID #1334-35) — even if Rost sincerely believes otherwise.

11. While the district court did not hold that the EEOC had conclusively established the "compelling interest" element of its opposition to the Funeral Home's RFRA defense, it assumed so arguendo. *See R.G. & G.R. Harris Funeral Homes, Inc.,* 201 F.Supp.3d at 857-59.

12. Courts have repeatedly acknowledged that Title VII serves a compelling interest in eradicating all forms of invidious employment discrimination proscribed by the statute. *See, e.g., EEOC v. Miss. Coll.,* 626 F.2d 477, 488-89 (5th Cir. 1980). As the Supreme Court stated, the "stigmatizing injury" of discrimination, "and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race." *Roberts v. U.S. Jaycees,* 468 U.S. 609, 625, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984); *see also EEOC v. Pac. Press Publ'g Ass'n,* 676 F.2d 1272, 1280 (9th Cir. 1982) ("By enacting Title VII, Congress clearly targeted the elimination of all forms of discrimination as a `highest priority.' Congress' purpose to end discrimination is equally if not more compelling than other interests that have been held to justify legislation that burdened the exercise of religious convictions."), *abrogation on other grounds recognized by Am. Friends Serv. Comm. Corp. v. Thornburgh,* 951 F.2d 957, 960 (9th Cir. 1991).

13. In its district court briefing, the Funeral Home proposed three additional purportedly less restrictive alternatives: the government could hire Stephens; the government could pay Stephens a full salary and benefits until she secures comparable employment; or the government could provide incentives to other employers to hire Stephens and allow her to dress as she pleases. R. 67 (Def.'s Reply Mem. of Law in Support of Def.'s Mot. for Summ. J. at 17-18) (Page ID #2117-18). Not only do these proposals fail to further the EEOC's interest enabling Stephens to work for the Funeral Home without facing discrimination, but they also fail to consider the cost to the government, which is "an important factor in the least-restrictive-means analysis." *Hobby Lobby,* 134 S.Ct. at 2781. We agree with the EEOC that the Funeral Home's suggestions — which it no longer pushes on appeal — are not viable alternatives to enforcing Title VII in this case, as they do not serve the EEOC's interest in eradicating discrimination "equally well." *See id.* at 2782.

14. The Funeral Home insists that it would provide female funeral directors with a company-issued suit if it had any female Funeral Directors. *See* R. 53-3 (Rost Aff. ¶ 54) (Page ID #939). This is a factual claim that we cannot credit at the summary-judgment stage.

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File Name: 21a0071p.06

# UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

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NICHOLAS K. MERIWETHER,

*Plaintiff-Appellant*,

*v*.

FRANCESCA HARTOP, JOSEPH WATSON, SCOTT WILLIAMS, DAVID FURBEE, SONDRA HASH, ROBERT HOWARTH, GEORGE WHITE, and WALLACE EDWARDS, Trustees of Shawnee State University, in their official capacities; JEFFREY A. BAUER, ROBERTA MILLIKEN, JENNIFER PAULEY, TENA PIERCE, DOUGLAS SHOEMAKER, and MALONDA JOHNSON, in their official capacities,

*Defendants-Appellees*,

JANE DOE; SEXUALITY AND GENDER ACCEPTANCE,

*Intervenors-Appellees*.

No. 20-3289

Appeal from the United States District Court
for the Southern District of Ohio at Cincinnati.
No. 1:18-cv-00753—Susan J. Dlott, District Judge.

Argued: November 19, 2020

Decided and Filed: March 26, 2021

Before: McKEAGUE, THAPAR, and LARSEN, Circuit Judges.

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## COUNSEL

**ARGUED:** John J. Bursch, ALLIANCE DEFENDING FREEDOM, Washington, D.C., for Appellant. Paul R. Kerridge, KEATING MUETHING & KLEKAMP PLL, Cincinnati, Ohio, for Shawnee State Appellees. Adam G. Unikowsky, JENNER & BLOCK LLP, Washington, D.C., for Intervenor Appellees. **ON BRIEF:** John J. Bursch, Kristen K. Waggoner, ALLIANCE DEFENDING FREEDOM, Washington, D.C., David A. Cortman, Travis C. Barham,

ALLIANCE DEFENDING FREEDOM, Lawrenceville, Georgia, Thomas W. Kidd, Jr., KIDD & URLING, LLC, West Chester, Ohio, Tyson C. Langhofer, ALLIANCE DEFENDING FREEDOM, Ashburn, Virginia, for Appellant. Paul R. Kerridge, KEATING MUETHING & KLEKAMP PLL, Cincinnati, Ohio, for Shawnee State Appellees. Adam G. Unikowsky, JENNER & BLOCK LLP, Washington, D.C., Jennifer L. Branch, GERHARDSTEIN & BRANCH CO. LPA, Cincinnati, Ohio, Shannon P. Minter, Asaf Orr, Christopher F. Stoll, NATIONAL CENTER FOR LESBIAN RIGHTS, San Francisco, California, for Intervenor Appellees. Deborah A. Ausburn, TAYLOR ENGLISH DUMA LLP, Atlanta, Georgia, Christopher L. Thacker, BILLINGS LAW FIRM, PLLC, Lexington, Kentucky, Gary S. McCaleb, Flagstaff, Arizona, Matthew J. Burkhart, GALLAGHER KAVINSKY & BURKHART LPA, Columbus, Ohio, Jennifer C. Chavez, Washington, D.C., Randall L. Wenger, INDEPENDENCE LAW CENTER, Harrisburg, Pennsylvania, Gerard V. Bradley, UNIVERSITY OF NOTRE DAME, Notre Dame, Indiana, for Amici Curiae.

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**OPINION**

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THAPAR, Circuit Judge. Traditionally, American universities have been beacons of intellectual diversity and academic freedom. They have prided themselves on being forums where controversial ideas are discussed and debated. And they have tried not to stifle debate by picking sides. But Shawnee State chose a different route: It punished a professor for his speech on a hotly contested issue. And it did so despite the constitutional protections afforded by the First Amendment. The district court dismissed the professor's free-speech and free-exercise claims. We see things differently and reverse.

I.

The district court decided this case on a motion to dismiss, so we construe the complaint in the light most favorable to the plaintiff. That means we must accept the complaint's factual allegations as true and draw all reasonable inferences in Meriwether's favor. *Handy-Clay v. City of Memphis*, 695 F.3d 531, 538 (6th Cir. 2012). Under this standard, we must reverse the district court's dismissal unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* (quoting *Guzman v. U.S. Dep't of Homeland Sec.,* 679 F.3d 425, 429 (6th Cir. 2012)).

A.

Nicholas Meriwether is a philosophy professor at Shawnee State University, a small public college in Portsmouth, Ohio. Shawnee State began awarding bachelor's degrees just thirty years ago. And for twenty-five of those years, Professor Meriwether has been a fixture at the school. He has served in the faculty senate, designed a bachelor's degree program in Philosophy and Religion, led study-abroad trips, and taught countless students in classes ranging from Ethics to the History of Christian Thought. Up until the incident that triggered this lawsuit, Meriwether had a spotless disciplinary record.

Professor Meriwether is also a devout Christian. He strives to live out his faith each day. And, like many people of faith, his religious convictions influence how he thinks about "human nature, marriage, gender, sexuality, morality, politics, and social issues." R. 34, Pg. ID 1469. Meriwether believes that "God created human beings as either male or female, that this sex is fixed in each person from the moment of conception, and that it cannot be changed, regardless of an individual's feelings or desires." *Id.* He also believes that he cannot "affirm as true ideas and concepts that are not true." *Id.* Being faithful to his religion was never a problem at Shawnee State. But in 2016, things changed.

At the start of the school year, Shawnee State emailed the faculty informing them that they had to refer to students by their "preferred pronoun[s]." *Id.* at 1471–72. Meriwether asked university officials for more details about the new pronoun policy, and the officials confirmed that professors would be disciplined if they "refused to use a pronoun that reflects a student's self-asserted gender identity." *Id.* at 1472. What if a professor had moral or religious objections? That didn't matter: The policy applied "regardless of the professor's convictions or views on the subject." *Id.*

When Meriwether asked to see the revised policy, university officials pointed him to the school's existing policy prohibiting discrimination "because of . . . gender identity." R. 34-1, Pg. ID 1509. That policy applies to all of the university's "employees, students, visitors, agents and volunteers"; it applies at both academic and non-academic events; it applies on all university

property (including classrooms, dorms, and athletic fields); and it sometimes applies off campus. R. 34-2, Pg. ID 1511–12.

Meriwether approached the chair of his department, Jennifer Pauley, to discuss his concerns about the newly announced rules. Pauley was derisive and scornful. Knowing that Meriwether had successfully taught courses on Christian thought for decades, she said that Christians are "primarily motivated out of fear" and should be "banned from teaching courses regarding that religion." R. 34, Pg. ID 1473. In her view, even the "presence of religion in higher education is counterproductive." *Id.*

Meriwether continued to teach students without incident until January 2018. On the first day of class, Meriwether was using the Socratic method to lead discussion in his course on Political Philosophy. When using that method, he addresses students as "Mr." or "Ms." He believes "this formal manner of addressing students helps them view the academic enterprise as a serious, weighty endeavor" and "foster[s] an atmosphere of seriousness and mutual respect." *Id.* at 1475. He "has found that addressing students in this fashion is an important pedagogical tool in all of his classes, but especially in Political Philosophy where he and [the] students discuss many of the most controversial issues of public concern." *Id.* In that first class, one of the students Meriwether called on was Doe. According to Meriwether, "no one . . . would have assumed that [Doe] was female" based on Doe's outward appearances. *Id.* at 1474. Thus, Meriwether responded to a question from Doe by saying, "Yes, sir." *Id.* This was Meriwether's first time meeting Doe, and the university had not provided Meriwether with any information about Doe's sex or gender identity.

After class, Doe approached Meriwether and "demanded" that Meriwether "refer to [Doe] as a woman" and use "feminine titles and pronouns." *Id.* at1475. This was the first time that Meriwether learned that Doe identified as a woman. So Meriwether paused before responding because his sincerely held religious beliefs prevented him from communicating messages about gender identity that he believes are false. He explained that he wasn't sure if he could comply with Doe's demands. Doe became hostile—circling around Meriwether at first, and then approaching him in a threatening manner: "I guess this means I can call you a cu--." *Id.* Doe promised that Meriwether would be fired if he did not give in to Doe's demands.

Meriwether reported the incident to senior university officials, including the Dean of Students and his department chair, Jennifer Pauley. University officials then informed their Title IX office of the incident. Officials from that office met with Doe and escalated Doe's complaint to Roberta Milliken, the Acting Dean of the College of Arts and Sciences.

Dean Milliken went to Meriwether's office the next day. She "advised" that he "eliminate all sex-based references from his expression"—no using "he" or "she," "him" or "her," "Mr." or "Ms.," and so on. *Id.* at 1476–77. Meriwether pointed out that eliminating pronouns altogether was next to impossible, especially when teaching. So he proposed a compromise: He would keep using pronouns to address most students in class but would refer to Doe using only Doe's last name. Dean Milliken accepted this compromise, apparently believing it followed the university's gender-identity policy.

Doe continued to attend and participate in Meriwether's class. But Doe remained dissatisfied and, two weeks into the semester, complained to university officials again. So Dean Milliken paid Meriwether another visit. This time, she said that if Meriwether did not address Doe as a woman, he would be violating the university's policy.

Soon after, Meriwether accidentally referred to Doe using the title "Mr." before immediately correcting himself. Around this time, Doe again complained to the university's Title IX Coordinator and threatened to retain counsel if the university didn't take action. So Dean Milliken once again came to Meriwether's office. She reiterated her earlier demand and threatened disciplinary action if he did not comply.

Trying to find common ground, Meriwether asked whether the university's policy would allow him to use students' preferred pronouns but place a disclaimer in his syllabus "noting that he was doing so under compulsion and setting forth his personal and religious beliefs about gender identity." R. 34, Pg. ID 1478. Dean Milliken rejected this option out of hand. She insisted that putting a disclaimer in the syllabus would itself violate the university's gender-identity policy.

During the rest of the semester, Meriwether called on Doe using Doe's last name, and "Doe displayed no anxiety, fear, or intimidation" while attending class. *Id.* at 1477–79. In fact,

Doe excelled and participated as much or more than any other student in the course. At the end of the semester, Meriwether awarded Doe a "high grade." *Id.* at 1479. This grade reflected Doe's "very good work" and "frequent participation in class discussions." *Id.*

B.

As the semester proceeded, Meriwether continued to search for an accommodation of his personal and religious views that would satisfy the university. But Shawnee State was not willing to compromise. After Dean Milliken's final meeting with Meriwether, she sent him a formal letter reiterating her demand: Address Doe in the same manner "as other students who identify themselves as female." R. 34-9, Pg. ID 1702. The letter said that if Meriwether did not comply, "the University may conduct an investigation" and that he could be subject to "informal or formal disciplinary action." *Id.*

Then, just a few days later—and without waiting for a response from Meriwether—Milliken announced that she was "initiating a formal investigation." R. 34-10, Pg. ID 1703. She claimed that she was doing so because she received "another complaint from a student in [Meriwether's] class." *Id.* The complaint was again from Doe. When Meriwether again asked whether an accommodation might be possible given his sincerely held beliefs, Milliken shot him down. She said he had just two options: (1) stop using *all* sex-based pronouns in referring to students (a practical impossibility that would also alter the pedagogical environment in his classroom), or (2) refer to Doe as a female, even though doing so would violate Meriwether's religious beliefs.

Dean Milliken referred the matter to Shawnee State's Title IX office. Over the coming months, the university's Title IX staff conducted a less-than-thorough investigation. They interviewed just four witnesses—Meriwether, Doe, and two other transgender students. They did not ask Meriwether to recommend any potential witnesses. And aside from Doe and Meriwether themselves, none of the witnesses testified about a single interaction between the two.

Shawnee State's Title IX office concluded that "Meriwether's disparate treatment [of Doe] ha[d] created a hostile environment" in violation of the university's nondiscrimination

policies. R. 34-13, Pg. ID 1719. Those policies prohibit "discrimination against any individual because of . . . gender identity." R. 34-1, Pg. ID 1509. They define gender identity as a "person's innermost concept of self as male or female or both or neither." R. 34-2, Pg. ID 1522. And they define a hostile educational environment as "any situation in which there is harassing conduct that limits, interferes with or denies educational benefits or opportunities, from both a subjective (the complainant's) and an objective (reasonable person's) viewpoint." *Id.* at 1522–23. The Title IX report concluded that because Doe "perceives them self as a female," and because Meriwether has "refuse[d] to recognize" that identity by using female pronouns, Meriwether engaged in discrimination and "created a hostile environment." R. 34-13, Pg. ID 1719. The report did not mention Meriwether's request for an accommodation based on his sincerely held religious beliefs.

After the Title IX report issued, Dean Milliken informed Meriwether that she was bringing a "formal charge" against him under the faculty's collective bargaining agreement. R. 34-14, Pg. ID 1731. She then issued her own report setting forth her findings: "Because Dr. Meriwether repeatedly refused to change the way he addressed [Doe] in his class due to his views on transgender people, and because the way he treated [Doe] was deliberately different than the way he treated others in the class, . . . he effectively created a hostile environment for [Doe]." R. 34-17, Pg. ID 1742. Milliken's whole explanation of how Meriwether violated university policy spanned just one paragraph. *Id.* (final paragraph). Finally, to create a "safe educational experience for all students," Dean Milliken concluded that it was necessary to discipline Meriwether. *Id.* She recommended placing a formal warning in his file.

Provost Jeffrey Bauer was tasked with reviewing Milliken's disciplinary recommendation before it was imposed. Meriwether wrote Provost Bauer a letter stating that he treated Doe exactly the same as he treated all male students; that he began referring to Doe without pronouns and by Doe's last name as an accommodation to Doe; and that Doe's "access to educational benefits and opportunities was never jeopardized." R. 34-18, Pg. ID 1766. Meriwether further explained that he could not use female pronouns to refer to Doe due to his "conscience and religious convictions." *Id.* He asked Provost Bauer to allow "reasonable minds . . . to differ" on this "newly emerging cultural issue." *Id.* Provost Bauer rejected Meriwether's request, stating

that he "approve[d] Dean Milliken's recommendation of formal disciplinary action." R. 34-19, Pg. ID 1770. Bauer did not address Meriwether's arguments to the contrary, nor did he grapple with Meriwether's request for a religious accommodation.

Shawnee State then placed a written warning in Meriwether's file. The warning reprimanded Meriwether and directed him to change the way he addresses transgender students to "avoid further corrective actions." R. 34-20, Pg. ID 1771. What does "further corrective actions" mean? Suspension without pay and termination, among other possible punishments. R. 34-4, Pg. ID 1646; *see also* R. 34, Pg. ID 1487.

C.

The Shawnee State faculty union then filed a grievance on Meriwether's behalf. It asked the university to (1) vacate the disciplinary action, and (2) allow Meriwether to keep speaking in a manner consistent with his religious beliefs.

Provost Bauer, who had already rejected Meriwether's claim once, was tasked with deciding the grievance. A union representative, Dr. Chip Poirot, joined Meriwether to present the grievance at a hearing. From the outset, Bauer exhibited deep hostility. He repeatedly interrupted the representative and made clear that he would not discuss the academic freedom and religious discrimination aspects of the case. The union representative tried to explain the teachings of Meriwether's church and why Meriwether felt he was being compelled to affirm a position at odds with his faith. At one point during the hearing, Provost Bauer "openly laughed." R. 34-24, Pg. ID 1780. Indeed, Bauer was so hostile that the union representative "was not able to present the grievance." *Id.* at 1780–81. Bauer denied the grievance.

The next step in Shawnee State's grievance process involved an appeal to the university's president. In a twist of fate, the president turned out to be Bauer. Shortly after Provost Bauer denied the grievance, he was appointed interim university president. Bauer designated two of his representatives, Shawnee State's Labor Relations Director and General Counsel, to meet with Meriwether and Poirot on his behalf.

The officials agreed with the union that Meriwether's conduct had not "created a hostile educational environment." R. 34-27, Pg. ID 1799. But they recommended ruling against Meriwether anyway. This was, they said, not a hostile-environment case; instead, it was a "differential treatment" case. *Id.* This change in theory contradicted the Title IX investigation and Dean Milliken's disciplinary recommendation (which Provost Bauer approved)—both of which accused Meriwether of violating university policy by "creat[ing] a hostile environment for [Doe]." R. 34-13, Pg. ID 1719; R. 34-17, Pg. ID 1741–42. The officials justified the university's refusal to accommodate Meriwether's religious beliefs by equating his views to those of a hypothetical racist or sexist. R. 34, Pg. ID 1490; R. 34-27, Pg. ID 1799. Since the university would not accommodate religiously motivated racism or sexism, it ought not accommodate Meriwether's religious beliefs. Bauer adopted his representatives' findings and denied the grievance again.

That was the end of the grievance process at Shawnee State. Because Meriwether now fears that he will be fired or suspended without pay if he does not toe the university's line on gender identity, he alleges he cannot address "a high profile issue of public concern that has significant philosophical implications." R. 34, Pg. ID 1492–93. He steers class discussions away from gender-identity issues and has refused to address the subject when students have raised it in class. The warning letter in Meriwether's file will also make it "difficult, if not impossible," for him to obtain a position at another institution once he retires from Shawnee State. *Id.* at 1493.

D.

Out of options at Shawnee State, Meriwether filed this lawsuit. He alleged that the university violated his rights under: (1) the Free Speech and Free Exercise Clauses of the First Amendment; (2) the Due Process and Equal Protection Clauses of the Fourteenth Amendment; (3) the Ohio Constitution; and (4) his contract with the university.

The district court referred the case to a magistrate judge. Doe and an organization, Sexuality and Gender Acceptance, then moved to intervene, and the magistrate granted their motion. Next, the defendants and intervenors filed separate motions to dismiss under Rule

12(b)(6). The magistrate recommended dismissing all of Meriwether's federal claims and declining to exercise supplemental jurisdiction over his state-law claims. Meriwether then objected to the magistrate's report and recommendation. But the district court adopted it in full.

Meriwether now appeals the district court's decision, except for its dismissal of his equal-protection claim. We first address Meriwether's free-speech claim before turning to his free-exercise and due-process claims.

II.

"Universities have historically been fierce guardians of intellectual debate and free speech." *Speech First, Inc. v. Schlissel*, 939 F.3d 756, 761 (6th Cir. 2019). But here, Meriwether alleges that Shawnee State's application of its gender-identity policy violated the Free Speech Clause of the First Amendment. The district court rejected this argument and held that a professor's speech in the classroom is never protected by the First Amendment. We disagree: Under controlling Supreme Court and Sixth Circuit precedent, the First Amendment protects the academic speech of university professors. Since Meriwether has plausibly alleged that Shawnee State violated his First Amendment rights by compelling his speech or silence and casting a pall of orthodoxy over the classroom, his free-speech claim may proceed.

A.

1.

Start with the basics. The First Amendment protects "the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977). Thus, the government "may not compel affirmance of a belief with which the speaker disagrees." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573 (1995). When the government tries to do so anyway, it violates this "cardinal constitutional command." *Janus v. Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463 (2018).

It should come as little surprise, then, "that prominent members of the founding generation condemned laws requiring public employees to affirm or support beliefs with which they disagreed." *Id.* at 2471 & n.8 (citing examples including Thomas Jefferson, Oliver

Ellsworth, and Noah Webster). Why? Because free speech is "essential to our democratic form of government." *Id.* at 2464. Without genuine freedom of speech, the search for truth is stymied, and the ideas and debates necessary for the continuous improvement of our republic cannot flourish. *See id.*

Courts have often recognized that the Free Speech Clause applies at public universities. *See, e.g.*, *Ward v. Polite*, 667 F.3d 727, 732–33 (6th Cir. 2012). Thus, the state may not act as though professors or students "shed their constitutional rights to freedom of speech or expression at the [university] gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Government officials violate the First Amendment whenever they try to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion," and when they "force citizens to confess by word or act their faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

To be sure, free-speech rules apply differently when the government is doing the speaking. And that remains true even when a government employee is doing the talking. Thus, in *Garcetti v. Ceballos*, the Supreme Court held that normally "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." 547 U.S. 410, 421 (2006).

2.

Here, the threshold question is whether the rule announced in *Garcetti* bars Meriwether's free-speech claim. It does not.

*Garcetti* set forth a general rule regarding government employees' speech. But it expressly declined to address whether its analysis would apply "to a case involving speech related to scholarship or teaching." 547 U.S. at 425; *see also Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 563 (4th Cir. 2011) ("The plain language of *Garcetti* thus explicitly left open the question of whether its principles apply in the academic genre where issues of 'scholarship or teaching' are in play."). Although *Garcetti* declined to address the question, we can turn to the Supreme Court's prior decisions for guidance. Those decisions have

"long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003).

Start with *Sweezy v. New Hampshire*. 354 U.S. 234 (1957) (plurality opinion). During the McCarthy era, New Hampshire instituted a loyalty program "to eliminate 'subversive persons' among government personnel." *Id.* at 236. The state legislature authorized the Attorney General to become a "one-man legislative committee" and take appropriate action if he found that a person was "subversive." *Id.* at 236–37. When the Attorney General questioned public university professor Paul Sweezy, he declined to reveal the contents of a lecture he had delivered to "100 students in [a] humanities course." *Id.* at 243. The Attorney General then had the court hold him in contempt. *Id.* at 244–45. The case ultimately made its way to the Supreme Court, which held that a legislative inquiry into the contents of a professor's lectures "unquestionably was an invasion of [his] liberties in the areas of academic freedom and political expression." *Id.* at 250. The Court explained that it "could not be seriously debated" that a professor's "right to lecture" is protected by the Constitution. *Id.* at 249–50. And it emphasized "[t]he essentiality of freedom in the community of American universities." *Id.* at 250. When the state targets professors' academic freedom rather than protects it, scholarship, teaching, and education "cannot flourish." *Id.*; *see also id.* at 262 (Frankfurter, J., concurring in result) ("Political power must abstain from intrusion into this activity of freedom . . . except for reasons that are exigent and obviously compelling.").

A decade later, in a case involving a similar New York law banning "subversive" activities, the Supreme Court affirmed that the Constitution protects "academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). It characterized academic freedom as "a special concern of the First Amendment" and said that the First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom." *Id.* After all, the classroom is "peculiarly the 'marketplace of ideas.'" *Id.* And when the state stifles a professor's viewpoint on a matter of public import, much more than the professor's rights are at stake. Our nation's future "depends upon leaders trained through wide exposure to [the] robust exchange of ideas"—not through the

"authoritative" compulsion of orthodox speech. *Id.* (citation omitted); *accord Sweezy*, 354 U.S. at 249–50 (plurality opinion) ("To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.").

Together, *Sweezy* and *Keyishian* establish that the First Amendment protects the free-speech rights of professors when they are teaching. *See also Healy v. James*, 408 U.S. 169, 180–81 (1972) ("[W]e break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom."); *Tinker*, 393 U.S. at 506 ("First Amendment rights . . . are available to teachers[.]").

As a result, our court has rejected as "totally unpersuasive" "the argument that teachers have no First Amendment rights when teaching, or that the government can censor teacher speech without restriction." *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 680 (6th Cir. 2001). And we have recognized that "a professor's rights to academic freedom and freedom of expression are paramount in the academic setting." *Bonnell v. Lorenzo*, 241 F.3d 800, 823 (6th Cir. 2001); *see Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1188–89 (6th Cir. 1995).[1] Simply put, professors at public universities retain First Amendment protections at least when engaged in core academic functions, such as teaching and scholarship. *See Hardy*, 260 F.3d at 680.

In reaffirming this conclusion, we join three of our sister circuits: the Fourth, Fifth, and Ninth. In *Adams v. Trustees of the University of North Carolina–Wilmington*, the Fourth Circuit held that *Garcetti* left open the question whether professors retained academic-freedom rights under the First Amendment. 640 F.3d at 562. It concluded that the rule announced in *Garcetti* does not apply "in the academic context of a public university." *Id.*; *see also Lee v. York Cnty. Sch. Div.*, 484 F.3d 687, 694 n.11 (4th Cir. 2007). The Fifth Circuit has also held that the speech of public university professors is constitutionally protected, reasoning that "academic freedom is a special concern of the First Amendment." *Buchanan v. Alexander*, 919 F.3d 847, 852–53 (5th Cir. 2019) (quotation omitted) (analyzing the claim under the *Pickering*-*Connick* framework).

[1]Shawnee State and the intervenors suggest that our decision in *Evans-Marshall v. Board of Education of Tipp City* is to the contrary. 624 F.3d 332 (6th Cir. 2010). Not so. There, we held that "the First Amendment does not extend to the in-class curricular speech of teachers in primary and secondary schools." *Id.* at 334. We distinguished college and university professors and made clear that our holding was limited to schoolteachers. *Id.* at 343–44.

Likewise, the Ninth Circuit has recognized that "if applied to teaching and academic writing, *Garcetti* would directly conflict with the important First Amendment values previously articulated by the Supreme Court." *Demers v. Austin*, 746 F.3d 402, 411 (9th Cir. 2014). Thus, it held that "*Garcetti* does not—indeed, consistent with the First Amendment, cannot—apply to teaching and academic writing that are performed 'pursuant to the official duties' of a teacher and professor." *Id.* at 412.

One final point worth considering: If professors lacked free-speech protections when teaching, a university would wield alarming power to compel ideological conformity. A university president could require a pacifist to declare that war is just, a civil rights icon to condemn the Freedom Riders, a believer to deny the existence of God, or a Soviet émigré to address his students as "comrades." That cannot be. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe" such orthodoxy. *Barnette*, 319 U.S. at 642.

3.

Shawnee State and the intervenors raise several arguments in response.

*First*, they suggest that we ought not apply the Supreme Court's academic-freedom cases that preceded *Garcetti*. But our job as lower court judges is to apply existing Supreme Court precedent unless it is expressly overruled. *Agostini v. Felton*, 521 U.S. 203, 237 (1997). And here, the Supreme Court has not overruled its academic-freedom cases. "It is not our prerogative to set this binding precedent aside." *Mayhew v. Town of Smyrna*, 856 F.3d 456, 464 (6th Cir. 2017). Nor is it our prerogative to cast aside our holding "that a teacher's in-class speech deserves constitutional protection." *Hardy*, 260 F.3d at 680. *Garcetti* expressed no view on this issue and even recognized that "expression related to . . . classroom instruction" might not fit within the Court's "customary employee-speech jurisprudence." *Garcetti*, 547 U.S. at 425. Thus, we remain bound by prior Supreme Court and Sixth Circuit precedent in this area.

*Second*, they argue that even if there is an academic-freedom exception to *Garcetti*, it does not protect Meriwether's use of titles and pronouns in the classroom. As they would have it, the use of pronouns has nothing to do with the academic-freedom interests in the substance of

classroom instruction. But that is not true. Any teacher will tell you that choices about how to lead classroom discussion shape the *content* of the instruction enormously. That is especially so here because Meriwether's choices touch on gender identity—a hotly contested matter of public concern that "often" comes up during class discussion in Meriwether's political philosophy courses. R. 34, Pg. ID 1492; *see Janus*, 138 S. Ct. at 2476 (describing gender identity as a "controversial [and] sensitive political topic[] . . . of profound value and concern to the public" (cleaned up)).

By forbidding Meriwether from describing his views on gender identity even in his syllabus, Shawnee State silenced a viewpoint that could have catalyzed a robust and insightful in-class discussion. Under the First Amendment, "the mere dissemination of ideas . . . on a state university campus may not be shut off in the name alone of 'conventions of decency.'" *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 670 (1973) (per curiam). Rather, the lesson of *Pickering* and the Court's academic-freedom decisions is that the state may do so only when its interest in restricting a professor's in-class speech outweighs his interest in speaking.

Remember, too, that the university's position on titles and pronouns goes both ways. By defendants' logic, a university could likewise *prohibit* professors from addressing university students by their preferred gender pronouns—no matter the professors' own views. And it could even impose such a restriction while denying professors the ability to explain to students why they were doing so. But that's simply not the case. Without sufficient justification, the state cannot wield its authority to categorically silence dissenting viewpoints. *See Keyishian*, 385 U.S. at 602–03; *Sweezy*, 354 U.S. at 250–51 (plurality opinion); *Wieman v. Updegraff*, 344 U.S. 183, 195–96 (1952) (Frankfurter, J., concurring); *Barnette*, 319 U.S. at 639; *see also Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 835–36 (1995).

Thus, the academic-freedom exception to *Garcetti* covers all classroom speech related to matters of public concern, whether that speech is germane to the contents of the lecture or not. The need for the free exchange of ideas in the college classroom is unlike that in other public workplace settings. And a professor's in-class speech to his students is anything but speech by an ordinary government employee. Indeed, in the college classroom there are three critical interests at stake (all supporting robust speech protection): (1) the students' interest in receiving

informed opinion, (2) the professor's right to disseminate his own opinion, and (3) the public's interest in exposing our future leaders to different viewpoints. *See Lane v. Franks*, 573 U.S. 228, 236 (2014); *Sweezy*, 354 U.S. at 250 (plurality opinion). Because the First Amendment "must always be applied 'in light of the special characteristics of the . . . environment' in the particular case," *Healy*, 408 U.S. at 180 (alteration in original) (quoting *Tinker*, 393 U.S. at 506), public universities do not have a license to act as classroom thought police. They cannot force professors to avoid controversial viewpoints altogether in deference to a state-mandated orthodoxy. Otherwise, our public universities could transform the next generation of leaders into "closed-circuit recipients of only that which the State chooses to communicate." *Tinker*, 393 U.S. at 511. Thus, "what constitutes a matter of public concern and what raises academic freedom concerns is of essentially the same character." *Dambrot*, 55 F.3d at 1188.

Of course, some classroom speech falls outside the exception: A university might, for example, require teachers to call roll at the start of class, and that type of non-ideological ministerial task would not be protected by the First Amendment. Shawnee State says that the rule at issue is similarly ministerial. But as we discuss below, titles and pronouns carry a message. The university recognizes that and wants its professors to use pronouns to communicate a message: People can have a gender identity inconsistent with their sex at birth. But Meriwether does not agree with that message, and he does not want to communicate it to his students. That's not a matter of classroom management; that's a matter of academic speech.

*Finally*, defendants argue that academic freedom belongs to public universities, not professors. But we've held that university professors "have . . . First Amendment rights when teaching" that they may assert against the university. *Hardy*, 260 F.3d at 680; *see Bonnell*, 241 F.3d at 823. So this arguments fails.

B.

Although *Garcetti* does not bar Meriwether's free-speech claim, that is not the end of the matter. We must now apply the longstanding *Pickering-Connick* framework to determine whether Meriwether has plausibly alleged that his in-class speech was protected by the First Amendment. *See Hardy*, 260 F.3d at 678 (taking this approach in an academic-speech case);

*Adams*, 640 F.3d at 564 (same); *Buchanan*, 919 F.3d at 853 (same); *Demers*, 746 F.3d at 412–13 (same). Under that framework, we ask two questions: First, was Meriwether speaking on "a matter of public concern"? *Connick v. Myers*, 461 U.S. 138, 146 (1983). And second, was his interest in doing so greater than the university's interest in "promoting the efficiency of the public services it performs through" him? *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

1.

To determine whether speech involves a matter of public concern, we look to the "content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147–48. When speech relates "to any matter of political, social, or other concern to the community," it addresses a matter of public concern. *Id.* at 146. Thus, a teacher's in-class speech about "race, gender, and power conflicts" addresses matters of public concern. *Hardy*, 260 F.3d at 679. A basketball coach using racial epithets to motivate his players does not. *Dambrot*, 55 F.3d at 1190. "The linchpin of the inquiry is, thus, for both public concern and academic freedom, the extent to which the speech advances an idea transcending personal interest or opinion which impacts our social and/or political lives." *Id.* at 1189.

Meriwether did just that in refusing to use gender-identity-based pronouns. And the "*point* of his speech" (or his refusal to speak in a particular manner) was to convey a message. *Id.* at 1187. Taken in context, his speech "concerns a struggle over the social control of language in a crucial debate about the nature and foundation, or indeed real existence, of the sexes." Professors' Amicus Br. at 1. That is, his mode of address *was* the message. It reflected his conviction that one's sex cannot be changed, a topic which has been in the news on many occasions and "has become an issue of contentious political . . . debate." *See Cockrel v. Shelby Cnty. Sch. Dist.*, 270 F.3d 1036, 1051 (6th Cir. 2001).

From courts to schoolrooms this controversy continues. Recently, the Fifth Circuit rejected an appellant's motion to be referred to by the appellant's preferred gender pronouns—over an "emphatic[] dissent." *United States v. Varner*, 948 F.3d 250, 254, 261 (5th Cir. 2020). And, on the other side, a Texas high school generated controversy when it permitted

its students to display preferred gender pronouns on their online profiles.[2] Further examples abound. In short, the use of gender-specific titles and pronouns has produced a passionate political and social debate. All this points to one conclusion: Pronouns can and do convey a powerful message implicating a sensitive topic of public concern.

The history of pronoun usage in American discourse underscores this point. Following the 1745 publication of Anne Fisher's *A New Grammar*, the "idea that *he*, *him* and *his* should go both ways caught on and was widely adopted."[3] But in the latter half of the twentieth century, gendered pronouns became imbued with new meaning. The feminist movement came to view the generic use of masculine pronouns as "a crucial mechanism for the conceptual invisibility of women." Carol Sanger, *Feminism and Disciplinarity: The Curl of the Petals*, 27 Loy. L.A. L. Rev. 225, 247 n.87 (1993). It regarded the "generic masculine pronoun" as rooted in "pre-existing cultural prejudice" and subtly "influencing our perceptions and recirculating the sexist prejudice." Deborah Cameron, *Feminism and Linguistic Theory* 137 (2d ed. 1992); *see also* Susan A. Speer, *Gender Talk: Feminism, Discourse and Conversation Analysis* 2–3 (2005). As a result, "feminist attempts at language reform" served as a means for "sensitiz[ing] individuals to ways in which language is discriminatory towards women." Susan Ehrlich & Ruth King, *Gender-based language reform and the social construction of meaning*, 3 Discourse & Soc'y 151, 156 (1992). To the feminist cause, pronouns mattered.

And history tends to repeat itself. Never before have titles and pronouns been scrutinized as closely as they are today for their power to validate—or invalidate—someone's perceived sex or gender identity. Meriwether took a side in that debate. Through his continued refusal to address Doe as a woman, he advanced a viewpoint on gender identity. *See Dambrot*, 55 F.3d at 1189. Meriwether's speech manifested his belief that "sex is fixed in each person from the moment of conception, and that it cannot be changed, regardless of an individual's feelings or desires." R. 34, Pg. ID 1469. The "focus," "point," "intent," and "communicative purpose" of

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[2]Alexandra Cronin, *Controversy Sparks over Frisco Transgender Students' Right to Choose Preferred Pronouns*, LOCAL PROFILE (Sept. 28, 2020), https://localprofile.com/2020/09/28/frisco-transgender-students-preferred-pronouns/.

[3]Patricia T. O'Conner & Stewart Kellerman, *All-Purpose Pronoun*, N.Y. TIMES MAG. (July 21, 2009), https://www.nytimes.com/2009/07/26/magazine/26FOB-onlanguage-t html.

the speech in question was a matter of public concern. *Farhat v. Jopke*, 370 F.3d 580, 592 (6th Cir. 2004) (citations omitted).

And even the university appears to think this pronoun debate is a hot issue. Otherwise, why would it forbid Meriwether from explaining his "personal and religious beliefs about gender identity" in his syllabus? R. 34, Pg. ID 1478, 1488–91. No one contests that what Meriwether proposed to put in his syllabus involved a matter of public concern. *See Scarbrough v. Morgan Cnty. Bd. of Educ.*, 470 F.3d 250, 253, 256 (6th Cir. 2006) (holding that "intended speech" which the plaintiff was later "unable" to make "touched on a matter of public concern"). In short, when Meriwether waded into the pronoun debate, he waded into a matter of public concern.

2.

Because Meriwether was speaking on a matter of public concern, we apply *Pickering* balancing to determine whether the university violated his First Amendment rights. This test requires us "to arrive at a balance between the interests of the [professor], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U.S. at 568. Here, that balance favors Meriwether.

Start with Meriwether's interests. We begin with "the robust tradition of academic freedom in our nation's post-secondary schools." *Hardy*, 260 F.3d at 680; *see also Keyishian*, 385 U.S. at 603 ("Our Nation is deeply committed to safeguarding academic freedom[.]"). That tradition alone offers a strong reason to protect Professor Meriwether's speech. After all, academic freedom is "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." *Keyishian*, 385 U.S. at 603. And the First Amendment interests are especially strong here because Meriwether's speech also relates to his core religious and philosophical beliefs. Finally, this case implicates an additional element: potentially compelled speech on a matter of public concern. And "[w]hen speech is compelled . . . additional damage is done." *Janus*, 138 S. Ct. at 2464.

Those interests are powerful. Here, the university refused even to permit Meriwether to comply with its pronoun mandate while expressing his personal convictions in a syllabus

disclaimer. That ban is anathema to the principles underlying the First Amendment, as the "proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'" *Matal v. Tam*, 137 S. Ct. 1744, 1764 (2017) (plurality opinion) (quoting *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)). Indeed, the premise that gender identity is an idea "embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view." *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 660 (2000).

And this is particularly true in the context of the college classroom, where students' interest in hearing even contrarian views is also at stake. "Teachers and students must always remain free to inquire, to study and to evaluate, [and] to gain new maturity and understanding." *Sweezy*, 354 U.S. at 250 (plurality opinion); *see also Blum v. Schlegel*, 18 F.3d 1005, 1012 (2d Cir. 1994) (noting that "the efficient provision of services" by a university "actually depends, to a degree, on the dissemination in public fora of controversial speech implicating matters of public concern").

On the other side of the ledger, Shawnee State argues that it has a compelling interest in stopping discrimination against transgender students. It relies on *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.* in support of this proposition. 884 F.3d 560 (6th Cir. 2018). But *Harris* does not resolve this case. There, a panel of our court held that an employer violates Title VII when it takes an adverse employment action based on an employee's transgender status. *Id.* at 571, 591.[4] The panel did not hold—and indeed, consistent with the First Amendment, could not have held—that the government always has a compelling interest in regulating employees' speech on matters of public concern. Doing so would reduce *Pickering* to a shell. And it would allow universities to discipline professors, students, and staff any time their speech might cause offense. That is not the law. *See Street v. New York*, 394 U.S. 576, 592 (1969) ("[T]he public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."). Purportedly neutral non-discrimination policies cannot be used to

[4]Title VII differs from Title IX in important respects: For example, under Title IX, universities must consider sex in allocating athletic scholarships, 34 C.F.R. § 106.37(c), and may take it into account in "maintaining separate living facilities for the different sexes." 20 U.S.C. § 1686. Thus, it does not follow that principles announced in the Title VII context automatically apply in the Title IX context.

transform institutions of higher learning into "enclaves of totalitarianism." *Tinker*, 393 U.S. at 511.

Turning to the facts, the university's interest in punishing Meriwether's speech is comparatively weak. *See Hardy*, 260 F.3d at 680–81. When the university demanded that Meriwether refer to Doe using female pronouns, Meriwether proposed a compromise: He would call on Doe using Doe's last name alone. That seemed like a win-win. Meriwether would not have to violate his religious beliefs, and Doe would not be referred to using pronouns Doe finds offensive. Thus, on the allegations in this complaint, it is hard to see how this would have "create[d] a hostile learning environment that ultimately thwarts the academic process." *Bonnell*, 241 F.3d at 824. It is telling that Dean Milliken at first approved this proposal. And when Meriwether employed this accommodation throughout the semester, Doe was an active participant in class and ultimately received a high grade.

As we stated in *Hardy*, "a school's interest in limiting a teacher's speech is not great when those public statements 'are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally.'" 260 F.3d at 681 (quoting *Pickering*, 391 U.S. at 572–73). The mere "fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker*, 393 U.S. at 508. At this stage of the litigation, there is no suggestion that Meriwether's speech inhibited his duties in the classroom, hampered the operation of the school, or denied Doe any educational benefits. *See Bonnell*, 241 F.3d at 824. Without such a showing, the school's actions "mandate[] orthodoxy, not anti-discrimination," and ignore the fact that "[t]olerance is a two-way street." *Ward*, 667 F.3d at 735. Thus, the *Pickering* balance strongly favors Meriwether.

Finally, Shawnee State and the intervenors argue that Title IX compels a contrary result. We disagree. Title IX prohibits "discrimination under any education program or activity" based on sex. 20 U.S.C. § 1681(a). The requirement "that the discrimination occur 'under any education program or activity' suggests that the behavior [must] be serious enough to have the systemic effect of denying the victim equal access to an educational program or activity." *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 652 (1999); *see Pahssen v. Merrill Cmty. Sch. Dist.*,

668 F.3d 356, 362 (6th Cir. 2012). But Meriwether's decision not to refer to Doe using feminine pronouns did not have any such effect. As we have already explained, there is no indication at this stage of the litigation that Meriwether's speech inhibited Doe's education or ability to succeed in the classroom. *See* 20 U.S.C. § 1681(a); *Doe v. Miami Univ.*, 882 F.3d 579, 590 (6th Cir. 2018) (holding that a Title IX hostile-environment claim requires that one's "educational experience [be] permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive so as to alter the conditions of the victim's educational environment" (cleaned up)). Bauer even admitted that Meriwether's conduct "was not so severe and pervasive that it created a hostile educational environment." R. 34-27, Pg. ID 1799. Thus, Shawnee State's purported interest in complying with Title IX is not implicated by Meriwether's decision to refer to Doe by name rather than Doe's preferred pronouns.

* * *

In sum, "the Founders of this Nation . . . 'believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.'" *Dale*, 530 U.S. at 660–61 (quoting *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)). Shawnee State allegedly flouted that core principle of the First Amendment. Taking the allegations as true, we hold that the university violated Meriwether's free-speech rights.[5]

III.

Meriwether next argues that as a public university, Shawnee State violated the Free Exercise Clause when it disciplined him for not following the university's pronoun policy. We agree.

The Constitution requires that the government commit "itself to religious tolerance." *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rights Comm'n*, 138 S. Ct. 1719, 1731 (2018) (citation omitted). Thus, laws that burden religious exercise are presumptively unconstitutional unless

[5]The district court's conclusions about Meriwether's remaining free-speech claims were all premised on the notion that his speech was not protected. Because that premise was legally erroneous, we vacate all of the district court's free-speech holdings.

they are both neutral and generally applicable. *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 877–78 (1990). To determine whether a law is neutral, courts must look beyond the text and scrutinize the history, context, and application of a challenged law. *Masterpiece*, 138 S. Ct. at 1731; *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). In this way, the Free Exercise Clause guards against "even subtle departures from neutrality on matters of religion." *Masterpiece*, 138 S. Ct. at 1731 (cleaned up).

A.

Meriwether has plausibly alleged that Shawnee State's application of its gender-identity policy was not neutral for at least two reasons. First, officials at Shawnee State exhibited hostility to his religious beliefs. And second, irregularities in the university's adjudication and investigation processes permit a plausible inference of non-neutrality.[6]

1.

State actors must give "neutral and respectful consideration" to a person's sincerely held religious beliefs. *Masterpiece*, 138 S. Ct. at 1729. When they apply an otherwise-neutral law with religious hostility, they violate the Free Exercise Clause. *Id.* at 1731. In this case, "the pleadings give rise to a sufficient 'suspicion' of religious animosity to warrant 'pause' for discovery." *New Hope Family Servs., Inc. v. Poole*, 966 F.3d 145, 163 (2d Cir. 2020) (quoting *Masterpiece*, 138 S. Ct. at 1731). Meriwether "was entitled to a neutral decisionmaker who would give full and fair consideration to his religious objection as he sought to assert it in all of the circumstances in which this case was presented, considered, and decided." *Masterpiece*, 138 S. Ct. at 1732. And that, he at least plausibly did not receive.

Start with one of the individuals Meriwether alleges was involved in the action against him—Department Chair Jennifer Pauley. Meriwether came to her to discuss his religious concerns about the new policy. Pauley might have responded with tolerance, or at least neutral objectivity. She did not. Instead, she remarked that religion "oppresses students" and said that

[6]Of course, to have standing to bring a Free Exercise claim, Meriwether must have also suffered an injury because of the non-neutrality. Here, he claims that the non-neutrality led to his ultimate discipline. So he has standing to bring his claim.

even its "presence" at universities is "counterproductive." R. 34, Pg. ID 1473. Christians in particular, she said, were "primarily motivated out of fear." *Id.* In her view, "Christian doctrines . . . should not be taught." *Id.* And for good measure, she added that Christian professors "should be banned" from teaching courses on Christianity—knowing that Meriwether had done so for decades. *Id.* Neutral and non-hostile? As alleged, no. In fact, it has the makings of the very religious intolerances that "gave concern to those who drafted the Free Exercise Clause." *Lukumi*, 508 U.S. at 532 (citation omitted).

So what does the university say about these statements? It claims that Pauley was not involved in formulating, interpreting, or applying the university's gender-identity policy, and that she was not involved in the action against him. Maybe so. But at the motion-to-dismiss stage, courts must accept the allegations as true. And here, the complaint alleges that Pauley was involved.[7]

And Pauley was not the only allegedly hostile actor. After Meriwether was disciplined, a union representative presented Meriwether's grievance to Provost Bauer—a supposedly neutral adjudicator. But Bauer did not seem so neutral. He repeatedly interrupted the union representative and made clear that he would not discuss the "academic freedom and religious discrimination aspects" of the case. R. 34-24, Pg. ID 1780. The union representative tried to explain Meriwether's religious beliefs and the teachings of his church. But Provost Bauer responded with open laughter.[8] And after the laughter, Bauer became "so uncooperative" that the union representative "was not able to present the grievance" at all. R. 34, Pg. ID 1489. Bauer's alleged actions and words demonstrated anything but the "neutral and respectful consideration" that the Constitution demands. *Masterpiece*, 138 S. Ct. at 1729.

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[7]Ultimately, Meriwether bears the burden of proving that Pauley was involved in the decision-making process. And if these were the only allegations in the complaint, this would be a much more difficult case since Meriwether's assertion that Pauley was involved does not make clear how she influenced the disciplinary decision. But we need not resolve this difficult question now because Meriwether has alleged sufficient additional facts against the university to withstand a motion to dismiss.

[8]The defendants and the district court stress that Poirot's notes referencing the open laughter state that Bauer laughed "at some point" during the presentation, without saying precisely when. But the complaint itself clarifies that the laughter occurred "[w]hen Dr. Poirot outlined the religious beliefs that Dr. Meriwether and his church hold." R. 34, Pg. ID 1488; *accord* R. 34-24, Pg. ID 1780 (discussing the laughter in the context of the religious aspects of the presentation). Pending discovery, we must accept that allegation as true.

Shawnee State's Director of Labor Relations (Bauer's representative) then piled on when he reviewed the grievance. In his view, Meriwether's convictions were no better—and no more worthy of tolerant accommodation—than religiously motivated racism or sexism. Bauer adopted this reasoning in denying Meriwether's grievance once again.

If this sounds familiar, it should. In *Masterpiece Cakeshop*, the Supreme Court reversed a decision of the Colorado Civil Rights Commission when the Commission made hostile statements that "cast doubt on the fairness" of the adjudication. 138 S. Ct. at 1729–30. The Commission had said that "religion has been used to justify all kinds of discrimination throughout history," suggesting that the defendant was using religion as a pretext for discrimination. *Id.* at 1729. The Supreme Court called such comments "inappropriate" and said they called the Commission's impartiality into question. *Id.* at 1729–30. That same rationale applies here. Meriwether respectfully sought an accommodation that would both protect his religious beliefs and make Doe feel comfortable. In response, the university derided him and equated his good-faith convictions with racism. An inference of religious hostility is plausible in these circumstances. *See Poole*, 966 F.3d at 168–70.

In sum, Meriwether has plausibly alleged that religious hostility infected the university's interpretation and application of its gender-identity policy. *See Masterpiece*, 138 S. Ct. at 1730. Whether this claim ultimately prevails will depend on the results of discovery and the clash of proofs at trial. For now, we simply hold that Meriwether has plausibly alleged a free-exercise claim based on religious hostility.

2.

While the hostility Shawnee State exhibited would be enough for Meriwether's claim to survive a motion to dismiss, Meriwether has more. He alleges that various irregularities in the university's investigation and adjudication processes also permit an inference of non-neutrality. We agree.

Not all laws that look "neutral and generally applicable" are constitutional. *Lukumi*, 508 U.S. at 534 ("Facial neutrality is not determinative."). The Free Exercise Clause "forbids subtle departures from neutrality and covert suppression of particular religious beliefs." *Id.* (cleaned

up); *Ward*, 667 F.3d at 738 (noting that while a law might appear "neutral and generally applicable on its face, . . . in practice [it may be] riddled with exemptions or worse [be] a veiled cover for targeting a belief or a faith-based practice"). Thus, courts have an obligation to meticulously scrutinize irregularities to determine whether a law is being used to suppress religious beliefs. *See Lukumi*, 508 U.S. at 534–35; *Monclova Christian Acad. v. Toledo-Lucas Cnty. Health Dep't*, 984 F.3d 477, 481–82 (6th Cir. 2020).[9] And here, that scrutiny reveals signs of non-neutrality.

*First*, the university's alleged basis for disciplining Meriwether was a moving target. The Title IX report claimed that Meriwether violated the university's gender-identity policy by creating a "hostile educational environment." R. 34-13, Pg. ID 1719. Dean Milliken agreed and recommended disciplining Meriwether for this "hostile environment." R. 34-17, Pg. ID 1742. Yet when Meriwether grieved his discipline, university officials conceded that Meriwether had never created a hostile environment. Instead, they said the case was about "disparate treatment." R. 34-27, Pg. ID 1799. But at oral argument, the university changed its position once again: It said that "this really is a hostile-environment case." Oral Arg. 37:00–04.

These repeated changes in position, along with the alleged religious hostility, permit a plausible inference that the university was not applying a preexisting policy in a neutral way, but was instead using an evolving policy as pretext for targeting Meriwether's beliefs. *See Ward*, 667 F.3d at 736–37; *see also Lukumi*, 508 U.S. at 534. And it is also plausible that the re-interpretation of the policy was an "after-the-fact invention" designed to justify punishing Meriwether for his religiously motivated speech, not a neutral interpretation of a generally

[9]The obligation to scrutinize irregularities is longstanding. In *Yick Wo v. Hopkins*, for example, the Supreme Court scrutinized the application of a new city ordinance that appeared "fair on its face" only to find that it was being "administered . . . with an evil eye." 118 U.S. 356, 373–74 (1886). The Supreme Court held that San Francisco violated the Equal Protection Clause when it declined to renew the petitioner's laundry-business license under its new ordinance. *Id.* at 374. The Court held that the city acted out of discriminatory animus because the petitioner—a Chinese immigrant—had operated his business for twenty-two years without incident, and because San Francisco tended to use its "arbitrary power" under the new ordinance to deny licenses only to Chinese immigrants. *Id.* at 358 (statement of facts); *id.* at 366, 374 (opinion of the Court). The Court found it constitutionally "intolerable" that a man's "means of living" could be disrupted by the "mere will" of a public official who harbors discriminatory animus against him. *Id.* at 370. The Equal Protection Clause does not tolerate irregular, discriminatory application of "neutral" laws. Nor does the Free Exercise Clause.

applicable policy. *See Ward*, 667 F.3d at 736 (noting that "after-the-fact invention[s]" permit an inference of religious discrimination).

*Second*, the university's policy on accommodations was a moving target. Why does this matter? Because when "individualized exemptions from a general requirement are available, the government 'may not refuse to extend that system to cases of "religious hardship" without compelling reason.'" *Lukumi*, 508 U.S. at 537 (quoting *Smith*, 494 U.S. at 884).

When Dean Milliken told Meriwether that he was violating the university's gender-identity policy, Meriwether proposed a compromise: He would address Doe using Doe's last name and refrain from using pronouns to address Doe. Dean Milliken accepted this accommodation. But several weeks later, she retracted the agreed-upon accommodation and demanded that Meriwether use Doe's preferred pronouns if he intended to use pronouns to refer to other students. Now the university claims that its policy does not permit *any* religious accommodations.

This about-face permits a plausible inference that the policy allows accommodations, but the university won't provide one here. If this inference is supported through discovery and trial, a jury could conclude that the university's refusal to stick to its accommodation is "pretext for punishing [Meriwether's] religious views and speech." *Ward*, 667 F.3d at 735.

*Third*, the university's Title IX investigation raises several red flags. On their own, these issues might not warrant an inference of non-neutrality. But combined with the other allegations in the complaint, they provide probative "circumstantial evidence" of discrimination. *Lukumi*, 508 U.S. at 540.

For starters, the Title IX investigator interviewed just four witnesses, including Meriwether and Doe. She did not interview a single non-transgender student in any of Meriwether's classes, nor did she ask Meriwether to recommend any potential witnesses. Indeed, except for Meriwether and Doe, not a single witness testified about any interactions between the two. Even so, the Title IX officer concluded that Meriwether "created a hostile environment." R. 34-13, Pg. ID 1719.

Under the university's policies, a hostile environment exists only when "there is harassing conduct that limits, interferes with or denies educational benefits or opportunities, from both a subjective (the complainant's) and an objective (reasonable person's) viewpoint." R. 34-2, Pg. ID 1523. But the Title IX report does not explain why declining to use a student's preferred pronouns constitutes harassment. It does not explain how Meriwether's conduct interfered with or denied Doe or Doe's classmates *any* "educational benefits or opportunities," let alone how an "objective observer" could reach such a conclusion. R. 34-2, Pg. ID 1523. And it does not grapple with Meriwether's request for an accommodation based on his sincerely held religious beliefs. In short, the university's cursory investigation and findings provide circumstantial evidence of "subtle departures from neutrality." *Lukumi*, 508 U.S. at 534 (citation omitted). And this suggests that the "neutral . . . consideration to which [Meriwether] was entitled was compromised here." *Masterpiece*, 138 S. Ct. at 1729.

3.

The university raises several counterarguments, none of which we find persuasive.

*First*, the university seems to suggest that compliance with nondiscrimination laws can *never* burden an individual's religious beliefs under our holding in *Harris Funeral Homes*. If that is their argument, it mischaracterizes the case. In *Harris*, a panel of our court held that Title VII prevented an employer from firing a transgender employee because of the employee's transgender status. 884 F.3d at 574–75. The employer believed that the law burdened the free exercise of his religion because he would have to endorse the mutability of sex to comply. *Id.* at 589. The panel explained that even if the belief were sincere, that did not resolve the question. *Id.* And ultimately, the panel determined that compliance with Title VII did not burden the employer's religious beliefs because "requiring the [employer] to refrain from firing an employee with different . . . views . . . does not, as a matter of law, mean that [the employer] is endorsing or supporting those views." *Id.* As the university would have it, that means that compliance with a nondiscrimination law can never amount to coerced endorsement of contrary religious views.

That is not what we said, and that is not the law. Depending on the circumstances, the application of a nondiscrimination policy could force a person to endorse views incompatible with his religious convictions. And a requirement that an employer *not fire* an employee for expressing a transgender identity is a far cry from what we have here—a requirement that a professor affirmatively change his speech to recognize a person's transgender identity. The university itself recognizes that *Harris* was careful not to require an "endorsement regarding the mutability of sex." Defendants' Br. at 46; *see Harris*, 884 F.3d at 589. Remember, too, that Meriwether proposed a compromise: He would consider referring to students according to their self-asserted gender identity if he could also include a note in the syllabus about his religious beliefs on the issue. The university said no; Meriwether would violate the policy even by disclaiming a belief in transgender identity. It cannot now argue that the policy did not require Meriwether to endorse a view on gender identity contrary to his faith.

*Next*, the intervenors submit that because Milliken "issued [the] written warning," and because "there is no allegation that Milliken harbored any animus toward plaintiff's religious beliefs," Meriwether's free-exercise claim must fail. Intervenors' Br. at 52. Why? Because the original disciplinary decision was not the product of animus. But that argument is both factually and legally flawed.

According to the facts in the complaint, Milliken did not issue the warning. She recommended it, but *Bauer* imposed the punishment and notified Meriwether of it. And in any case, *Masterpiece* forecloses this argument: A disciplinary proceeding that is fair at the beginning still violates the Free Exercise Clause if it is influenced by religious hostility later. In *Masterpiece*, the Colorado Civil Rights Division, like Milliken, first "found probable cause that Phillips violated [the Colorado Anti-Discrimination Act] and referred the case to the Civil Rights Commission." 138 S. Ct. at 1726. An ALJ then "ruled against Phillips and the cakeshop." *Id.* And the Commission, like Bauer, "affirmed the ALJ's decision in full." *Id.* Neither the Civil Rights Division nor the ALJ exhibited any hostility. But the Commission was hostile, and that was enough. *Id.* at 1725, 1729–30. It doesn't matter that some stages of a proceeding are fair and neutral if others are not. What matters is whether unconstitutional animus infected the proceedings.

*Finally*, the university argues that Meriwether simply could have complied with the alternative it offered him: Don't use any pronouns or sex-based terms at all. This offer, the university says, would not violate Meriwether's religious beliefs. But such an offer has two problems. First, it would prohibit Meriwether from speaking in accordance with his belief that sex and gender are conclusively linked. *See Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 796 (1988) (explaining that the "difference between compelled speech and compelled silence . . . is without constitutional significance"). And second, such a system would be impossible to comply with, especially in a class heavy on discussion and debate. No "Mr." or "Ms." No "yes sir" or "no ma'am." No "he said" or "she said." And when Meriwether slipped up, which he inevitably would (especially after using these titles for twenty-five years), he could face discipline. Our rights do not hinge on such a precarious balance.

The effect of this Hobson's Choice is that Meriwether must adhere to the university's orthodoxy (or face punishment). This is coercion, at the very least of the indirect sort. And we know the Free Exercise Clause protects against both direct and indirect coercion. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017); *see also McDaniel v. Paty*, 435 U.S. 618, 633 (1978) (Brennan, J., concurring in judgment) (The "proposition—that the law does not interfere with free exercise because it does not directly prohibit religious activity, but merely conditions eligibility for office on its abandonment—is . . . squarely rejected by precedent."). Simply put, the alternative the university offered does not save its policy.

B.

For the reasons just explained, Meriwether has plausibly alleged that Shawnee State burdened his free-exercise rights. Thus, we apply "the most rigorous of scrutiny" to the university's actions. *Lukumi*, 508 U.S. at 546. We uphold them only if they "advance interests of the highest order" and are "narrowly tailored in pursuit of those interests." *Id.* (cleaned up). The university does not even argue that its application of the policy meets this standard. Thus, we hold that Meriwether's free-exercise claim may proceed.[10]

[10]Because the complaint sufficiently alleges non-neutrality, we need not consider the harder question of whether *Employment Division v. Smith* applies. Meriwether argues that because the university's speech regulations

III.

Meriwether's final claim is that the policy is unconstitutionally vague as applied to him. The Supreme Court has told us that a policy is so vague as to violate due process when it either (1) fails to inform ordinary people what conduct is prohibited, or (2) allows for arbitrary and discriminatory enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). The standards depend on the legal context: There is "substantially more room for imprecision in regulations bearing only civil, or employment, consequences, than would be tolerated in a criminal code." *Dade v. Baldwin*, 802 F. App'x 878, 885 (6th Cir. 2020) (citing *Arnett v. Kennedy*, 416 U.S. 134, 159–60 (1974) (plurality opinion); *Vill. of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 498–99 (1982)). Even where First Amendment values are at stake, "employment standards 'are not void for vagueness as long as ordinary persons using ordinary common sense would be notified that certain conduct will put them at risk'" of discipline. *Dade*, 802 F. App'x at 885 (quoting *San Filippo v. Bongiovanni*, 961 F.2d 1125, 1136 (3d Cir. 1992)); *see Arnett*, 416 U.S. at 158–61 (plurality opinion). Finally, our analysis must turn on the "particular facts at issue, for a plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18–19 (2010) (cleaned up).

Looking to the particular facts here, Meriwether was on notice that the policy prohibited his conduct. As Meriwether alleges, the policy prohibits gender-identity discrimination, with gender-identity being defined to include "how individuals perceive themselves and what they call themselves." R. 34-2, Pg. ID 1522. When Meriwether asked the university administrators for guidance, they ultimately told him he had to use Doe's preferred pronouns. And when he didn't comply, they disciplined him. Since he was clearly on notice that the policy applied to his conduct, he may not challenge it for vagueness. *See Parker v. Levy*, 417 U.S. 733, 755–56 (1974).

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are "at odds with our nation's history and traditions," they are not subject to *Smith*'s neutral-and-generally-applicable test. *See* Appellant Br. 45 (citing *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 190 (2012)). If resolving the applicability of *Smith* becomes necessary as this suit progresses, the district court should do so in the first instance.

Meriwether also failed to argue that the policy allowed for arbitrary and discriminatory enforcement. His conclusory assertion that the policy gives officials "unbridled discretion" in enforcement does not cut it. R. 34, Pg. ID 1465. And to the extent that he developed the point a bit more in his reply brief, that does not suffice. *Sanborn v. Parker*, 629 F.3d 554, 579 (6th Cir. 2010). Thus, Meriwether's argument that the policy allowed for arbitrary and discriminatory enforcement fails as well.

IV.

For the reasons set forth above, we affirm the district court's due-process holding, reverse its free-speech and free-exercise holdings, vacate its dismissal of the state-law claims, and remand for further proceedings consistent with this opinion.

# 13 CFR § 120.110 - What businesses are ineligible for SBA business loans?

CFR

## § 120.110 What businesses are ineligible for SBA business loans?

The following types of businesses are ineligible:

**(a)** Non-profit businesses (for-profit subsidiaries are eligible);

**(b)** Financial businesses primarily engaged in the business of lending, such as banks, finance companies, and factors (pawn shops, although engaged in lending, may qualify in some circumstances);

**(c)** Passive businesses owned by developers and landlords that do not actively use or occupy the assets acquired or improved with the loan proceeds (except Eligible Passive Companies under § 120.111);

**(d)** Life insurance companies;

**(e)** Businesses located in a foreign country (businesses in the U.S. owned by aliens may qualify);

**(f)** Pyramid sale distribution plans;

**(g)** Businesses deriving more than one-third of gross annual revenue from legal gambling activities;

**(h)** Businesses engaged in any illegal activity;

**(i)** Private clubs and businesses which limit the number of memberships for reasons other than capacity;

**(j)** Government-owned entities (except for businesses owned or controlled by a Native American tribe);

**(k)** Businesses principally engaged in teaching, instructing, counseling or indoctrinating religion or religious beliefs, whether in a religious or secular setting;

**(l)** [Reserved]

**(m)** Loan packagers earning more than one third of their gross annual revenue from packaging SBA loans;

**(n)** Businesses with an Associate who is incarcerated, on probation, on parole, or has been indicted for a felony or a crime of moral turpitude;

**(o)** Businesses in which the Lender or CDC, or any of its Associates owns an equity interest;

**(p)** Businesses which:

**(1)** Present live performances of a prurient sexual nature; or

**(2)** Derive directly or indirectly more than ***de minimis*** gross revenue through the sale of products or services, or the presentation of any depictions or displays, of a prurient sexual nature;

**(q)** Unless waived by SBA for good cause, businesses that have previously defaulted on a Federal loan or Federally assisted financing, resulting in the Federal government or any of its agencies or Departments sustaining a loss in any of its programs, and businesses owned or controlled by an applicant or any of its Associates which previously owned, operated, or controlled a business which defaulted on a Federal loan (or guaranteed a loan which was defaulted) and caused the Federal government or any of its agencies or Departments to sustain a loss in any of its programs. For purposes of this section, a compromise agreement shall also be considered a loss;

**(r)** Businesses primarily engaged in political or lobbying activities; and

**(s)** Speculative businesses (such as oil wildcatting).

[61 FR 3235, Jan. 31, 1996, as amended at 82 FR 39502, Aug. 21, 2017]

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- Different types of employment agreements and arrangements
- Starting work and negotiating an agreement
- Probation and trial periods
- Union rights
- Leaving or losing your job

**SEX WORKERS: YOUR RIGHTS**

# Your rights when doing sex work

## Introduction

Most sex workers in businesses work as independent contractors – the business doesn't pay their PAYE tax for them, and doesn't provide sick leave, annual leave or other benefits you get when you're officially an "employee".

In fact, lots of sex workers really are employees, without realising it. The law on whether someone is a contractor or employee says that you have to look at each case and see what's really happening in the relationship. Just because the employer says that you're a contractor and not an employee, that doesn't mean that legally you're not an employee. What's important is how close to the heart of the business your work is.

Employees have a lot more rights than contractors. For more information on how to tell if you're an employee or a contractor, see "When you're not an 'employee': Differences between employees, contractors and volunteers" in this chapter.

But even if you really are an independent contractor – or if your boss thinks you are – you have lots of workers' rights that your boss is supposed to respect.

## Your rights doing sex work as an independent contractor

Migrants and other vulnerable workers

When you're not an "employee": Differences between employees, contractors and volunteers

Sex workers: Your rights

*Overview of sex work and the law*

*Who can do sex work*

*Where and how you can work as a sex worker*

*Your rights when doing sex work*

*Discrimination and harassment in the sex industry*

*Health and safety in sex work*

*Changing jobs*

Other resources

## Your contract gives you rights – and maybe more than you think

If you are an independent contractor to a brothel, you are making what is supposed to be a free and equal agreement with a brothel operator that is good for both of you.

You have the right to negotiate the contract to include things that are important to you. You also have the right to keep a copy of the written contract.

In reality, often the brothel operator has, or seems to have, more power than the sex worker. If you want to even up the balance, you can get legal advice on the contract you are being asked to sign from:

- the New Zealand Prostitutes Collective (NZPC)
- a Community Law Centre
- a lawyer.

It's common for brothel operators to include in contracts a system of fines for things like turning up late or wearing the wrong clothes. If these fines are unreasonable and more like a punishment than about the true cost to the business of what you're doing, then your boss might not be able to get them enforced if you took your boss to court. Someone from the Prostitutes Collective can help you negotiate a better contract.

## Health and safety rights at work

Health and Safety at Work Act 2015, Prostitution Reform Act 2003, ss 8–10

Even if you're an independent contractor and not an employee, the brothel operator has to make sure you have a safe workplace.

Operators have to make sure you and your clients follow safer sex practices.

They also have to make sure everything else about the workplace is safe for you.

For more information, see the chapter "Employment conditions and protections", under "Health and safety protections".

## The right to give or refuse consent

Prostitution Reform Act 2013, s 17; Case: [2012] NZHC 2859

Even if you're an independent contractor and not an employee, you always have the right to give, refuse or take back consent to any kind of sex. It doesn't matter what your contract says about this – your right to consent is stronger than any other law.

If someone is making you do something you don't want to do, you can get help from:

- the New Zealand Prostitutes Collective (NZPC)
- the police, or
- a Community Law Centre.

## Your rights doing sex work as an employee

For general information on your rights as an employee, see the other sections of this chapter and also the chapters "Employment conditions and protections" and "Resolving employment problems".

Very few sex workers have written employment agreements. Some sex workers might actually legally be "employees" without realising it, but most at least think they are independent contractors.

If you are an employee – either because you have an employment agreement, or because despite what the operator says, your position in the business looks more like an employee – you have lots of extra employment rights.

For more information on how to tell if you're an employee or a contractor, see "When you're not an 'employee': Differences between employees, contractors and volunteers" in this chapter.

### Some specific employment rights sex workers might want to know about

An employer can't dock your pay unless it's in your employment contract, and they have to let you know every time they do it. For more information, see the chapter "Employment conditions and protections", under "Your pay / Payment of wages: When and how.

Employment Relations Act 2000, s 64

You must have a written employment agreement and your employer must give you a copy of it if you ask for one.

You have all the health and safety rights that are explained in the section above: "Your rights as a sex worker who is an independent contractor" / "Health and safety at work"

No. 16-1466

IN THE
# Supreme Court of the United States

MARK JANUS,
*Petitioner,*

v.

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 31 ET AL.,
*Respondents.*

**On Writ of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## BRIEF OF THE HUMAN RIGHTS CAMPAIGN, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., THE NATIONAL CENTER FOR LESBIAN RIGHTS, THE NATIONAL LGBTQ TASK FORCE, AND PFLAG AS AMICI CURIAE IN SUPPORT OF RESPONDENTS


LAURA B. HEIMAN
Lieff Cabraser Heimann & Bernstein, LLP
222 2nd Ave S, Suite 1640
Nashville, TN 37201

STEVEN E. FINEMAN
*Counsel of Record*
JASON L. LICHTMAN
KATHERINE I. MCBRIDE
Lieff Cabraser Heimann & Bernstein, LLP
250 Hudson Street, 8th Floor
New York, NY 10013
sfineman@lchb.com
(212) 355-9500

*Counsel for* Amici Curiae
(Additional Counsel Listed on Signature Page)

# TABLE OF CONTENTS

Page

STATEMENT OF INTEREST ..... 1

INTRODUCTION AND SUMMARY OF ARGUMENT ..... 3

ARGUMENT ..... 4

I. LGBT WORKERS FACE WORKPLACE DISCRIMINATION THAT DIMINISHES THEIR PERSONHOOD ..... 4

II. UNIONS DEPEND ON FAIR-SHARE FEES TO HELP COMBAT AND ADDRESS DISCRIMINATION AND PROVIDE IMPORTANT BENEFITS ..... 10

A. Unions Collectively Bargain For Antidiscrimination Provisions And Accompanying Grievance Procedures ..... 10

B. Unions Secure Health Benefits For All Workers And Their Families ..... 16

III. COLLECTIVE BARGAINING HAS FAR-REACHING POSITIVE CONSEQUENCES FOR WORKERS, EMPLOYERS, AND TAXPAYERS ..... 17

CONCLUSION ..... 21

TABLE OF AUTHORITIES

Page

**Cases**

*Abood v. Detroit Board of Education*,
431 U.S. 209 (1977).....4

*C.I.R. v. Schleier*,
515 U.S. 323 (1995).....9

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466 U.S. 54 (1984).....4

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654 F. App'x 606 (4th Cir. 2016) .....11

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853 F.3d 339 (7th Cir. 2017).....12

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527 U.S. 526 (1999).....4

*Lawrence v. Texas*,
539 U.S. 558 (2003).....3

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135 S. Ct. 2584 (2015).....3, 9

*United States v. Windsor*,
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TABLE OF AUTHORITIES
(continued)

Page

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Crosby Burns et al., Ctr. for Am. Progress, *Gay and Transgender Discrimination in the Public Sector: Why It's a Problem for State and Local Governments, Employees, and Taxpayers* (2012) .....19

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TABLE OF AUTHORITIES
(continued)

Page

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Human Rights Campaign Foundation, *The Cost of the Closet and the Rewards of Inclusion* (2014) .....9, 19, 20

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TABLE OF AUTHORITIES
(continued)

Page

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## STATEMENT OF INTEREST[1]

Amici are organizations committed to eliminating discrimination against lesbian, gay, bisexual and transgender ("LGBT") individuals in the workplace. The question presented is critical to that goal.

Amicus curiae Human Rights Campaign ("HRC") is the largest national LGBT political organization. HRC envisions an America where LGBT people are ensured of their basic equal rights, and can be open, honest, and safe at home, at work, and in the community. Among those basic rights is freedom from discrimination and access to equal opportunity.

Amicus curiae Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is the nation's oldest and largest legal organization whose mission is to achieve full recognition of the civil rights of LGBT people and those living with HIV through impact litigation, education, and policy.

Amicus curiae the National Center for Lesbian Rights ("NCLR") is a national non-profit legal organization dedicated to protecting and advancing the civil rights of LGBT people and their families

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[1] No counsel for a party authored any part of this brief and no counsel or party made a monetary contribution intended to fund the preparation or submission of the brief. Only the amici and their attorneys have paid for the filing and submission of this brief. Pursuant to Rule 37.3(a), all parties have granted blanket consent to the filing of amicus curiae briefs.

through litigation, public policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBT people and their families. NCLR has a particular interest in promoting equal opportunity for LGBT people in the workplace and represents LGBT people in employment and other cases in courts throughout the country.

Amicus curiae the National LGBTQ Task Force has worked since 1973 to build power, take action, and create change to achieve freedom and justice for Lesbian, Gay, Bisexual, Transgender and Queer ("LGBTQ") people and their families. The Task Force works toward a society that values and respects the diversity of human expression and identity and achieves equity for all. LGBTQ laborers routinely face discrimination and mistreatment because of their identity in workplaces, making union membership and representation an integral bulwark protecting the LGBTQ community's employment rights.

Amicus curiae PFLAG National, founded in 1972 with the simple act of a mother publicly supporting her gay son, is the nation's largest organization uniting families, allies, and LGBTQ people. Now entering its 45th year of providing support, education, and advocacy, PFLAG has nearly 400 chapters and 200,000 supporters crossing multiple generations of American families in major urban centers, small cities and rural areas across the United States, Washington D.C., Puerto Rico, and the largest non-stateside U.S. military installation and base in the world, located in Germany.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The United States has made significant strides toward LGBT equality since the days of *Lawrence v. Texas*, 539 U.S. 558 (2003), but the undeniable reality remains that many LGBT individuals face significant hurdles and high rates of discrimination in the workplace. Such discrimination is unfair, interferes with LGBT individuals' ability to support their families, and imposes significant economic costs on public employers and taxpayers. Countenancing systematic subordination on the basis of sexual orientation is also an affront to the equal dignity and personhood of LGBT individuals. *Cf. Obergefell v. Hodges*, 135 S. Ct. 2584, 2602, 2608 (2015). Yet that discrimination—for far too long regarded as not wrong at all—is difficult to combat, especially for individual employees who depend on their jobs and fear retaliation for speaking up, and employees who are unable to take on the high cost of litigation for the uncertain prospect of relief in court.

For many LGBT workers, unions have opened the door to equal treatment and made justice possible when other avenues to relief have been too risky or prohibitively expensive. Through the collective bargaining process, unions secure robust antidiscrimination protections and effective grievance mechanisms for LGBT workers. These valuable protections deter discrimination in a number of important and measureable ways, and provide a speedy remedy at no cost to the individual employee when it occurs. By bargaining for LGBT workers, unions serve the primary purpose of federal antidiscrimination law: eliminating discrimination

and avoiding harm through the adoption of antidiscrimination policies. *See, e.g.*, *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 545 (1999); *EEOC v. Shell Oil Co.*, 466 U.S. 54, 77 (1984).

The fair-share fees this Court approved in *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), provide public-sector unions with the resources needed to bargain for these and other vital protections. Overturning *Abood* would hamper union efforts to prevent and redress workplace discrimination against LGBT individuals and other workers, as well as efforts to promote open and accepting workplaces for all employees, and risk imposing associated costs on public-sector employers and taxpayers.

The story of the important role that secure, fee-supported unions have played in securing equal treatment for LGBT workers may not be well known to members of the public, but it is very well known to amici and their members. Amici write separately to tell that story so that the Court understands the full scope of what is at stake in the case at bar.

## ARGUMENT

### I. LGBT WORKERS FACE WORKPLACE DISCRIMINATION THAT DIMINISHES THEIR PERSONHOOD

State and local governments employ approximately one million individuals who identify as LGBT. Brad Sears, Nan D. Hunter & Christy Mallory, The Williams Inst., *Documenting Discrimination on the Basis of Sexual Orientation and Gender Identity in State Employment* 1-1 (2009)

(hereinafter *Documenting Discrimination*). These individuals are dedicated public servants who work to support their families and because they believe in their employers' service missions. LGBT public employees serve their communities as police officers, firefighters, nurses, librarians, sanitation workers, teachers, and more.

Emerging research suggests that a large proportion of LGBT workers—in both the public and private sectors—experience discrimination in the workplace because of their sexual orientation and/or gender identity. Brad Sears & Christy Mallory, *Employment Discrimination Against LGBT People: Existence and Impact*, *in* Gender Identity and Sexual Orientation Discrimination in the Workplace 40-3 to 40-12 (Christine Michelle Duffy & Denise M. Visconti eds., 2014) (hereinafter *Employment Discrimination Against LGBT People*). This discrimination takes various forms, including pay disparities and verbal and physical harassment.

In terms of economic discrimination, numerous studies—all of which control for productivity—show that gay male employees are paid less on average than their heterosexual male coworkers. Sears & Mallory, *Employment Discrimination Against LGBT People* 40-16. The pay gap ranges between 10 and 32 percent for gay men compared to their heterosexual peers, and researchers attribute this gap to different treatment of workers because of their sexual orientation. *Ibid.* Research suggests that lesbian workers earn less than both heterosexual and gay men. *Documenting Discrimination* 10-1. And transgender individuals report experiencing unemployment at twice the rate of the general

population. Jaime M. Grant et al., Nat'l Ctr. for Transgender Equality, Nat'l Gay & Lesbian Task Force, *Injustice at Every Turn: A Report of the Nat'l Transgender Discrimination Survey* 3 (2011) (hereinafter *Injustice at Every Turn*).

Recent studies also identify wage gaps in the public sector based on sexual orientation. Specifically, gay, lesbian, and bisexual government employees earn 8 to 29 percent less than their heterosexual counterparts. *Documenting Discrimination* 10-1 to 10-2.

These wage gaps in the private and public sectors persist across geographic boundaries: "Census data analyses show that men in same-sex couples earn less than men in opposite-sex marriages earn in 47 states and the District of Columbia." *Employment Discrimination Against LGBT People* 40-16 (footnote omitted).

Discrimination against LGBT workers goes beyond pay disparities—recent studies show that LGBT employees and their non-LGBT coworkers consistently report having experienced or witnessed overt discrimination based on sexual orientation or gender identity in the workplace, including harassment and termination. Brad Sears & Christy Mallory, The Williams Inst., *Documented Evidence of Employment Discrimination & Its Effects on LGBT People* 2 (2011) (hereinafter *Documented Evidence of Employment Discrimination*).

Since 1972, the National Opinion Research Center at the University of Chicago has conducted an annual General Social Survey ("GSS") that reliably monitors social and demographic changes in

the United States. *Documented Evidence of Employment Discrimination* 4; *see also* Nat'l Op. Research Ctr. at Univ. of Chi., Gen. Soc. Survey (GSS), http://www.norc.org/Research/Projects/Pages/general-social-survey.aspx (last visited Jan. 17, 2018) ("Except for U.S. Census data, the GSS is the most frequently analyzed source of information in the social sciences."). In 2008, the GSS asked survey participants about their sexual orientation for the first time. *Ibid.* Twenty-seven percent of the respondents who identified as lesbian, gay, or bisexual—including private- and public-sector employees—reported experiencing employment discrimination because of their sexual orientation during the five years prior to the survey. *Ibid.* That number was even higher—38 percent—for respondents who reported being open about their sexual orientation in the workplace. *Ibid.* "Harassment was the most frequently reported form of sexual orientation-based discrimination by respondents who were open about being [lesbian, gay, or bisexual] in the workplace . . . followed by losing a job. . . ." *Ibid.* The 2008 GSS also separately reported responses from lesbian, gay, and bisexual individuals working just in the public sector—"25% of LGB-identified respondents who were employed by federal, state, or local government reported having experienced employment discrimination because of their sexual orientation during the five years prior to the survey." *Ibid.*

Reported discrimination rates against transgender individuals are even higher. A full 70 percent of respondents to a 2009 survey of transgender individuals reported having experienced workplace discrimination related to their gender

identity. *Documented Evidence of Employment Discrimination* 7. In 2011, 78 percent of respondents in the largest survey of transgender people to date reported having experienced workplace discrimination related to their gender identity. *Id.* (citing *Injustice at Every Turn*).

A 2009 report by the Williams Institute at UCLA School of Law documented more than 380 illustrative examples of discrimination and harassment of public-sector LGBT workers from 1980 through 2009. *Employment Discrimination Against LGBT People* 40-11 (citing *Documenting Discrimination* 12-1 to 12-189). These examples, involving 49 states and every branch of state government, included severe verbal harassment and instances of physical violence in which "a gay employee of the Connecticut State Maintenance Department was tied up by his hands and feet; a firefighter in California had urine put in her mouthwash; a transgender corrections officer in New Hampshire was slammed into a concrete wall; and a transgender librarian at a college in Oklahoma had a flyer circulated about her declaring that God wanted her to die." *Id.* at 40-11 to 40-12.

In light of such discrimination against LGBT individuals, it is not surprising that more than half of all LGBT workers nationwide report hiding their sexual orientation or gender identity in the workplace. Human Rights Campaign Foundation, *The Cost of the Closet and the Rewards of Inclusion* 9 (2014) (hereinafter *Cost of the Closet*). In related contexts, this Court has recognized that enduring such discrimination "is a fundamental injury to the individual rights of a person." *C.I.R. v. Schleier*, 515

U.S. 323, 339 (1995) (O'Connor, J., dissenting) (citation omitted). As Justice O'Connor recognized, "[s]uch offense to the rights and dignity of the individual attaches regardless of whether the discrimination is based on race, sex, age, or other suspect characteristics." *Ibid.*

Discrimination on the basis of sexual orientation and gender identity not only diminishes the dignity and personhood of LGBT individuals, *cf. Obergefell*, 135 S. Ct. at 2602, 2608, it also can have a demonstrable negative impact on their mental and physical health. Research regarding mental and physical health outcomes for LGBT people supports this conclusion: "High levels of perceived discrimination or fear of discrimination among LGBT people have been linked" to various negative mental health outcomes, including "psychological distress, depression, loneliness, and low self-esteem." *Employment Discrimination Against LGBT People* 40-18 (footnotes omitted); *see also id.* at 40-17 (quoting U.S. Dep't of Health & Human Servs., Healthy People 2010: Understanding & Improving Health 16 (2d ed. 2000)) (noting that the U.S. Department of Health and Human Services has identified the gay and lesbian population as a group requiring special public health attention because "issues surrounding personal, family, and social acceptance of sexual orientation can place a significant burden on mental health and personal safety.").

While LGBT individuals have long faced discrimination on the basis of sexual orientation and gender identity in both public- and private-sector workplaces, research systematically documenting

their experiences is relatively recent. Unions, which work tirelessly to protect the civil and economic rights of all workers, have served and continue to serve a crucial function in preventing and addressing discrimination against LGBT workers. In order to do so, however, unions in the public and private sectors must remain financially viable.

## II. UNIONS DEPEND ON FAIR-SHARE FEES TO HELP COMBAT AND ADDRESS DISCRIMINATION AND PROVIDE IMPORTANT BENEFITS

Unions employ collective bargaining and grievance procedures to create and enforce contractual antidiscrimination provisions that protect the safety and dignity of all workers. Unions also safeguard workers' wellbeing by securing important health benefits for all workers and their families.

### A. Unions Collectively Bargain For Antidiscrimination Provisions And Accompanying Grievance Procedures

The collective bargaining process offers a platform uniquely suited to creating and enforcing workplace rights that exist independently of any state or federal law. Yeongsik Kim, Comment, *Using Collective Bargaining to Combat LGBT Discrimination in the Private-Sector Workplace*, 30 Wis. J.L. Gender & Soc'y 73, 74 (2015) (hereinafter *Using Collective Bargaining*). Public-sector unions across the country have long used their financial resources—including fair-share fees—to bargain for antidiscrimination provisions that provide protections beyond the scope of available statutory

protections, including protections on the basis of sexual orientation and gender identity. Unions' efforts to combat anti-LGBT discrimination began decades ago, when there was no judicial recognition that existing federal law against sex discrimination logically encompasses anti-LGBT discrimination. Unions recognized early on that a simple, explicit ban on "sexual orientation discrimination" or "gender identity discrimination" in a collective bargaining agreement ("CBA") streamlines dispute resolution for both workers and their employers. The explicit contractual provision provides clear guidance to all concerned, thereby furthering the paramount objective of Title VII, which is the optimal prevention of discrimination, rather than redress after it occurs. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998) (Title VII aims, chiefly, "not to provide redress but to avoid harm").[2]

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[2] Unions still have an important role to play in combating discrimination even now that lower courts have overwhelmingly recognized that to discriminate "because of such individual's . . . sex" includes discrimination against transgender employees, and are increasingly recognizing coverage of discrimination against lesbians, gay men, and bisexuals. *See generally G.G. v. Gloucester Cty. Sch. Bd.*, 654 F. App'x 606, 607 (4th Cir. 2016) ("The First, Sixth, Ninth, and Eleventh Circuits have all recognized that discrimination against a transgender individual based on that person's transgender status is discrimination because of sex under federal civil rights statutes and the Equal Protection Clause of the Constitution."); *see also, e.g.*, *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 351 (7th Cir. 2017)

*Footnote continued on next page*

Thus, the longstanding work of unions against anti-LGBT discrimination is important for all LGBT workers, particularly for those in states that do not prohibit discrimination on the basis of sexual orientation or gender identity as a matter of state law.[3]

As early as 1974, two American Federation of State, County and Municipal Employees ("AFSCME") local unions—one representing bus drivers in Ann Arbor, the other public library workers in Seattle—negotiated CBAs that expressly prohibited discrimination based on sexual orientation. Miriam Frank, Out in the Union: A Labor History of Queer America (2014) 105–07. In the late 1970s, New York City's Motion Picture

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*Footnote continued from previous page*
(en banc) (recognizing "the common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex"). Antidiscrimination provisions in CBAs still (and will continue to) provide valuable, efficient mechanisms for resolving incidents without the need for judicial involvement.

[3] Currently, only twenty-nine states prohibit discrimination against public employees on the basis of sexual orientation or gender identity. An additional five states prohibit discrimination against public employees on the basis of sexual orientation. Movement Advancement Project, *State laws or policies that prohibit discrimination against state employees on the basis of sexual orientation or gender identity*, http://www.lgbtmap.org/equality-maps/non_discrimination_laws/state_employees.

Projectionists Local 306 added "sexual preference" to its antidiscrimination articles. *Id.* at 59. Historical accounts reflect that Local 306 also made regular donations to lesbian and gay charities and supported gay colleagues suffering from AIDS. *Ibid.* Uptown in New York City in the mid-1980s, the Columbia clerical local union improved wages and benefits and then leveraged "that secure economic context" to collectively bargain for protections and benefits for LGBT workers, including: nondiscrimination protection, spousal equivalent bereavement leave, health coverage, and tuition benefits for domestic partners. *Id.* at 104. In 1989, a Boston school bus driver filed a grievance with his union after a supervisor with access to his disability records revealed that the driver had AIDS, which led to the driver enduring verbal and physical harassment, including being chained to a radiator. *Id.* at 117. The local union—United Steel Workers of America Local 8751—rallied in support of his grievance, and the company agreed to provide the worker with permanent health insurance and to sponsor AIDS training for the entire workforce. *Ibid.*

Unions also pioneered early protections for transgender workers. In the 1980s, a union steward in an industrial laundry facility in New Jersey was harassed when she returned to work after gender reassignment surgery. *Id.* at 2. She raised the issue with her representative from the Amalgamated Clothing and Textile Workers Union who both resolved her complaint and successfully negotiated with management to add "change of sex" to the list of protected classes during the next round of contract negotiations. *Ibid.*

Labor unions' early leadership in this area has led to contractual protections that now cover thousands of LGBT workers. Currently, more than 1,700 AFSCME union contracts include sexual orientation as part of a nondiscrimination clause, and many also include language prohibiting discrimination on the basis of gender identity. *Gay And Transgender Discrimination in the Public Sector*, AFSCME, https://www.afscme.org/news/publications/gay-and-transgender-discrimination-in-the-public-sector. (last visited Jan. 18, 2018). The Service Employees International Union ("SEIU") has affirmed its "commitment to equal rights for all our members, regardless of sexual orientation" and resolved to "make it a collective bargaining . . . goal to ensure that all members enjoy equal rights and benefits." SEIU, Convention Resolution, *Proposal #205: Equal Rights For All SEIU Members* (2004). In 2005, SEIU United Health Care Workers West negotiated a CBA with Kaiser Permanente that prohibits "discrimination against any Employee or applicant because of . . . race, color, religion, creed, national origin, ancestry, gender, *gender identity*, *sexual orientation*, age, physical or mental disabilities, political affiliation, marital status, medical condition (as defined by applicable law), or veteran status." Collective Bargaining Agreement, SEIU United Healthcare Workers W. and Kaiser Permanente, Art. VIII (Oct. 1, 2005) (emphasis added). The minute the CBA became effective, its antidiscrimination protections extended to 55,000 healthcare workers in California.

Antidiscrimination provisions in collective bargaining agreements—which serve as the "agreed-upon rule of law" governing employers and workers,

*United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 580 (1960)—protect the safety and dignity of all workers, particularly those who identify as LGBT. First, these provisions deter discrimination in concrete ways. Research suggests that implementing LGBT-supportive policies in the workplace results in lower reported levels of discrimination. Jennica R. Webster et al., *Workplace contextual supports for LGBT employees: A review, meta-analysis, and agenda for future research*, Human Res. Mgmt. 10 (2017) (hereinafter *Workplace contextual supports for LGBT employees*); *see also* M.V. Lee Badgett et al., The Williams Inst., *The Business Impact of LGBT-Supportive Workplace Policies* 7 (2013) (hereinafter *Business Impact of LGBT-Supportive Workplace Policies*) ("Research suggests that LGBT employees experience less discrimination when their employer has a nondiscrimination policy that includes sexual orientation and gender identity.").

Second, codifying antidiscrimination prohibitions in union contracts allows workers to invoke grievance procedures to address and resolve violations. Grievance procedures vary across unions and collective bargaining agreements but often start with informal resolution measures, move to more formal committee review, and, if necessary, culminate in arbitration or litigation. *Using Collective Bargaining* 90.

Thirdly, when consistently implemented and enforced, these policies have been shown to impact the workplace and inter-worker relations, contributing to an open and accepting workplace for

LGBT workers. *Workplace contextual supports for LGBT employees* 11.

### B. Unions Secure Health Benefits For All Workers And Their Families

Unions have played a crucial role in negotiating for vanguard health and benefit plans for every employee, including LGBT workers and their families. For example, in 1982 the staff union at the Village Voice in New York City negotiated an extension of the paper's health plan to "spouse equivalents," which paved the way for modern domestic partner benefits. Frank, Out in the Union 109–11. New York City's Gay Teachers Association and the Lesbian and Gay Issues Committee of District Council 37 of AFSCME, the city's largest municipal union, were also instrumental in securing full domestic partner benefits for all New York City municipal employees, including retirees, predating changes to New York City law to provide these same benefits. *Id.* 122–23.

Two recent surveys—both conducted prior to this Court's ruling in *United States v. Windsor*, 570 U.S. 744 (2013)—illustrate unions' ongoing commitment to providing inclusive and comprehensive benefits to their members. The U.S. Bureau of Labor Statistics reported that as of March 2013, 51 percent of all unionized civilian workers—including state and local employees—had access to health care benefits for unmarried same-sex partners, compared to only 28 percent of nonunionized civilian workers. Elizabeth Ashack, Bureau of Labor Statistics, *Employer-sponsored benefits extended to domestic partners*, Mar. 2014, at 3. A 2011 survey of transgender Americans found that 19 percent of respondents

lacked any health insurance compared to 17 percent of the general population, and only 51 percent of respondents had employer-funded coverage compared to 58 percent of the general population. *Injustice at Every Turn* 76. In response, the SEIU passed a convention resolution in 2012 encouraging "all unions to provide trans-inclusive healthcare coverage for transgender employees who work for those unions." SEIU, Convention Resolution, *Resolution #304A: Trans-Inclusive Health Insurance Coverage* (2012).

## III. COLLECTIVE BARGAINING HAS FAR-REACHING POSITIVE CONSEQUENCES FOR WORKERS, EMPLOYERS, AND TAXPAYERS

Collective bargaining contributes to safer and healthier workplaces and can help reduce or avoid the expensive consequences of workplace discrimination.

Research suggests that unions create safer workplaces—especially for LGBT workers—in part because workers are more likely to report safety issues when they know that their union will protect them from repercussions. Josh Bivens et al., Econ. Policy Inst., *How today's unions help working people: Giving workers the power to improve their jobs and unrig the economy* 12 (2017). Unions also contribute to workplace health and safety by educating workers and the public about public health issues, including those that have historically affected the LGBT community.

For example, in the early 1980s, SEIU Local 250—which represented thirty thousand hospital

workers at voluntary and public facilities in the San Francisco Bay Area—created an AIDS committee. Frank, Out in the Union 119. The AIDS crisis was particularly devastating to gay individuals and heightened workplace discrimination against gay men because of stereotypes and misinformation about HIV transmission. *See, e.g.*, *id.* at 117–20. The SEIU AIDS committee worked with local doctors to produce a fact sheet, "AIDS and the Health Care Worker," which provided information about the AIDS epidemic and explained the low likelihood of transmission through casual contact at work. *Id.* at 119. "SEIU adapted 'AIDS and the Health Care Worker' to include material on occupational safety and best clinical practices and then distributed it nationally." *Ibid.* The brochure went through five editions in English and Spanish between 1984 and 1987, incorporating new research about AIDS and HIV with each printing. *Id.* 120.

Local AFSCME unions also helped combat discrimination against gay and bisexual men stemming from fear and misinformation about AIDS. In 1986, an X-ray technician at Temple University's dental school refused to attend to a patient with AIDS out of fear that HIV might be transmitted through saliva. Frank, Out in the Union, 117. The X-ray technician called her local union, AFSCME Local 1723, for support. Union president Gary Kapanowski, a gay man, was familiar with the most recent information regarding HIV transmission; he reassured the technician that wearing her required surgical gloves would prevent transmission of the disease. *Ibid.* Kapanowski realized that all members of his union would benefit from AIDS education and, in partnership with a local organization, offered an

AIDS training for Local 1723's forty dental assistants as well as graduate students, doctors, and dentists from the school to explain the realities of AIDS transmission and allay fears and misinformation. *Ibid.*

Finally, antidiscrimination provisions and accompanying grievance procedures in collective bargaining agreements help reduce the costly consequences of workplace discrimination, which include expenses related to recruitment, retention, and litigation, among others. In the public sector, "discriminating against workers based on their sexual orientation and gender identity hampers local and state governments' ability to recruit and retain the best and brightest employees in the labor force." Crosby Burns et al., Ctr. for Am. Progress, *Gay and Transgender Discrimination in the Public Sector: Why It's a Problem for State and Local Governments, Employees, and Taxpayers* 18–19 (2012). Moreover, hostile and discriminatory "work environments result in significant unnecessary costs since they increase absenteeism, lower productivity, and foster a less motivated, less entrepreneurial, and less committed workforce." *Id.* 19. When asked about experiencing a negative workplace environment because of their sexual orientation or gender identity, 30 percent of LGBT workers reported feeling distracted from work, 22 percent reported searching for a different job, and 15 percent reported staying home from work. *Cost of the Closet* 22.

Discrimination also leads to higher turnover rates, which is costly for all employers—recent estimates place the cost of replacing a departing employee between $5,000 and $10,000 for an hourly

worker, and between $75,000 and $211,000 for an executive who makes roughly $100,000 a year. Crosby Burns, Ctr. for Am. Progress, *The Costly Business of Discrimination: The Economic Costs of Discrimination & the Financial Benefits of Gay & Transgender Equality in the Workplace* 10 (2012). But "research has shown that employees who do not fear discrimination or have not experienced discrimination report fewer turnover intentions and higher levels of commitment to their employers." *Business Impact of LGBT-Supportive Workplace Policies* 17; *see also id.* at 11 (reporting that lesbian, gay and bisexual "employees who are covered by a nondiscrimination policy are more satisfied with their jobs than employees who are not covered by a policy"); *Cost of the Closet* 23 (one in four LGBT employees report staying in a job because the work environment was accepting).

Union grievance procedures provide an efficient and cost-effective way to resolve employment disputes, including complaints of discrimination based on sexual orientation or gender identity, short of pursuing litigation. Early examples of using grievance procedures to resolve discrimination against LGBT workers include: a retail worker initially denied a promotion in the late 1960s because his manager labelled him "a queer", a transgender retail employee in the mid-1970s allowed to keep their job, and an auto-plant worker facing verbal and physical harassment because of his sexual orientation in the 1990s, all of which were resolved without resorting to litigation in state or federal court. Frank, Out in the Union 114–16.

These are just some of the ways that collectively-bargained-for antidiscrimination protections and grievance procedures promote safe, supportive, and cost-efficient workplaces for all workers, including those who identify as LGBT.

## CONCLUSION

The United States has a great deal further to go to ensure that all workers are treated with equal dignity in the workplace. Well-funded unions can help us get there by continuing to bargain for and enforce antidiscrimination and benefit provisions that protect all employees, including LGBT individuals and their families.

Dated: January 19, 2018

Respectfully submitted,

SHARON MCGOWAN
Lambda Legal Defense & Education Fund, Inc.
1875 I Street, NW, 5th Floor
Washington, DC 20006

NATALIE NARDECCHIA
Lambda Legal Defense & Education Fund, Inc.
4221 Wilshire Blvd, Suite 280
Los Angeles, CA 90010

GREGORY R. NEVINS
Lambda Legal Defense & Education Fund, Inc.
730 Peachtree Street NE
Suite 640
Atlanta, GA 30308

STEVEN E. FINEMAN
*Counsel of Record*
JASON L. LICHTMAN
KATHERINE I. MCBRIDE
Lieff Cabraser Heimann & Bernstein, LLP
250 Hudson Street, 8th Floor
New York, NY 10013
(212) 355-9500

LAURA B. HEIMAN
Lieff Cabraser Heimann & Bernstein, LLP
222 2nd Ave S, Suite 1640
Nashville, TN 37201

SARAH WARBELOW
Human Rights Campaign
1640 Rhode Island Ave NW
Washington, DC 20036

# Model Contract Language

The strongest protections for lesbian, gay, bisexual and transgender workers is a union contract. Work with your Local Union leadership to ensure your contract fully includes LGBT workers and our families in every aspect, from general workplace non-discrimination to family benefits.

This resource provides sample language from actual union contracts in areas crucial to LGBT inclusion. If you have more questions about bargaining an inclusive contract, please contact our national office. Also, if your contract has some effective language that you would like to share, be sure to let us know.

Pride at Work conducts Union Certification Program trainings to support union leaders and staff in developing the concrete skills to bargain more inclusive contracts, drawing on specific language won by other union locals as well as education and bargaining strategies. To inquire about scheduling a training or a speaker, talk with your union leadership and contact us at our national office.

## Health Insurance

"Domestic partners of employees who are the same sex as the employee shall be eligible for coverage under the Employer's available health benefit plans as though they were married spouses. Dependents of such domestic partners shall be eligible for coverage under the health plans as if they were dependents of the employee. Requirements for domestic partner benefit eligibility shall be in accordance with Appendix E. Employees meeting such requirements shall then be authorized by the Employer to enroll their domestic partners and dependents."

-CBA between State Employees' Association of New Hampshire, SEIU, Local 1984 and the State of New Hampshire

## Leaves of Absence

It is imperative that measures taken to protect and include LGBT workers and their families are clearly spelled out, in order to be as effective as possible.
"24.11 California Faculty Association and The California State University
The term "immediate family" as used in this Agreement shall refer to the employee's spouse or domestic partner, parent, grandparent, grandchild, son, son-in-law, daughter, daughter-in-law, brother, sister, uncle, aunt, stepchild or stepparent of the employee, spouse or domestic partner, and close relative or persons residing in the immediate household of the employee (except domestic employees or roomers). Also included in this definition shall be any minor children or incapacitated individuals for whom the employee has primary responsibility or legal guardianship or conservator ship."

## Nondiscrimination

It is crucial to ensure that your contract's non-discrimination clause includes specific protections for "sexual orientation" and "gender identity & expression" because in most states, in the absence of a union contract, workers legally be fired because of their gsexual orientation, gender identity or expression.In most states, simply stating nondiscrimination "in accordance with state/federal law" does NOT include LGBT workers. Contract non-discrimination clauses are the front-line defense for LGBT people against discrimination and harassment on the job.**********

"1. Statutory Compliance
It is agreed that there shall be no discrimination in the application of the provisions of this Agreement based on impermissible factors as defined below and as consistent with the state of Michigan Elliot-Larsen Civil Rights Act of 1976. Refer to Appendix C for the text of the act. The University agrees to abide by the protections afforded employees with disabilities as outlined in the rules and regulations which implement Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act. Refer to Appendix A for a description of the Americans with Disabilities Act.

2. Impermissible Factors
"Impermissible factors" means an Employee's race, creed, color, religion, national origin, ancestry, marital status, familial status, parental status or pregnancy status, sex, gender identity or expression, sexual orientation, age, height, weight, disability, citizenship status, veteran status, HIV antibody status, political belief, membership in any social or political organization, participation in a grievance or complaint whether formal or informal, or any other factor irrelevant to his or her employment status or function.
3. Definition of Discrimination
Any of the following constitute "discrimination":

### Latest Tweets

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December 11, 2020 3:44 pm

Congress has failed to deliver ANY relief to millions of immigrant workers who've been on the front lines but thus… twitter.com/i/web/status/12838…
July 16, 2020 4:41 pm

Looking forward to this @APALAnational townhall( and @FlyingWithSara ) next Thursday at 8pm ET. pic.twitter.com/Pd5ZRE4TfD
July 16, 2020 3:49 pm

You can't safely reopen schools without all workers having access to pandemic paid sick days and paid leave. Pass it on.
July 16, 2020 3:01 pm

Low-wage workers, Black people, women and immigrants, have been essential to keeping all our communities safe & hea… twitter.com/i/web/status/12837…
July 16, 2020 1:56 pm

### Take Action

Demand #JusticeAtTMobile

Thank President Obama!

1. to discharge, or otherwise to act against an individual when the act arises from or is related to the Employee's status or function as a GSI or GSSA, because of an impermissible factor.
2. to limit, segregate, or classify an Employee in a way that deprives or tends to deprive an Employee of an employment opportunity or otherwise adversely affects the status of an Employee because of an impermissible factor.
3. sexual harassment. "Sexual harassment" means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature under the following conditions:
1. submission to or rejection of the conduct or communication by an employee is used as a factor in decisions affecting his or her employment; or
2. the conduct or communication has the purpose or effect of substantially interfering with an employee's employment, or creating an intimidating, hostile, or offensive employment environment.
4. harassment. "Harassment" means conduct by a University of Michigan employee directed toward a member of the bargaining unit that arises from or is related to the Employee's status or function as a GSI or GSSA and that includes, but is not limited to, repeated or continuing unconsented contact or repeated verbal abuse, , threats, or intimidation that significantly interferes with the Employee's ability to perform his or her job duties, that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress. Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose related to the individual's employment, unless the timing or manner in which the activity or conduct is done would cause a reasonable individual to suffer emotional distress and that actually causes the harassment grievant to suffer emotional distress.-CBA between Graduate Employees Local 3550 American Federation of Teachers, AFL-CIO and the University of Michigan**********

"7.1.1
The University will:
(a) Recruit, hire, train, and promote persons in all job titles, without regard to race, color, creed, religion, national origin, sex, sexual orientation, gender identity and gender expression, age, marital status, disability, or status as a disabled veteran or Vietnam-era veteran.
(b) Ensure that all personnel actions such as compensation, benefits, transfers, terminations, layoffs, return from layoff, reduction in force (RIF), University-sponsored training, education, tuition assistance, and social and recreation programs, will be administered without regard to race, color, creed, religion, national origin, sex, sexual orientation,
gender identity and gender expression, age, marital status, disability, or status as a disabled veteran or Vietnam-era veteran.

-CBA between United Faculty of Central and Central Washington UniversityIt is crucial to ensure that your contract's non-discrimination clause includes protections for sexual
orientation and gender identity / expression because there is no federal legislation protecting LGBT people from discrimination on the job. Most states also lack any legislation doing so. Thus, contract non-discrimination clauses are the front-line defense for LGBT people against discrimination and harassment on the job.

**********

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It is agreed that there shall be no discrimination in the application of the provisions of this Agreement based on impermissible factors as defined below and as consistent with the state of Michigan Elliot-Larsen Civil Rights Act of 1976. Refer to Appendix C for the text of the act. The University agrees to abide by the protections afforded employees with disabilities as outlined in the rules and regulations which implement Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act. Refer to Appendix A for a description of the Americans with Disabilities Act.
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"Impermissible factors" means an Employee's race, creed, color, religion, national origin, ancestry, marital status, familial status, parental status or pregnancy status, sex, gender identity or expression, sexual orientation, age, height, weight, disability, citizenship status, veteran status, HIV antibody status, political belief, membership in any social or political organization, participation in a grievance or complaint whether formal or informal, or any other factor irrelevant to his or her employment status or function.
3. Definition of Discrimination
Any of the following constitute "discrimination":
1. to discharge, or otherwise to act against an individual when the act arises from or is related to the Employee's status or function as a GSI or GSSA, because of an impermissible factor.
2. to limit, segregate, or classify an Employee in a way that deprives or tends to deprive an Employee of an employment opportunity or otherwise adversely affects the status of an Employee because of an impermissible factor.
3. sexual harassment. "Sexual harassment" means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature under the following conditions:
1. submission to or rejection of the conduct or communication by an employee is used as a factor in decisions affecting his or her employment; or
2. the conduct or communication has the purpose or effect of substantially interfering with an employee's employment, or creating an intimidating, hostile, or offensive employment environment.
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includes, but is not limited to, repeated or continuing unconsented contact or repeated verbal abuse, , threats, or intimidation that significantly interferes with the Employee's ability to perform his or her job duties, that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress. Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose related to the individual's employment, unless the timing or manner in which the activity or conduct is done would cause a reasonable individual to suffer emotional distress and that actually causes the harassment grievant to suffer emotional distress.-CBA between Graduate Employees Local 3550 American Federation of Teachers, AFL-CIO and the University of Michigan**********

7.1.1
The University will:
(a) Recruit, hire, train, and promote persons in all job titles, without regard to race, color, creed, religion, national origin, sex, sexual orientation, gender identity and gender expression, age, marital status, disability, or status as a disabled veteran or Vietnam-era veteran.
(b) Ensure that all personnel actions such as compensation, benefits, transfers, terminations, layoffs, return from layoff, reduction in force (RIF), University-sponsored training, education, tuition assistance, and social and recreation programs, will be administered without regard to race, color, creed, religion, national origin, sex, sexual orientation,
gender identity and gender expression, age, marital status, disability, or status as a disabled veteran or Vietnam-era veteran.

-CBA between United Faculty of Central and Central Washington University

## Links to Complete Union Contracts

Below you will find links to the actual collective bargaining agreements referenced above as containing model LGBT-inclusive language.

Please note, these contracts contain LGBT-inclusive language, but may not all be all-encompassing. For example, one agreement may have a very thorough definition of 'family,' but a less-than-perfect non-discrimination clause. Contracts might have effective language preventing discrimination based on sexual orientation, but language on gender identity / expression has not yet been won. Reading through these contracts can provide a useful context for considering your own Local Union contract, what priorities are for bargaining and where improvements can be made.

- **Graduate Employees Organization Local 3550 American Federation of Teachers, AFL-CIO and the University of Michigan**
- **California Faculty Association and The California State University**
- **United Faculty of Central and Central Washington University**
- **State Employees' Association of New Hampshire, SEIU, Local 1984 and the State of New Hampshire**

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OPINION

# Unions and LGBTQ Workers Could Be a Powerful Marriage

Why you can trust us

AIMÉE-JOSIANE TWAGIRUMUKIZA

6 MIN READ

NOV 17, 2020


When Amy Coney Barrett became the third justice appointed to the U.S. Supreme Court during Trump's presidency, I couldn't help but think about the court's recent decisions that have, for the moment, preserved or expanded civil rights. In June, the court preserved the Deferred Action for Childhood Arrivals program, for now; struck down an unlawful ban on abortions in Louisiana, for

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I thought about these decisions in the context of the court's unpredictable ruling record, including granting exemptions to the law for religious organizations. I considered just how short-term our wins could end up being under the court's new conservative majority.

**I think unions could be key in transforming the labor movement by strategically organizing LGBTQ workers into their ranks.**

It all brought up an important truth for me: the "law of the land" is ever changing—and the odds of getting justice are always stacked against those of us who cannot easily access legal advocacy. So, we organize.

History has shown that *we* have to demonstrate the power of the people to make *our* rights real on the ground. As a labor and community organizer, I get to be a part of that work. Still, as a Black nonbinary, lesbian, and immigrant worker, I've longed to find a piece of the labor movement that centers all my parts. I think unions could be key in transforming the labor movement by strategically organizing LGBTQ workers into their ranks.

There are 8.1 million LGBTQ working people in the United States, most of whom live in places without local laws that prohibit gender or sexual orientation discrimination in housing, education, or public accommodations. This is the landscape in which LGBTQ workers is fighting workplace discrimination, the crisis of violence against trans people, and the murders of Black, Indigenous and other trans women of color.

A 2018 report from the Movement Advancement Project found that 25% of LGB and 27% of transgender people report experiencing discrimination at work. The report also showed that Black, Latinx

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And for 1 million undocumented LGBTQ workers in this country, hostile immigration policies make it almost certain that they, in particular, will face increased risks of discrimination and exploitation at work.

Unions could make a difference here.

Joan Jones, founder of the National LGBTQ Workers Center, facilitating a workshop during the 2019 LGBTQ Economic Justice Summit. Photo by Jocelyn Munguia.

Photo by Jocelyn Munguia.

I know unions aren't perfect. In fact, a White union worker, James F. Blake, had Rosa Parks, a Black woman, arrested in 1955 for refusing to give up her bus seat to a White passenger in Montgomery, Alabama. Blake eventually retired 19 years later; some would call this a privilege of being a union worker. I would add: it's a privilege of being a working, White, cisgender, heterosexual male in the U.S.

My point is that unions represent all workers, and for better or worse, this means unions represent workers on the right and wrong sides of history. For instance, U.S. Customs and Border Protection agents have been accused of racist, physical, and sexual abuse of migrants and asylum-seekers. The National Border Patrol Council, a union and affiliate of the American Federation of Government Employees, claims to represent 90% of about 18,000 of these Border Patrol agents, and leadership regularly uses dehumanizing language to describe migrants and asylum-seekers. This union, like the segregated transportation unions of the past, put the labor movement at odds with the common good.

This is why it is more important than ever that unions rethink in which workplaces and with which populations they choose to build

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There are also lessons to be learned for the mainstream gay and lesbian advocacy contingent of the LGBTQ movement, which has power-fueled two strategies: winning policy changes and shifting popular opinion. These strategies previously culminated in SCOTUS striking down part of the Defense of Marriage Act in 2013, and then affirming a constitutional right to same-sex marriage in 2015. Both of these rulings were touted as victories for all LGBTQ people.

The reality is that the end of DOMA, and even the embrace of marriage equality, fell short—really short—of what Black, Brown and immigrant LGBTQ (emphasis on the T) people need to live full lives. What these rulings did was affirm mostly White, mostly gay, and mostly middle-class people's access to one of American society's notable upward mobility tools: marriage. What it didn't do was fix the economic crises that transgender and LGB people of color find ourselves in, while earning disproportionately less than our straight, cis, and White counterparts.

**Imagine if we could measure our movement's strength by the harms we can prevent altogether.**

So, unions still matter. That's why I am desperate to create a large and powerful entry point for LGBTQ immigrants and people of color into the labor movement. That desire led me and my good friend, Joan Jones, to co-found the National LGBTQ Workers Center in 2018. Our goal is to work against workplace discrimination and fight for economic justice for LGBTQ people, including support in forming a union.

At the National LGBTQ Workers Center, we're not a union, but we come from the union movement. Jones and I both know what it's like to have a contract that mitigates discrimination in pay and

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workers can only dream of in today's pandemic economy. It's what all workers deserve.

LGBTQ workers could be the poster children for the power of a union contract. We are often denied raises and promotions, and discriminated against or harassed because of our gender identity or our sexual orientation. But imagine if we could measure our movement's strength by the harms we can prevent altogether.

Of course this idea is racing against shrinking union density that's gone from 28.3% of the workforce in 1954 to 10.3% in 2019. The constant anti-union lawsuits certainly don't help. But what if the version of the labor movement that brought union membership to its peak in the early 20th century is outdated for today's American workforce? There may not be an LGBTQ union, but there are LGBTQ people in many unions. These 8.1 million workers could make up a big chunk of—or even add to—the 14.6 million workers represented by a union today.

It's about time that unions paid more attention to these often-overlooked workers. Bringing hundreds of thousands of LGBTQ workers into unions would move the labor movement further in the direction of racial and gender justice—period.

Left to right, Joan Jones and Monica Morales, members of the National LGBTQ Workers Center, at an outreach table at the 2019 Dyke March in Chicago, Illinois, on June 29, 2019. Photo by Jocelyn Munguia.

It is worth saying that changes in the courts and in the law do matter too. I, for one, was overcome with joy when I heard about the *Bostock* decision on the morning of June 15, which also happened to be my wife's birthday.

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Voting Rights Act in 2013. That ruling came down under the nation's first Black president, no less. The results of that 2013 decision have been hard felt, especially in places like Georgia, where the stakes have risen significantly over the past few weeks, as the nation turns its eyes to our state and braces for two hotly contested runoff elections that could determine which party controls the U.S. Senate.

What does stand the test of time is workers coming together to set standards and determine what is fair and just, not for one, but for the whole. And, yes, this can happen even without a union. It did in 1881, when formerly enslaved African-American washerwomen in Atlanta went on strike to demand better conditions and higher pay for their back-breaking labor. They organized and they won, and most domestic workers continue to do so today, without a union.

Many ideas move the labor movement, and I believe the time has come for unions to lean on the potential that LGBTQ workers represent as a base. How? Prioritize LGBTQ workers in their advocacy to the incoming administrations. Support organizations such as the National LGBTQ Workers Center and others. This year, we launched an LGBTQ anti-discrimination hotline in Chicago that provides workers with culturally competent peer-support as they navigate incidents or patterns of discrimination. Unions can start by looking to us for solutions now, just as we look to them for much needed reinforcement.

**AIMÉE-JOSIANE TWAGIRUMUKIZA** (they/them) is a non-binary lesbian and Rwandan immigrant who works as the Black Organizing Director at the National Domestic Workers Alliance. An opinion writer who focuses on the experiences of LGBTQ people and Black immigrants, they are a Public Voices Fellow of the OpEd Project, and currently serve as the Secretary-Treasurer of the National LGBTQ Workers Center, which fights against sexual and gender discrimination in the workplace. Aimée-Josiane lives in East Point, Georgia, with their writer-bae wife and diva cat. They have a B.A. in Sociology from Georgia State University, and speak English and French. They can be reached on Instagram @rwandalicious.

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