

Sexual Harassment and Employment Discrimination Under Title VII: Selected Legal Issues

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Sexual Harassment and Employment Discrimination Under Title VII: Selected Legal Issues

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, bars employment discrimination based on sex, but it does not expressly prohibit harassment. The Supreme Court has interpreted the statute to prohibit harassing conduct when it is so intolerable it can be said to alter the terms, conditions, or privileges of employment. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66-67, 73 (1986). The Court has explained that harassment reaches this level when it is severe or pervasive. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993). In making this assessment, courts are to consider all the circumstances, including the frequency and severity of the discriminatory conduct; whether it is physically threatening or humiliating; and whether it unreasonably interferes with an employee's work performance. *See, e.g., EEOC v. Cent. Wholesalers, Inc.*, 573 F.3d 167, 175-76 (4th Cir. 2009). Courts commonly observe that the bar for showing actionable harassment is high, and they regularly dismiss Title VII harassment claims when plaintiffs fail to show sufficient severity or pervasiveness. *See, e.g., EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 315 (4th Cir. 2008).

Assuming a plaintiff shows she has suffered harassment, she must also show that the employer should be held liable for the harassment. To decide this, courts consider whether the harasser had supervisory authority over the plaintiff, whether the plaintiff suffered an adverse action such as termination, and whether the employer took steps to prevent and remedy harassment. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 747 (1998). Courts also consider whether the plaintiff took advantage of opportunities to report and remedy harassment. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

Title VII sexual harassment can include not only unwelcome sexual advances, but also proposals that condition employment benefits on a worker submitting to sexual demands. Such harassment can also include mistreatment based on sexual orientation, gender identity, or failure to conform to sex-based stereotypes. Treating workers of one gender worse than others—sexist harassment—is also illegal, even if the conduct is not sexual.

Title VII's anti-retaliation provision makes it unlawful for an employer to discriminate against an employee for reporting a Title VII violation. 42 U.S.C. § 2000e-3(a). The provision bars adverse action taken because an employee has opposed employment discrimination or has participated in a Title VII enforcement action. This includes making a charge, testifying, assisting, or contributing to an investigation, proceeding, or hearing. An employee may be protected from retaliation even if he or she reports behavior that does not qualify as a Title VII violation. To be protected against retaliation, a plaintiff must have a good faith or objectively reasonable belief that the conduct he or she reported was unlawful under Title VII. *EEOC v. Rite Way Serv., Inc.*, 819 F.3d 235, 237 (5th Cir. 2016). Beyond prohibiting retaliation in the form of adverse employment actions like termination or demotion, Title VII also bars retaliatory harassment—that is, when a plaintiff reports a potential Title VII violation of any kind, and the employer reacts by harassing the employee.

A plaintiff may recover compensatory damages in any case of intentional discrimination, including sexual harassment. 42 U.S.C. § 1981a. Compensatory damages can include future pecuniary losses, emotional pain, suffering, inconvenience, and other nonpecuniary losses. *Id.* § 1981a(b)(3). A plaintiff may also recover punitive damages in some circumstances. Damages are capped based on an employer's size. A worker who was discharged, constructively or otherwise, may also be eligible for awards of backpay or frontpay.

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Introduction

The issue of sexual harassment in the workplace has received significant attention from time to time as harassment is reported in private and public employment.¹ This attention has prompted inquiries into the scope and sufficiency of legal protection for harassment victims.² Since 2021, legislation has addressed certain harassment-related issues, including forced arbitrations and the use of confidentiality provisions in settlement agreements.³

Title VII of the Civil Rights Act of 1964 (Title VII) makes it unlawful for most private and public employers with at least fifteen employees 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.”⁴ Though Title VII does not expressly prohibit harassment,⁵ the Supreme Court and federal circuit courts interpret Title VII’s prohibition against discrimination in the “terms, conditions, or privileges of employment” to prohibit harassment based on race, color, religion, sex, or national origin⁶ when harassing conduct has become so intolerable it can be said to alter those terms, conditions, or privileges. Courts describe such a circumstance as a “hostile work environment,” and the terms “harassment” and “hostile work environment” are often used interchangeably.⁷

¹ See, e.g., Press Release, Federal Deposit Insurance Corporation, FDIC Special Review Committee Releases Independent Report on Workplace Misconduct and Culture (May 7, 2024), <https://www.fdic.gov/news/press-releases/2024/fdic-special-review-committee-releases-independent-report-workplace> [<https://perma.cc/BSR7-TUP7>]; Holly Corbett, The #MeToo Movement Six Years Later: What’s Changed And What’s Next, FORBES (Nov. 16, 2023, at 02:00pm ET), <https://www.forbes.com/sites/hollycorbett/2023/11/16/the-metoo-movement-six-years-later-whats-changed-and-whats-next/> [<https://perma.cc/8RPD-F35F>].

² U.S. COMM. ON C.R., FEDERAL #MeToo: EXAMINING SEXUAL HARASSMENT IN GOVERNMENT WORKPLACES BRIEFING REPORT (April 2020), <https://www.usccr.gov/files/pubs/2020/04-01-Federal-Me-Too.pdf> [<https://perma.cc/5SGH-7SM5>].

³ Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, 9 U.S.C. §§ 401–402; Speak Out Act, 42 U.S.C. §§ 19401–19404.

⁴ 42 U.S.C. § 2000e-2(a)(1) (“It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”). Title VII applies to private employees, state and local government employees, and most federal civilian employees. See 42 U.S.C. §§ 2000e(b), 2000e-16(a); CRS Report R46534, *The Civil Rights Act of 1964: An Overview*, by Christine J. Back, 63 (2020). It does not generally cover judicial employees. CRS In Focus IF12745, *Policies Governing Employment Discrimination and Harassment in the Judicial Branch*, by Abigail A. Graber and Whitney K. Novak (2024). The Congressional Accountability Act covers legislative employees, applying Title VII standards by cross-reference. 2 U.S.C. § 1302.

⁵ See 42 U.S.C. § 2000e-2(a)(1); see also *id.* § 2000e-2(b) (making it unlawful for an employer “to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.”).

⁶ *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66–67, 73 (1986) (recognizing sexual harassment as a violation of Title VII and expressly holding that such claims are actionable under Title VII). See also, e.g., *EEOC v. Cent. Wholesalers, Inc.*, 573 F.3d 167, 174–77 (4th Cir. 2009) (analyzing Title VII harassment claims based on race and sex); *EEOC v. WC&M Enters., Inc.*, 496 F.3d 393, 399–02 (5th Cir. 2007) (analyzing Title VII harassment claims based on religion and national origin).

⁷ See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (quoting *Meritor*, 477 U.S. at 64) (explaining that the “phrase ‘terms, conditions, or privileges of employment’ evinces a congressional intent ‘to strike at the entire spectrum of disparate treatment of men and women’ in employment,” which includes requiring people to work in a discriminatorily hostile or abusive environment”); *EEOC v. Fairbrook Med. Clinic*, 609 F.3d 320, 327 (4th Cir. 2010) (quoting *Meritor*, 477 U.S. at 66) (explaining that a plaintiff alleging harassment can establish a Title VII violation by “proving that discrimination based on sex has created a hostile or abusive work environment”).

This report addresses various legal issues related to sexual harassment and Title VII.⁸ As the statute contains neither an express prohibition against harassment nor a definition of harassment, this report examines (1) how the Supreme Court and federal appellate courts have mapped out the scope of protection that Title VII provides employees against sexual harassment, including the Supreme Court’s “severe or pervasive” standard; (2) limits on employer liability for harassment; and (3) retaliation for reporting harassment, among other issues.

Hostile Work Environment Legal Standards

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

To prevail on a hostile work environment claim, a plaintiff must generally (1) establish the requisite elements and (2) show a basis for holding the employer liable for the abusive conduct. Generally, courts require plaintiffs to satisfy the following elements to establish a hostile work environment claim (although courts vary in how they formulate the analysis):

- the conduct was based on the plaintiff’s protected category;
- the plaintiff *subjectively* viewed the harassment as creating an abusive work environment; and⁹
- the work environment is *objectively* abusive.¹⁰

The “Severe or Pervasive” Standard

The Supreme Court has characterized its Title VII hostile work environment jurisprudence as making “clear that conduct must be extreme to amount to a change in the terms and conditions of employment,” and it has stated that the rationale for such a standard is to “ensure that Title VII does not become a ‘general civility code.’”¹¹ “A recurring point in [our] opinions,” the Court stated in *Faragher v. City of Boca Raton*, “is that ‘simple teasing,’ offhand comments, and

⁸ This report does not address harassment based on other protected characteristics, which may raise distinct issues and fact patterns. For a discussion of other forms of employment harassment, see CRS Report R49010, *What Is Harassment? An Overview from Federal Employment Law*, by April J. Anderson (2026).

⁹ Some courts consider, in addition to whether the victim perceived the environment as hostile, whether the behavior was unwelcome. *See, e.g.,* *Blomker v. Jewell*, 831 F.3d 1051, 1056 (8th Cir. 2016) (listing unwelcomeness as one of the requirements in establishing a hostile environment); *Smith v. Rock-Tenn Servs., Inc.*, 813 F.3d 298, 307 (6th Cir. 2016) (same); *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 277 (4th Cir. 2015) (en banc) (stating that an allegation of a hostile work environment based on race should show unwelcome behavior).

¹⁰ *See, e.g.,* *LeGrand v. Area Res. for Cmty. and Hum. Servs.*, 394 F.3d 1098, 1101 (8th Cir. 2005) (requiring the plaintiff to show membership in a protected group, that they were subjected to unwelcome sexual harassment, that the harassment was based on sex, and that the harassment was “sufficiently severe or pervasive as to affect a term, condition, or privilege of employment by creating an objectively hostile or abusive environment” (quoting *Meriwether v. Caraustar Packaging Co.*, 326 F.3d 990, 993 (8th Cir. 2003)); *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1245 (11th Cir. 1999) (en banc) (setting forth similar elements to establish a “hostile-environment sexual-harassment claim”).

¹¹ *Faragher v. City of Boca Raton*, 524 U.S. 775, 787–88 (1998).

isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'"¹²

To that end, the most difficult legal question to prove in hostile work environment claims is usually whether the harassment was objectively offensive. The Supreme Court's legal standard for objective offensiveness, announced in *Harris v. Forklift Systems, Inc.*,¹³ asks whether the alleged conduct was "severe or pervasive" enough to create an abusive or hostile work environment for the victim.¹⁴ Under this standard, even if a victim experiences offensive or harassing conduct, a harasser's actions will not give rise to a Title VII violation unless those acts in total were "severe or pervasive" enough to create an "abusive" or "hostile" work environment.¹⁵

Under *Harris*, a court considers "all the circumstances," including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."¹⁶

Courts commonly observe that the bar for showing actionable harassment is high,¹⁷ and they regularly dismiss Title VII harassment claims when plaintiffs fail to show sufficient severity or pervasiveness.¹⁸ Courts also repeatedly state how difficult it is to assess whether harassing

¹² *Id.* (citation omitted) (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998)).

¹³ 510 U.S. 17, 23 (1993).

¹⁴ *See generally*, *Pa. State Police v. Suders*, 542 U.S. 129, 133 (2004) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)) (to be actionable under Title VII, plaintiffs must show "harassing behavior 'sufficiently severe or pervasive to alter the conditions of [their] employment'" (alteration in original)).

¹⁵ *See, e.g.*, *Gerald v. Univ. of P.R.*, 707 F.3d 7, 18 (1st Cir. 2013) ("We proceed to the real bone of contention here—whether the harassment was sufficiently severe or pervasive. This is the factor the district court found lacking and it is also the entire focus of the [defendant]'s argument on appeal. This is not surprising [since] . . . the real question is typically whether the bad acts taken in the aggregate are sufficiently severe or pervasive to be actionable."); *EEOC v. Cent. Wholesalers, Inc.*, 573 F.3d 167, 175–76 (4th Cir. 2009) (citing *Harris*, 510 U.S. at 17) (applying specific factors); *Mendoza*, 195 F.3d at 1245–51 (same).

¹⁶ *See, e.g.*, *Central Wholesalers*, 573 F.3d at 175–76 (applying *Harris* to harassment analysis); *Mendoza*, 195 F.3d at 1245–51 (same). *See also Faragher*, 524 U.S. at 787–88 (discussing *Harris* as "direct[ing] courts to determine whether an environment is sufficiently hostile or abusive by 'looking at all the circumstances,' including the 'frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.'").

¹⁷ *See, e.g.*, *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 315 (4th Cir. 2008) ("Our circuit has likewise recognized that plaintiffs must clear a high bar in order to satisfy the severe or pervasive test."); *Mendoza*, 195 F.3d at 1243, 1251 (holding alleged conduct insufficient to constitute actionable harassment where the plaintiff alleged her supervisor looked her up and down and made a sniffing motion as he looked at her groin two times, constantly followed her, told her he was "getting fired up," and passed by her in the hallway and rubbed his hip against her hip while touching her shoulder; stating that to hold this conduct actionable would "establish a baseline of actionable conduct that is far below that established by other circuits" and citing cases with similar or more serious allegations that failed to constitute actionable harassment as a matter of law).

¹⁸ *See, e.g.*, *LeGrand v. Area Res. for Cmty. and Hum. Servs.*, 394 F.3d 1098, 1102–03 (8th Cir. 2005) (affirming grant of summary judgment on plaintiff's harassment claim, as conduct was not severe or pervasive enough to be actionable under Title VII); *Mormol v. Costco Wholesale Corp.*, 364 F.3d 54, 58–59 (2d Cir. 2004) (same); *Burnett v. Tyco Corp.*, 203 F.3d 980, 984–85 (6th Cir. 2000) (same).

conduct is severe or pervasive enough to amount to a Title VII violation.¹⁹ As the Second Circuit²⁰ has observed, “[t]he line between complaints that are easily susceptible to dismissal as a matter of law and those that are not is indistinct. . . . And on either side of the line there are . . . gradations of abusiveness.”²¹ As elaborated on below, federal circuit courts vary in how they apply this fact-intensive inquiry.

In general, courts most readily conclude that alleged conduct is sufficiently severe or pervasive in the context of sexual harassment claims when the challenged behavior constitutes rape²² or involves physical threats at work,²³ repeated solicitation for sex,²⁴ repeated touching of intimate body parts,²⁵ or daily or regular verbal harassment.²⁶ The Supreme Court in *Harris* observed that “[t]his is not, and by its nature cannot be, a mathematically precise test.”²⁷ That does not mean that the number of harassing incidents is unimportant, however. Conduct must be severe *or*

¹⁹ See, e.g., *Turner v. The Saloon, Ltd.*, 595 F.3d 679, 685 (7th Cir. 2010) (“We have acknowledged before that ‘drawing the line’ between what is and is not objectively hostile ‘is not always easy’”; contrasting facts involving sexual assault, obscene language, or pornographic material with “occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers.”) (quoting *Baskerville v. Culligan Int’l Co.*, 50 F.3d 428, 430 (7th Cir. 1995)); see also *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 464 (7th Cir. 1990) (stating that because “the statute does not use the term [harassment] or otherwise refer specifically to the conduct described by it, the metes and bounds of the wrong have been left for definition by the courts”).

²⁰ This report references a number of decisions by federal appellate courts of various regional circuits. For brevity, references to a particular circuit in the body of this report (e.g., the Second Circuit) refer to the U.S. Court of Appeals for that particular circuit.

²¹ *Redd v. N.Y. Div. of Parole*, 678 F.3d 166, 177 (2d Cir. 2012); see also *Harris*, 510 U.S. at 24 (Scalia, J., concurring) (“‘Abusive’ (or ‘hostile,’ which in this context I take to mean the same thing) does not seem to me a very clear standard—and I do not think clarity is at all increased by adding the adverb ‘objectively’ or by appealing to a ‘reasonable person[’s]’ notion of what the vague word means.”).

²² See *Lapka v. Chertoff*, 517 F.3d 974, 983–84 (7th Cir. 2008) (holding that coworker rape was severe enough to constitute actionable harassment under Title VII); *Gary v. Long*, 59 F.3d 1391, 1397 (D.C. Cir. 1995) (“If proven to be true, [supervisor]’s repeated verbal and physical harassment of [plaintiff], culminating in a rape, is ‘not only pervasive harassment but also criminal conduct of the most serious nature’ that is ‘plainly sufficient to state a claim for ‘hostile environment sexual harassment.’” (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986))).

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

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

²⁵ *Hulsey*, 367 F.3d at 1248.

²⁶ See *EEOC v. BNSF Ry. Co.*, 150 F.4th 948, 966 (8th Cir. 2025), *reh’g denied*, No. 24-2082, 2025 WL 3085999 (8th Cir. Nov. 5, 2025) (concluding hostile environment could be found where plaintiff experienced unsanitary bathroom conditions aimed at intimidating women, “endured discriminatory comments—up to three times a week—and saw sexually explicit graffiti every time that she worked”); *Copeland v. Ga. Dep’t of Corr.*, 97 F.4th 766, 776 (11th Cir. 2024) (expressing “no doubt” that “conduct that occurs daily (even over a shorter span of time) is frequent”); *Boumehdi v. Plastag Holdings, LLC*, 489 F.3d 781, 789 (7th Cir. 2007) (concluding in a case where plaintiff’s supervisor allegedly made “at least eighteen sexist or sexual comments in less than a year’s time,” and similar comments were made “very often,” that such conduct was pervasive enough to create a hostile work environment); *EEOC v. WC&M Enters., Inc.*, 496 F.3d 393, 400 (5th Cir. 2007) (determining, in a case where plaintiff faced verbal harassment on “a regular basis for a period of approximately one year,” that evidence was sufficient to show actionable Title VII claim).

²⁷ *Harris*, 510 U.S. at 23.

pervasive; it need not be both.²⁸ Appellate courts commonly emphasize frequency, often counting instances of harassment one by one and taking note of the duration of the harassment in addition to the severity of the conduct.²⁹ Many forms of mistreatment can play a role in creating a hostile work environment. Courts have considered displays of pornography, sexual graffiti, and playing music with “sexually demeaning and violent language” as contributing to a hostile environment.³⁰

Even though there are trends in the case law, federal appellate panels also sometimes diverge on seemingly similar facts.³¹ Below are selected cases addressing harassment claims that reflect how, in cases alleging serious physical and verbal misconduct, courts may come to different conclusions faced with similar fact patterns.

In *Turner v. The Saloon, Ltd.*,³² the Seventh Circuit allowed the plaintiff’s case to proceed to trial where the harasser grabbed the plaintiff’s genitals, asked the plaintiff to kiss her, pressed against the plaintiff asking if he missed her, grabbed his buttocks, and told him she missed seeing him naked when she saw plaintiff change into his work uniform. When faced with somewhat similar facts in *LeGrand v. Area Resources for Community and Human Services*,³³ however, the Eighth Circuit held that the evidence could not show actionable harassment where the harasser forcibly

²⁸ *BNSF Ry. Co.*, 150 F.4th at 966.

²⁹ See, e.g., *LeGrand v. Area Res. for Cmty. and Hum. Servs.*, 394 F.3d 1098, 1103 (8th Cir. 2005) (characterizing conduct as “three isolated incidents, which occurred over a nine-month period” to hold conduct did not amount to Title VII violation); *Burnett v. Tyco Corp.*, 203 F.3d 980, 985 (6th Cir. 2000) (“[A] single battery coupled with two merely offensive remarks over a six-month period does not create an issue of material fact as to whether the conduct alleged was sufficiently severe to create a hostile work environment.”); *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1242–43, 1249 (11th Cir. 1999) (en banc) (reporting that plaintiff alleged her supervisor looked her up and down and made a sniffing motion as he looked at her groin, passed by her in the hallway and rubbed his hip against her hip while touching her shoulder smiling, and constantly followed her, stating that “a single instance of slight physical contact, one arguably inappropriate statement, and three instances of [her supervisor]’s making a sniffing sound” occurring over an eleven-month period was “far too infrequent” to constitute a Title VII violation).

³⁰ *EEOC v. BNSF Ry. Co.*, 150 F.4th 948, 966 (8th Cir. 2025); *Sharp v. S&S Activewear, L.L.C.*, 69 F.4th 974, 979 (9th Cir. 2023) (“More than offhand foul comments, the music at S&S allegedly infused the workplace with sexually demeaning and violent language, which may support a Title VII claim even if it offended men as well as women.”).

³¹ See, e.g., *Mormol v. Costco Wholesale Corp.*, 364 F.3d 54, 55–56, 58–59 (2d Cir. 2004) (holding that conduct did not amount to actionable harassment, where plaintiff repeatedly declined her supervisor’s propositions for sex, in which he told her he would not approve her vacation request unless she had sex with him, again asked her to have sex and said he would punch her time card at night so she would be paid for hours she did not work, and asked her again for sex, telling her he would give her money and make her a full-time employee but only require her to work part-time; characterizing this harassment as amounting to only a few episodes and not severe enough to “overcome its lack of pervasiveness”); *Paul v. Northrop Grumman Ship Sys.*, 309 F. App’x 825, 826, 829 (5th Cir. 2009) (holding that conduct was not severe or pervasive enough to be actionable, where harasser came up to plaintiff and placed his chest against her breasts for 30 seconds, then followed her, forced his way through the door ahead of her, and placed his hand on her stomach and rubbed his pelvic region across her hips and buttocks; stating that “non-consensual physical touching” is actionable only where “chronic and frequent.”). Divergent, or seemingly inconsistent, analyses commonly exist within a given circuit’s precedent as well. Cf. *Nitsche v. CEO of Osage Valley Elec. Co-op.*, 446 F.3d 841, 843–44, 846 (8th Cir. 2006) (holding alleged conduct over twenty years was not severe or pervasive enough, where the harasser, two or three times, stuck a shovel between plaintiff’s legs and rubbed him with it; repeatedly told him he needed to get a pap smear; called him a “stub” and suggested he had a short penis, among other acts and behavior); *Eich v. Bd. of Regents for Cent. Mo. State Univ.*, 350 F.3d 752, 760–61 (8th Cir. 2003) (holding harassment was actionable where over seven years, harasser brushed up against plaintiff’s breasts, ran his fingers through her hair, and simulated sex acts with plaintiff while she was bent over during a handcuff training exercise, among other acts and behavior); see also *Redd v. N.Y. Div. of Parole*, 678 F.3d 166, 179–80 (2d Cir. 2012) (holding conduct was severe or pervasive enough where supervisor intentionally touched plaintiff’s breasts three times with hands); cf. *Quinn v. Green Tree Credit Corp.*, 159 F.3d 759, 768 (2d Cir. 1998) (holding conduct not severe or pervasive enough where supervisor intentionally touched plaintiff’s breasts using papers he was holding in his hand and said she was voted as having the “sleekest ass” in the office), *abrogated on other grounds by Nat’l R.R. Passenger v. Morgan*, 536 U.S. 101 (2002).

³² 595 F.3d 679, 685 (7th Cir. 2010).

³³ 394 F.3d 1098, 1100, 1103 (8th Cir. 2005).

kissed the plaintiff “in the mouth,” grabbed the plaintiff’s buttocks, reached for the plaintiff’s genitals, gripped the plaintiff’s thigh, asked the plaintiff to watch pornographic movies with him, and on another occasion suggested that the plaintiff would advance in the company if he (the plaintiff) engaged in sexual conduct with the harasser while watching pornographic movies.

The First Circuit held in *Gerald v. University of Puerto Rico*³⁴ that the harasser’s conduct—solicitation for sex on one occasion, touching the victim’s breast on another occasion, and asking her in front of other coworkers why she would not have sex with him—was severe or pervasive enough to constitute actionable harassment. In *Brooks v. City of San Mateo*, the Ninth Circuit held that the harasser’s conduct did not amount to severe or pervasive harassment where he touched the plaintiff’s stomach while she was working and made a sexual comment, forced his hand underneath her sweater and bra to touch her bare breast, and then approached her as though he was going to “fondle her breasts again.”³⁵ The court emphasized that the conduct was “highly reprehensible” but repeatedly characterized the behavior as a single episode of harassment and an “entirely isolated incident.”³⁶ Similarly, the Eighth Circuit concluded that a plaintiff could not state a claim of harassment based on “one instance of unwelcome physical contact, one or two statements where [the supervisor] stated he could ‘have [her]’ and several statements about how he never should have hired a female and wanted to make [her] cry.”³⁷

Courts can also have different perspectives on how a “reasonable” person would view similar facts, such as whether certain behavior is threatening or whether any reasonable person would view physical contact as severe. In *Turner*, for example, the Seventh Circuit emphasized that if there is touching of an intimate body part, such evidence weighs “most heavily” in determining whether the harassment is actionable.³⁸ The court also stated that the harasser’s grabbing of the plaintiff’s genitals was “probably severe enough on its own” to go to a jury on whether the harassment was objectively severe or pervasive.³⁹ In *LeGrand*, however, the Eighth Circuit characterized the conduct (which included groping) as being “manifestly inappropriate” but composed of only “three isolated incidents, which occurred over a nine-month period,” thus rendering the conduct—in the court’s view—“not so severe or pervasive as to poison [the plaintiff]’s work environment.”⁴⁰ The court in *LeGrand* also characterized the evidence as not demonstrating incidents that were “physically violent or overtly threatening.”⁴¹

As circuit precedent is controlling on both the circuit itself and lower courts within the circuit, older circuit precedent continues to shape recent analyses. If a circuit court has held that certain fact patterns are not enough to show severity or pervasiveness, lower courts in the circuit have accordingly held that fact patterns concerning similarly or less egregious conduct also do not amount to actionable harassment.⁴² For example, in 1999, the Fifth Circuit held in *Shepherd v. Comptroller of Public Accounts of State of Texas* that conduct did not amount to actionable

³⁴ 707 F.3d 7, 18 (1st Cir. 2013).

³⁵ 229 F.3d 917, 921, 924–27 (9th Cir. 2000).

³⁶ *Id.* at 924–27.

³⁷ *Paskert v. Kemna-ASA Auto Plaza, Inc.*, 950 F.3d 535, 538 (8th Cir. 2020).

³⁸ *Turner*, 595 F.3d at 685–86. *See also Gerald*, 707 F.3d at 18 (“These offensive incidents, which involved sexual propositioning and uninvited touching, can reasonably be viewed as severe; and, in the case of the breast grabbing incident, physically threatening (not to mention criminal).”).

³⁹ *Turner*, 595 F.3d at 685–86.

⁴⁰ *LeGrand*, 394 F.3d at 1102–03.

⁴¹ *Id.* at 1102.

⁴² *Friend v. City of Greenwood*, No. 4:19-CV-00018, 2020 WL 2306112, at *6 (N.D. Miss. May 5, 2020) (“[T]he alleged conduct appears less severe than conduct that the Fifth Circuit has deemed insufficient to establish a sex discrimination claim”), *aff’d sub nom.*, *Friend v. McAdams*, 861 F. App’x 825 (5th Cir. 2021).

harassment under Title VII where the harasser made remarks about the plaintiff's breasts and the size of her thighs, simulated looking under her dress, repeatedly stood over her desk and tried to look down her clothing, rubbed her from her shoulder down to her wrist with his hand while standing beside her several times, and motioned for her to sit in his lap when plaintiff arrived late to a meeting while saying "here's your seat."⁴³ While the court's analysis in *Shepherd* has faced criticism in later decisions from the circuit,⁴⁴ the Fifth Circuit and lower courts still rely on *Shepherd* as controlling authority dictating conduct insufficient to create a hostile work environment.⁴⁵

Recent Supreme Court precedent in nonharassment cases may also impact how courts apply the "severe or pervasive" standard. In *Muldrow v. City of St. Louis*, the Supreme Court addressed the level of harm plaintiffs needs to show in nonharassment cases—cases involving a discrete, negative employment action. In that case, lower courts had held that the plaintiff's transfer (allegedly on account of her sex) to a lower-status job with weekend work and fewer perks did not support a discrimination claim.⁴⁶ The changes did not impose "significant" harm required for a discrimination claim, the lower courts held, particularly because she retained the same pay.⁴⁷ The Supreme Court reversed the lower courts' decisions and held that plaintiff's transfer could be an actionable harm under Title VII. The Court rejected the requirement that a plaintiff show "significant" harm from discrimination. Instead, the Court in *Muldrow* ruled, a plaintiff need only show "some harm" to an identifiable term or condition of employment.⁴⁸

The *Muldrow* Court did not address harassment cases. After the decision, at least two appellate panels have held that the ruling lowered the bar to show harm in a harassment or hostile environment case.⁴⁹ According to that court, a plaintiff must still show an objectively hostile work environment⁵⁰ and must show "the hostility produce[d] some harm respecting an identifiable term or condition of employment."⁵¹ The plaintiff need not show significant harm, however. As another court put it, "when we consider whether a hostile-work environment was severe or pervasive

⁴³ *Shepherd v. Comptroller of Pub. Accounts of State of Tx.*, 168 F.3d 871, 872, 875 (5th Cir. 1999).

⁴⁴ *Royal v. CCC & R Tres Arboles, L.L.C.*, 736 F.3d 396, 402–03 (5th Cir. 2013) (stating that *Shepherd* has "been called into question by our court" for an analysis that seems to require that pervasive conduct must also be severe to constitute actionable harassment, but still distinguishing the facts at issue from those in *Shepherd* to hold that the alleged harassment was actionable) (citing *Harvill v. Westward Commc'ns., L.L.C.*, 433 F.3d 428, 434–35 (5th Cir. 2005)).

⁴⁵ See, e.g., *Barnett v. Boeing Co.*, 306 F. App'x 875, 879 (5th Cir. 2009) ("The incidents of sexual harassment . . . do not rise to the level required by *Shepherd* and *Hockman*."); *Haynes v. Brennan*, No. 4:14-CV-01759, 2016 WL 2939074, at *3 (S.D. Tex. May 20, 2016) (granting summary judgment to defendant in reliance on *Shepherd*, when plaintiff alleged that harasser touched her thigh, forcibly kissed her forehead, frequented her work station, paid unwanted sexual attention to her, and plaintiff heard that harasser's friend tried to get her transferred).

⁴⁶ *Muldrow v. City of St. Louis*, 601 U.S. 346, 350 (2024).

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Kellar v. Yunion, Inc.*, 157 F.4th 855, 873 (6th Cir. 2025) ("But now, after *Muldrow* and *McNeal*, courts cannot require a plaintiff to show that he suffered a heightened level of harm to succeed on a hostile-work-environment claim. For summary judgment purposes, once a plaintiff provides evidence that the environment itself was objectively hostile to the protected class, so long as the hostility 'produce[d] "some harm respecting an identifiable term or condition of employment," he meets his burden.') (quoting *McNeal v. City of Blue Ash*, 117 F.4th 887, 904 (6th Cir. 2024) (applying standard to disability claim)); *McNeal*, 117 F.4th at 904 ("Because hostile-work-environment claims arise out of the same statutory language as disparate-treatment claims, *Muldrow*'s holding that Title VII does not require plaintiffs to show 'significant' harm applies to both types of claims." (quoting *Muldrow*, 601 U.S. at 355)).

⁵⁰ *Kellar*, 157 F.4th at 873.

⁵¹ *Id.*

enough to violate Title VII, . . . we effectively ask whether it left an employee ‘worse off respecting employment terms or conditions.’”⁵²

Another circuit has rejected that application of *Muldrow*, holding that hostile environment claims are unlike discrete action claims and do not use the same standard of harm.⁵³ That court expressed doubt that the *Muldrow* standard and the “severe or pervasive” standard should be combined in harassment cases and questioned whether they can be combined without becoming “circular.”⁵⁴ In that court’s view, “[t]o say that *Muldrow* changed this for hostile-environment claims is essentially to say that *Muldrow* gutted the very thing that distinguishes hostile-environment claims from discrete-act claims.”⁵⁵

Employer Liability for Hostile Work Environments

Even when a plaintiff puts forth evidence meeting the elements of a sexual harassment claim, including sufficiently severe or pervasive mistreatment, the plaintiff must also show that the employer should be held liable for the harassment.⁵⁶ The legal standard for evaluating employer liability is based on several Supreme Court decisions: *Meritor Savings Bank v. Vinson*, which held that employers are not “automatically liable for sexual harassment by their supervisors”⁵⁷; and *Faragher v. City of Boca Raton*⁵⁸ and *Burlington Industries, Inc. v. Ellerth*,⁵⁹ which further delineated when employers *can* be held liable for workplace harassment.⁶⁰

These cases are important for a legal analysis because the legal standards for establishing employer liability for workplace harassment are not expressly included or addressed in Title VII.⁶¹ The Supreme Court has repeatedly observed that Congress has not altered or overruled *Meritor*’s limitation on employer liability for harassment, even though it has subsequently amended Title VII.⁶² Post-*Meritor*, the Court has acknowledged that there “are good reasons” to always hold employers liable “for misuse of supervisory authority”⁶³ but has viewed itself as bound by *Meritor*, particularly since “[t]he decision of Congress to leave *Meritor* intact is

⁵² *McNeal*, 117 F.4th at 904 (quoting *Muldrow*, 601 U.S. at 355).

⁵³ *Russell v. Driscoll*, 157 F.4th 1348, 1352–53 (10th Cir. 2024).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93, 103 (2d Cir. 2010) (“Beyond demonstrating a hostile work environment, a plaintiff must show a basis for imputing the objectionable conduct to the employer. When, as here, the alleged harasser is in a supervisory position over the plaintiff, the objectionable conduct is automatically imputed to the employer.” (citations omitted)).

⁵⁷ *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986) (declining to “issue a definitive rule on employer liability,” but reasoning that Congress’s decision to define employer to include any “agent” of an employer “surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible” and rejecting the court of appeals’ holding that employers should always be held strictly liable for sexual harassment by supervisors).

⁵⁸ 524 U.S. 775, 780 (1998).

⁵⁹ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 747 (1998).

⁶⁰ See generally *Pa. State Police v. Suders*, 542 U.S. 129, 143 (2004) (discussing “the framework *Ellerth* and *Faragher* established to govern employer liability for sexual harassment by supervisors”).

⁶¹ *Ellerth*, 524 U.S. at 763–64 (discussing the holding in *Meritor* limiting employer liability for workplace harassment and observing that “Congress has not altered *Meritor*’s rule even though it has made significant amendments to Title VII in the interim”).

⁶² *Id.*; see also *Faragher*, 524 U.S. at 804 n.4 (stating it was bound by *Meritor* because of stare decisis, but also because Congress’s decision not to disturb the holding in *Meritor* was “conspicuous” in light of the 1991 amendments to Title VII).

⁶³ *Faragher*, 524 U.S. at 804.

conspicuous.”⁶⁴ Similarly, in *Ellerth*, the Court stated that it was bound by *Meritor*’s holding that employer liability for harassment is subject to limitation.⁶⁵ As detailed below, under the Supreme Court’s formulation, establishing employer liability for workplace harassment nevertheless turns significantly on whether the harassing employee was a supervisor.⁶⁶

Under *Faragher* and *Ellerth*, there are two threshold considerations that help determine employer liability for harassment: the harasser’s status—as the victim’s supervisor or coworker—and whether the harassment also led to a “tangible employment action” (e.g., termination or demotion of the victim).⁶⁷ Under this framework,

- if the harasser was the victim’s supervisor *and* the harassment led to a “tangible employment action,” the employer will be strictly liable for the harassment;⁶⁸
- if the harasser was the victim’s supervisor but the harassment did *not* lead to a tangible employment action, the employer can avail itself of an affirmative defense (considering the employer’s actions to prevent harassment and respond to reported harassment) to avoid liability altogether;⁶⁹
- if the harasser was the victim’s coworker, the victim has the burden to show that the employer was negligent in response to the harassment.⁷⁰

In fashioning the rules for employer liability, the Court in *Faragher* and *Ellerth* observed that all workplace harassment is in some sense aided by the employment context wherein “[p]roximity and regular contact may afford a captive pool of potential victims.”⁷¹ The Court also stated that “a supervisor’s power and authority invests his or her harassing conduct with a particular threatening character, and in this sense, a supervisor always is aided by the agency relation.”⁷² The rules for employer liability for workplace harassment thus take into account how much the harasser was aided by their relationship with the employer.

In *Ellerth*, the Court reasoned that harassing supervisors can only make “tangible employment decisions” against employees because of the power they wield on behalf of the employer.⁷³ In

⁶⁴ *Id.* at 804 n.4; *see also Ellerth*, 524 U.S. at 763–64.

⁶⁵ *Ellerth*, 524 U.S. at 763.

⁶⁶ *Vance v. Ball State Univ.*, 570 U.S. 421, 424 (2013) (explaining that under Title VII, “an employer’s liability for such harassment may depend on the status of the harasser,” and discussing the significance of whether the harasser was the victim’s coworker or supervisor).

⁶⁷ A “tangible employment action” in the context of a Title VII harassment analysis is a “significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.” *Ellerth*, 524 U.S. at 761.

⁶⁸ *Faragher*, 524 U.S. at 807–08 (holding that an employer is strictly liable for actionable harassment by a supervisor “when the supervisor’s harassment culminates in a tangible employment action”); *see also Pa. State Police v. Suders*, 542 U.S. 129, 144–46 (2004) (discussing the analyses, rationales, and holdings in the *Faragher* and *Ellerth* decisions).

⁶⁹ *Faragher*, 524 U.S. at 807 (holding that an employer is vicariously liable for actionable harassment by a supervisor but may assert an affirmative defense to liability or damages, with proof by a preponderance of the evidence, when “no tangible employment action is taken”); *Ellerth*, 524 U.S. at 765 (same).

⁷⁰ *Faragher*, 524 U.S. at 799 (discussing the broad “unanimity of views among the holdings of District Courts and Courts of Appeals” that have “uniformly judg[ed] employer liability for co-worker harassment under a negligence standard”). *Cf. Vance*, 570 U.S. at 421, 424 (“Under Title VII, an employer’s liability for such harassment may depend on the status of the harasser. If the harassing employee is the victim’s co-worker, the employer is liable only if it was negligent in controlling working conditions.”). *But see Suders*, 524 U.S. at 143 n.6 (“*Ellerth* and *Faragher* expressed no view on the employer liability standard for co-worker harassment. Nor do we.”).

⁷¹ *Ellerth*, 524 U.S. at 760.

⁷² *Id.* at 763.

⁷³ *Id.* at 761–62.

those circumstances, a supervisor's harassing acts are attributable to the employer for Title VII purposes because tangible employment actions "are the means by which the supervisor brings the official power of the enterprise to bear on subordinates."⁷⁴ The Court accordingly held in *Ellerth* that an employer is strictly liable (that is, liable regardless of intent) for such supervisory harassment.⁷⁵

If harassment by a supervisor does *not* come with a tangible employment action, the Court in *Ellerth* stated that it is "less obvious" whether the "agency relation" facilitated the harassment.⁷⁶ In those cases, the Court has held that an employer can raise an affirmative defense to liability⁷⁷ often called the *Faragher-Ellerth* defense.⁷⁸ This defense requires that the employer establish, by a preponderance of the evidence, two elements: (1) "that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior" and (2) "that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise."⁷⁹ By establishing both elements, an employer avoids liability for supervisory harassment altogether, however severe or pervasive the harassment at issue.⁸⁰

Applying the *Faragher-Ellerth* Defense

Applying the *Faragher* and *Ellerth* decisions in sexual harassment cases, federal appellate courts considering whether an employer has established the affirmative defense carefully evaluate, first, the employer's prevention and response measures, and second, a victim's efforts to seek internal remedies.⁸¹ For the first prong of the defense—that an employer "exercised reasonable care to prevent and correct promptly" the harassment—federal courts consider a number of factors.⁸² These factors include the nature of the harassment at issue,⁸³ the time it took for the employer to respond,⁸⁴ the quality of any investigation and remedial measures,⁸⁵ evidence of an

⁷⁴ *Id.* at 762.

⁷⁵ *Id.* at 765.

⁷⁶ *Id.*

⁷⁷ *Id.*; *Faragher*, 524 U.S. at 807–08.

⁷⁸ *See, e.g.*, *Gorzynski v. JetBlue Airways Corp.*, 596 F.3d 93, 103 (2d Cir. 2010) (discussing availability of "*Faragher/Ellerth* affirmative defense").

⁷⁹ *Faragher*, 524 U.S. at 807 (also explaining that it will "normally suffice" to establish the second prong with evidence that the employee failed to use any complaint procedure provided by the employer).

⁸⁰ *See id.* at 807–08.

⁸¹ *See, e.g.*, *Crockett v. Mission Hosp. Inc.*, 717 F.3d 348, 356–58 (4th Cir. 2013).

⁸² *See, e.g.*, *Stuart v. Gen. Motors Corp.*, 217 F.3d 621, 633 (8th Cir. 2000) ("Factors the Court may consider when assessing the reasonableness of [the employer]'s remedial measures include the amount of time elapsed between the notice of harassment, which includes but is not limited to a complaint of sexual harassment, and the remedial action, and the options available to the employer such as employee training sessions, disciplinary action taken against the harasser(s), reprimands in personnel files, and terminations, and whether or not the measures ended the harassment.").

⁸³ *See Jackson v. Quanex Corp.*, 191 F.3d 647, 663 (6th Cir. 1999) ("Significantly, a court must judge the appropriateness of a response by the frequency and severity of the alleged harassment."); *Wyatt v. Nissan N. Am., Inc.*, 999 F.3d 400, 415 (6th Cir. 2021) (holding that a "three-week delay in investigating explicit allegations of unwanted physical invasions creates a question of reasonableness that should be resolved by a jury" and distinguishing case from a similar one of delayed investigation into "vague" allegations).

⁸⁴ *See, e.g.*, *Hill v. Am. Gen. Fin., Inc.*, 218 F.3d 639, 643 (7th Cir. 2000) (holding that employer satisfied first prong of affirmative defense when its action after receiving the plaintiff's complaint was "immediate"). *But see Jackson*, 191 F.3d at 664 (stating that "the mere fact of a quick response" to complaints, "without more," cannot satisfy the employer's "burden of proving that its action was a reasonable attempt to prevent and correct the problem").

⁸⁵ *See, e.g.*, *Jackson v. County of Racine*, 474 F.3d 493, 502 (7th Cir. 2007) (holding that first prong of affirmative (continued...))

antiharassment policy,⁸⁶ and any other evidence about an employer's efforts to prevent and respond to harassment.⁸⁷ Though federal appellate courts generally agree that an employer's actions must be "reasonably calculated" to prevent or stop further harassment,⁸⁸ courts differ in how they evaluate this requirement.⁸⁹

For example, when evaluating a sheriff's office's response to harassment that included sexual assaults and a rape,⁹⁰ the Tenth Circuit cited various features of the employer's investigation of the harassment that justified sending the case to trial to determine the reasonableness of the response.⁹¹ Among other facts, the court said that the sheriff had assigned the investigation to a detective who was never trained in conducting harassment investigations; this detective was a close friend of the alleged harasser and considered him a mentor; the detective focused the investigation on gathering details about the plaintiff's sex life rather than the allegations of sexual assault and rape; and the detective repeatedly told the plaintiff she should resign.⁹² Additionally, when the detective informed the sheriff there was a possible rape, the sheriff instructed that the investigation should stop, and there was no evidence that the department sought to improve its sexual harassment program after that.⁹³ Though the harasser later resigned, the court found that that did not save the employer from liability.⁹⁴

defense was satisfied where the "investigation was thorough and resulted in a significant disciplinary measure" against the harasser); *Reed v. MBNA Mktg. Sys., Inc.*, 333 F.3d 27, 34 (1st Cir. 2003) (holding first prong satisfied based on evidence including that the employer began investigating the day the plaintiff reported her supervisor's conduct, and that the harasser was removed from the workplace almost immediately).

⁸⁶ See, e.g., *Hill*, 218 F.3d at 643 ("While an appropriate anti-harassment policy with complaint procedure is not always necessary to sustain the defense, it is a relevant consideration.").

⁸⁷ See, e.g., *Brenneman v. Famous Dave's of Am., Inc.*, 507 F.3d 1139, 1145 (8th Cir. 2007) (holding that evidence satisfied the "correction" prong when employer investigated and stopped the harassment and offered to relocate the plaintiff to a restaurant five miles away, even though transferring the victim, and not the harasser, was "not ideal").

⁸⁸ See *Kramer v. Wasatch Cnty. Sheriff's Off.*, 743 F.3d 726, 747 (10th Cir. 2014) (stating that evidence showing an employer's attempt to promptly remediate, "without any showing that such attempts were 'reasonably calculated to end the harassment' and deter future harassers," could not satisfy defense (citation omitted)); *Jackson*, 474 F.3d at 502 ("We have said that '[a]n employer's response to alleged instances of employee harassment must be reasonably calculated to prevent further harassment under the particular facts and circumstances of the case at the time the allegations are made.'"); *Jackson*, 191 F.3d at 663 ("Generally, a response is adequate if it is reasonably calculated to end the harassment."); see also *Hardage v. CBS Broad., Inc.*, 427 F.3d 1177, 1186 (9th Cir. 2005) (stating that the reasonableness of the remedy depends on "its ability to: (1) 'stop harassment by the person who engaged in harassment;' and (2) 'persuade potential harassers to refrain from unlawful conduct.'" (quoting *Nichols v. Azteca Rest. Enter., Inc.*, 256 F.3d 864, 875 (9th Cir. 2001))), *amended on denial of reh'g*, 433 F.3d 672 (9th Cir. 2006), *amended on denial of reh'g*, 436 F.3d 1050 (9th Cir. 2006).

⁸⁹ See, e.g., *Est. of Harris v. City of Milwaukee*, 141 F.4th 858, 866 (7th Cir. 2025) (holding that mere existence of an antiharassment policy is not sufficient, as "a company's policy must give employees a meaningful process to express their concerns about an individual in their work environment"); *Weger v. City of Ladue*, 500 F.3d 710, 719–20 (8th Cir. 2007) (stating that the distribution of an antiharassment policy is "not dispositive" of the reasonableness of an employer's prevention efforts under the first prong of defense). Cf. *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 266 (4th Cir. 2001) ("Distribution of an anti-harassment policy provides 'compelling proof' that the company exercised reasonable care in preventing and promptly correcting sexual harassment." (quoting *Lissau v. S. Food Serv., Inc.*, 159 F.3d 177, 182 (4th Cir.1998))).

⁹⁰ *Kramer*, 743 F.3d at 732–34.

⁹¹ *Id.* at 747–49 (examining aspects of the investigation and holding it insufficient to satisfy corrective prong).

⁹² *Id.* (stating that "[r]esponses to complaints that encourage the plaintiff to drop the complaint or otherwise penalize the plaintiff certainly do not prove an employer's reasonableness as a matter of law").

⁹³ *Id.* at 749 (stating that "'an employer's decision to do nothing on the basis of an inadequate investigation likewise supports a finding that the employer did not take prompt and effective remedial action'" (quoting *Wilson v. Tulsa Junior Coll.*, 164 F.3d 534, 543 n.7 (10th Cir.1998))).

⁹⁴ *Id.*

In another case, the Eighth Circuit held that an employer satisfied the first prong of the affirmative defense even though the employer refused to give the plaintiffs the results of the investigation; shared the information with the alleged harasser, including the names and statements of the witnesses; and permitted the harasser to continue to be present in the plaintiffs' work area.⁹⁵ The employer's investigation found that the alleged harasser had engaged with female employees in a "nonsexual" manner,⁹⁶ though the behavior included "massaging their shoulders, neck, and upper chest underneath their uniforms," "going under their desks in order to massage their legs," and making comments about the physical appearance of women.⁹⁷ Acknowledging "flaws" in the investigation, the court nevertheless cited among the "most significant" facts establishing the first prong of the defense that the harassing behavior stopped the day that one of the plaintiffs reported it to upper management.⁹⁸

In evaluating the second prong of the defense—that the plaintiff unreasonably failed to take advantage of an employer's preventive or corrective opportunities—courts typically examine whether the plaintiff used available reporting procedures.⁹⁹ At times, a court may consider a plaintiff's justification for delaying a report or never reporting harassment out of fear of retaliation or concern that the official responsible for resolving complaints is unlikely to remedy the harassment.¹⁰⁰

For example, the First Circuit held that an employer had not established that a plaintiff was unreasonable when she delayed reporting an assault by her supervisor for a year.¹⁰¹ The court reasoned that a jury could conclude the plaintiff's delay was reasonable in part because she was a teenager at the time of the assault while her supervisor was twice her age.¹⁰² In its analysis, the court also considered the supervisor's threats that the plaintiff would be fired if she reported the assault, that both of them would be fired, and that he had influential ties to the owner of the

⁹⁵ *Weger*, 500 F.3d at 716, 723–24.

⁹⁶ *Id.* at 716.

⁹⁷ *Id.* at 714 n.3.

⁹⁸ *Id.* at 716, 723–24 (also stating that during the investigation, the harasser was only permitted to enter the plaintiffs' work area in the presence of another supervisor and for a work-related purpose and was temporarily relieved of his direct supervision over the plaintiffs, and stating that after the investigation, the harasser remained the plaintiffs' superior in the department but was permanently removed from directly supervising them).

⁹⁹ See, e.g., *Hardage v. CBS Broad., Inc.*, 427 F.3d 1177, 1182, 1188 (9th Cir. 2005) (holding that plaintiff unreasonably failed to invoke "preventative or corrective opportunities"; discussing facts that employer had an antiharassment policy and complaint procedure of which plaintiff was aware, that plaintiff took six months to report the harassment after it began, and that when plaintiff reported the harassment, he specifically asked the company not to investigate or intervene because he wanted to try to handle the situation himself), *amended on denial of reh'g*, 433 F.3d 672 (9th Cir. 2006), *amended on denial of reh'g*, 436 F.3d 1050 (9th Cir. 2006); *Est. of Harris v. City of Milwaukee*, 141 F.4th 858, 867 (7th Cir. 2025) (concluding plaintiff's anonymous, undated complaint failed to follow employer procedures and so she failed to use the antiharassment policy).

¹⁰⁰ See, e.g., *Kramer*, 743 F.3d at 751 (quoting *Reed*, 333 F.3d at 35–36) (stating that though a generalized fear of retaliation can never justify a failure to use internal grievance procedures, if such fear is based on "concrete reason[s] to apprehend that complaint would be useless or result in affirmative harm to the complainant," the plaintiff's reasonableness becomes an issue to be resolved at trial); see also, e.g., *Gorzynski*, 596 F.3d at 104–05 (rejecting defendant's argument that plaintiff was unreasonable for failing to report harassment to another manager in addition to her supervisor; holding that evidence created a jury question about whether plaintiff was reasonable to believe that other avenues for reporting would be futile, where evidence reflected that two other managers had responded to earlier complaints by admonishing the plaintiff and suspending another employee). But see *Lauderdale v. Tex. Dep't of Crim. Just.*, 512 F.3d 157, 165 (5th Cir. 2007) ("In most cases, as here, once an employee knows his initial complaint is ineffective, it is unreasonable for him not to file a second complaint, so long as the employer has provided multiple avenues for such a complaint.").

¹⁰¹ *Reed*, 333 F.3d at 37; see also *id.* at 30–31 (explaining factual context of case).

¹⁰² *Id.* at 37.

company who had previously acted in his favor in another circumstance involving his rumored involvement with a young woman.¹⁰³

In contrast, the Eighth Circuit held that the employer in a different case had shown that the plaintiffs, both officers in the police department, had acted unreasonably when they delayed reporting their supervisor's harassment for a year.¹⁰⁴ The court rejected the plaintiffs' arguments that they credibly feared retaliation and doubted they would receive a fair investigation given the close relationship between the harasser and the police chief.¹⁰⁵ Though the court acknowledged the "enormous difficulties involved in lodging complaints" and the heightened psychological burden of requiring victims to report harassment when they also perceive bias in the harasser's favor,¹⁰⁶ the court said that only "credible" fears of retaliation could excuse a yearlong delay, and without evidence of "any threat by any Department employee," the plaintiffs did not make that showing.¹⁰⁷

Application of the Negligence Standard for Coworker Harassment

It is much harder to impose employer liability for a coworker's, rather than a supervisor's, harassment. If the harasser was the plaintiff's coworker, courts do not ask whether the employer should have affirmatively tried to prevent harassment in the first place. Rather than make the employer prove that it did enough and that the plaintiff behaved unreasonably, courts put the burden of proof on the plaintiff to show that the employer was negligent. That is, the plaintiff must generally show that the employer knew or should have known about the harassment and failed to take effective remedial action.¹⁰⁸ Framed differently, in coworker harassment cases, the employer may only be liable if the plaintiff can show that the employer unreasonably allowed the harassment to persist.¹⁰⁹ How this standard is applied in sexual harassment cases depends heavily on the facts and varies from case to case.¹¹⁰

To determine whether an employer "knew (actual notice) or should have known (constructive notice)" of the offensive conduct, courts look at all of the circumstances. Courts have generally found that employers receive notice when plaintiffs report to management personnel who are

¹⁰³ *Id.*

¹⁰⁴ *Weger v. City of Ladue*, 500 F.3d 710, 714, 720, 726 (8th Cir. 2007).

¹⁰⁵ *Id.* at 725.

¹⁰⁶ *Id.* (quoting *Coates v. Sundor Brands, Inc.*, 164 F.3d 1361, 1366 (11th Cir. 1999)).

¹⁰⁷ *Id.* (also stating that "the reasonableness of Plaintiffs' fears of retaliation is further called into question because the Department's antiharassment policy contained an antiretaliation provision"); see also *Trahanas v. Nw. Univ.*, 64 F.4th 842, 854 (7th Cir. 2023) (holding plaintiff's fear that if she reported harassment she would not receive a letter of recommendation did not justify failure to report). But see *Wyatt v. Nissan N. Am., Inc.*, 999 F.3d 400, 416 (6th Cir. 2021) (holding that a jury could find worker's two-month delay in reporting reasonable, given harasser's threats that she needed his support at the company).

¹⁰⁸ See, e.g., *Reynaga v. Roseburg Forest Products*, 847 F.3d 678, 599 (9th Cir. 2017); *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 319 (4th Cir. 2008) (also explaining that knowledge can be imputed to the employer if a reasonable person would have known about the harassment, and that the remedial action must be "reasonably calculated to end the harassment"). See also *MacCluskey v. Univ. of Conn. Health Ctr.*, No. 17-0807, 2017 WL 6463200, at *2 (2d Cir. Dec. 19, 2017) (articulating the test for negligence as "whether (1) the employer 'failed to provide a reasonable avenue for complaint' or (2) 'it knew, or in the exercise of reasonable care should have known, about the harassment yet failed to take appropriate remedial action.'" (quoting *Duch v. Jakubek*, 588 F.3d 757, 762 (2d Cir. 2009))).

¹⁰⁹ *Vance v. Ball State Univ.*, 570 U.S. 421, 423 (2013).

¹¹⁰ *Johnson v. Bd. of Supervisors of La. State Univ. & Agric. & Mech. Coll.*, 90 F.4th 449, 456 (5th Cir. 2024) (stating that the effectiveness of an employer response is a fact-specific inquiry, and holding employer's response appropriate where it separated the victim from the perpetrator and investigated).

designated to receive harassment complaints.¹¹¹ When complainants report to someone not so designated, it is less obvious whether an employer should be charged with knowledge. Courts have held that it is not enough for a complainant to tell just anyone about the harassment; the employer must have been given a “reasonable chance of being able to respond to the information.”¹¹² For this inquiry, the company’s organizational structure matters but is not decisive.¹¹³ Ultimately, courts have looked at whether an employee “complain[ed] to someone who could reasonably be expected to refer the complaint up the ladder to the employee authorized to act on it.”¹¹⁴

Regardless of a report, if a manager actually witnesses harassment or similarly inappropriate conduct, it may amount to notice.¹¹⁵ Further, a company cannot escape liability by adopting a “see no evil, hear no evil” strategy.¹¹⁶ An employer that lacks reasonable mechanisms or procedures for reporting misconduct, for example, may be charged with constructive knowledge of the coworker harassment at issue.¹¹⁷

Even without evidence of a report to management or of a manager who witnesses sexual harassment, courts may impute knowledge of the harassment to the employer if there is other evidence to support the inference. For example, in *Duch v. Jakubek*, the Second Circuit found that a reasonable jury could conclude that a supervisor had notice of sexual harassment in light of the circumstances, including that the plaintiff had sought to change her schedule to avoid working with the harasser; the harasser had engaged in sex-related misconduct in the past; the supervisor had told the harasser to “cut it out [and] grow up”; and the supervisor had observed that working around the harasser caused the complainant to become emotional and visibly upset.¹¹⁸ Similarly, in *Hawkins v. Anheuser-Busch, Inc.*, the Sixth Circuit held that a jury could find that a brewery knew or should have known of harassing conduct.¹¹⁹ There, even though the plaintiff never reported individual incidents of harassment or cited sexual harassment in her complaints, the court emphasized that she had repeatedly complained about her coworker’s “unbearable” behavior and asked for a transfer, and that the harasser had a known history of sexual harassment.¹²⁰ Thus, overall, the inquiry into whether an employer is on notice of harassment is not a mechanical one, but depends on the evidence.

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

¹¹¹ See, e.g., *Breda v. Wolf Camera & Video*, 222 F.3d 886, 889 (11th Cir. 2000) (“[I]f an employer has a company policy specifically designating the person or persons to whom an employee should report instances of suspected sexual harassment, once the employee complains to the designated person or persons, the employer is deemed to have actual notice of the harassment.”); *Williamson v. City of Houston*, 148 F.3d 462, 466 (5th Cir. 1998) (“The conclusion that the City can be held liable on the basis of Bozeman’s knowledge is put beyond doubt by the HPD’s sexual harassment policy, which specifically directs those who believe they have been harassed to report it to their supervisors.”).

¹¹² *Young v. Bayer Corp.*, 123 F.3d 672, 674 (7th Cir. 1997).

¹¹³ *Williamson v. City of Houston*, 148 F.3d 462, 466 (5th Cir. 1998).

¹¹⁴ *Young*, 123 F.3d at 675; see also *Duch*, 588 F.3d at 763 (holding that a report to a nonsupervisory coworker sparks employer liability only if “that co-worker has an official or strong de facto duty to act as a conduit to management for complaints about work conditions”).

¹¹⁵ See *Bonenberger v. Plymouth Twp.*, 132 F.3d 20, 23 (3d Cir. 1997) (finding employer knowledge of harassment imputed where direct supervisor witnessed the harassment directly).

¹¹⁶ *Ocheltree v. Scollon Prods.*, 335 F.3d 325, 334 (4th Cir. 2003).

¹¹⁷ *Id.*

¹¹⁸ *Duch*, 588 F.3d at 765 (alteration in original).

¹¹⁹ 517 F.3d 321, 339 (6th Cir. 2008).

¹²⁰ *Id.* at 339–40.

action.¹²¹ This showing does not mean the employer must take all actions that a plaintiff requests: “all that [the employer is] required to do . . . [is] to take prompt action reasonably calculated to end the harassment.”¹²² Employers must take actions which seek to end current harassment and deter future harassment in the given context of that workplace.¹²³ In *Berry v. Delta Airlines*, for example, the Seventh Circuit concluded that an employer reacted promptly and appropriately to end harassment where the employer immediately contacted its local Equal Employment Opportunity Commission (EEOC) office, began an investigation, confronted the harasser and later changed his shift to separate him from the victim, and required all local employees to view a sexual harassment training video.¹²⁴ These actions stopped the harassment and were sufficient, in the court’s view, even though the plaintiff argued that the employer could have done more, such as separating her from the harasser at an earlier date, ordering the harasser to leave her alone, or requiring employees to engage in discussion sessions.¹²⁵

In contrast, courts have held that an employer response is inadequate where, for example, an employer advises or counsels a harasser to stop without taking any other actions or imposing discipline,¹²⁶ or involuntarily transfers the plaintiff.¹²⁷ Further, even if the employer’s actions stop the harassment, that fact alone may be insufficient to show an effective response. In one Sixth Circuit case, the employer argued that it responded adequately to a plaintiff’s allegations of harassment by transferring her to another shift at her request, launching a prompt investigation including interviewing many employees, and sending the complainant a letter informing her when the investigation was complete and that retaliation would not be tolerated.¹²⁸ The appellate court found that these measures could not justify summary judgment for the employer.¹²⁹ Even though the harassment stopped because of the transfer, and the employer argued that the evidence revealed in its investigation provided insufficient grounds under its collective bargaining agreement to terminate the harasser, the court observed that the harasser had a history of sexually

¹²¹ *Vance v. Ball State Univ.*, 570 U.S. 421, 427 (2013).

¹²² *Berry v. Delta Airlines, Inc.*, 260 F.3d 803, 812–13 (7th Cir. 2001). *But see* *Reynaga v. Roseburg Forest Products*, 847 F.3d 678, 690 (9th Cir. 2017) (“[P]rompt action is not enough. The remedial measures must also be effective.”).

¹²³ *Fuller v. City of Oakland*, 47 F.3d 1522, 1528 (9th Cir. 1995).

¹²⁴ *Berry*, 260 F.3d at 813; *see also* *Star v. West*, 237 F.3d 1036, 1039 (9th Cir. 2001) (holding that employer took sufficient action by counseling harasser, ordering him to leave complainant alone, and transferring him to a different shift); *McKenzie v. Ill. Dep’t of Transp.*, 92 F.3d 473, 476 (7th Cir. 1996). The EEOC has primary responsibility for enforcing Title VII. *E.E.O.C. v. Shell Oil Co.*, 466 U.S. 54, 62 (1984); 42 U.S.C. § 2000e-5(e)(1).

¹²⁵ *Berry*, 260 F.3d at 813.

¹²⁶ *See, e.g.,* *Waltman v. Int’l Paper Co.*, 875 F.2d 468, 470 (5th Cir. 1989); *Loughman v. Malnati Org., Inc.*, 395 F.3d 404, 407 (7th Cir. 2005); *EEOC v. Sunbelt Rentals*, 521 F.3d 306, 310 (2008).

¹²⁷ *Ellison v. Brady*, 924 F.2d 72, 75 (9th Cir. 1991); *see also* EEOC, *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors*, Notice No. 915.002 (June 18, 1999), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-vicarious-liability-unlawful-harassment-supervisors> [<https://perma.cc/DYK6-YD7U>] (“The complainant should not be involuntarily transferred or otherwise burdened.”). The EEOC’s 1999 guidance was superseded by new guidance on harassment, issued in 2024. EEOC, ENFORCEMENT GUIDANCE ON HARASSMENT IN THE WORKPLACE, NOTICE NO. 915.064 (April 29, 2024), <https://naacpld.org/wp-content/uploads/Enforcement-Guidance-on-Harassment-in-the-Workplace.pdf> [<https://perma.cc/V7VH-NE9U>]. The 2024 guidance was rescinded in 2026. *See* EEOC, Press Release, EEOC Commission Votes to Rescind 2024 Harassment Guidance (Jan 23, 2026), <https://www.eeoc.gov/newsroom/eeoc-commission-votes-rescind-2024-harassment-guidance> [<https://perma.cc/83GD-Y6RG>]. It is currently unclear if the 1999 guidance is in effect.

¹²⁸ *Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 341–42 (6th Cir. 2008).

¹²⁹ *Id.* at 344.

inappropriate conduct and a history of lying about it.¹³⁰ Under those circumstances, the court concluded that a jury could find that the remedy was insufficient.¹³¹

Harassment by Non-Employees

In some cases, courts have recognized that an employer can be liable for harassment by someone other than an employee—a customer, patient, or client, for example. Most courts to consider the matter have concluded that an employer is liable for their negligence, the same standard that applies to coworker harassment.¹³² An EEOC regulation also adopts this standard.¹³³ To succeed in these claims, a plaintiff must show “that the employer knew or should have known of the hostile work environment but failed to take reasonable measures to try and stop it.”¹³⁴

Accordingly, as one court put it, an “employer’s response to a third party’s unwelcome sexual advances toward an employee can independently create a hostile work environment.”¹³⁵ Courts applying the negligence standard to employers in the context of third-party sexual harassment have considered, among other things, whether the employer’s response subjected the employee to further abuse.¹³⁶ Thus the Ninth Circuit held that a manicurist could state a claim for a hostile work environment when he told his manager that a customer had asked for sex, and his manager ordered him to complete the customer’s pedicure. The court said that this response “discounted and effectively condoned the customer’s sexual harassment” and sent a message that he “was expected to tolerate the customer’s harassment as part of his job.”¹³⁷ Similarly, the Fifth Circuit ruled that a nurse’s claim about a patient’s persistent groping could go to a jury, given that the employer knew about the behavior and her complaints were “met with laughter and dismissal.”¹³⁸

Two federal appellate courts—the Sixth and Seventh Circuits—have in some cases declined to apply a negligence standard for non-employee harassment.¹³⁹ They use instead a standard more favorable to employers. Under this standard, an employer is liable only if it either intended to

¹³⁰ *Id.* at 344–45.

¹³¹ *Id.*; see also *EEOC v. Cent. Wholesalers*, 573 F.3d 167, 177–78 (4th Cir. 2009) (holding that employer’s response could not justify summary judgment where employer took no or delayed action in response to some of the employee’s complaints even while responding to other complaints).

¹³² *Fried v. Wynn Las Vegas, LLC*, 18 F.4th 643, 647 (9th Cir. 2021) (stating that “it is well established that an employer can create a hostile work environment by failing to take immediate and corrective action in response to a coworker’s or third party’s sexual harassment or racial discrimination the employer knew or should have known about” and that “[a]ll federal circuits are in accord on this point”).

¹³³ 29 C.F.R. § 1604.11(e) (2025) (allowing liability for non-employee harassment when the employer “knows or should have known of the conduct and fails to take immediate and appropriate corrective action”).

¹³⁴ *Gardner v. CLC of Pascagoula, L.L.C.*, 915 F.3d 320, 327 (5th Cir. 2019), *as revised* (Feb. 7, 2019).

¹³⁵ *Fried*, 18 F.4th at 650.

¹³⁶ *Id.* at 651.

¹³⁷ *Id.* at 652.

¹³⁸ *Gardner*, 915 F.3d at 327.

¹³⁹ *Bivens v. Zep, Inc.*, 147 F.4th 635, 646 (6th Cir. 2025) (“Other than the Seventh Circuit, every other circuit to reach the issue, by our count the First, Second, Eighth, Ninth, Tenth, and Eleventh Circuits, has ‘applied’ some form of ‘a negligence theory of liability to the harassing acts of customers.’” (quoting *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062, 1074 (10th Cir. 1998))); *Dunn v. Wash. Cnty. Hosp.*, 429 F.3d 689, 692 (7th Cir. 2005) (holding, in assessing a claim that an independent-contractor doctor harassed nurses, that “the right question is whether the Hospital intentionally created or tolerated unequal working conditions”). There appears to be disagreement between Seventh Circuit panels about the right standard, as some panels apply a negligence standard. *EEOC v. Costco Wholesale Corp.*, 903 F.3d 618, 627 (7th Cir. 2018) (holding that “an employer is responsible for its own negligence if it” fails to prevent violation on its premises); *Nischan v. Stratosphere Quality, LLC*, 865 F.3d 922, 931 (7th Cir. 2017) (applying a negligence standard).

cause the harassment or was substantially certain that harassment would result from its actions.¹⁴⁰ The Sixth Circuit grounded its departure from the negligence rule adopted by the majority of courts in agency principles, reasoning that customers “rarely agree to act on the corporate proprietor’s ‘behalf’” and “are not agents of that company.”¹⁴¹ The court also opined, however, that “many of the circuit cases that nominally apply a negligence standard would likely have been resolved the same way under the intent standard we adopt.” The court explained that plaintiffs harassed by customers in those cases often complained of inaction despite the employer knowing about repeated harassment.¹⁴²

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

Under the *Faragher-Ellerth* paradigm, a harasser’s position in the workplace—as a supervisor, coworker, or third party—has significant legal implication.¹⁴³

Given the legal significance of the harasser’s status, parties often dispute the issue, and courts in turn must determine whether the evidence shows that the harasser was a supervisor or coworker.¹⁴⁴ The *Faragher-Ellerth* decisions did not define the meaning of “supervisor,”¹⁴⁵ and lower courts in turn applied varying interpretations in the absence of a definition.¹⁴⁶

Against a backdrop of disagreement among circuit courts concerning the type of evidence indicative of supervisory status, the Supreme Court addressed the issue in its 2013 decision in *Vance v. Ball State University*.¹⁴⁷ The Court in *Vance* held, in a 5-4 decision, that for purposes of hostile work environment claims, a supervisor is one who has the authority to take actions in the workplace such as hiring, firing, making promotion decisions, reassigning to positions “‘with significantly different responsibilities,’” or making decisions “‘causing a significant change in benefits.’”¹⁴⁸ The Court rejected a definition based on whether the alleged harasser had authority

¹⁴⁰ *Bivens*, 147 F.4th at 648.

¹⁴¹ *Id.* at 647.

¹⁴² *Id.*

¹⁴³ See, e.g., *Howard v. Winter*, 466 F.3d 559, 565 (4th Cir. 2006) (“The question of whether McCall was Howard’s supervisor or her coworker is of great significance because in a case of harassment by a supervisor ‘with immediate (or successively higher) authority over the employee,’ an employer is vicariously liable for the harassment, subject to limited affirmative defenses not relevant here.” (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998))); *Johnson v. Booker T. Washington Broad. Serv., Inc.*, 234 F.3d 501, 513 (11th Cir. 2000) (stating that harasser’s supervisory status, and whether actions taken against plaintiff were tangible employment actions, are “critical”).

¹⁴⁴ See, e.g., *Howard*, 466 F.3d at 566–67; *Wyatt v. Hunt Plywood Co.*, 297 F.3d 405, 411 (5th Cir. 2002).

¹⁴⁵ *Vance v. Ball State Univ.*, 570 U.S. 421, 438 (2013) (explaining that neither *Faragher* nor *Ellerth* presented “the question of the degree of authority that an employee must have in order to be classified as a supervisor”).

¹⁴⁶ *Id.* at 430 (“Under *Ellerth* and *Faragher*, it is obviously important whether an alleged harasser is a ‘supervisor’ or merely a co-worker, and the lower courts have disagreed about the meaning of the concept of a supervisor in this context.”); *Howard*, 466 F.3d at 566 (holding that harasser was not plaintiff’s supervisor, as harasser lacked the authority to fire, promote, demote, or reassign the plaintiff, which the court viewed as the “most powerful indication of supervisory status”); *Mack v. Otis Elevator Co.*, 326 F.3d 116, 120, 126–27 (2d Cir. 2003), *abrogated by Vance v. Ball State Univ.*, 570 U.S. 421 (2013) (holding that harasser was supervisor, though it was undisputed that he *lacked* the authority to hire, fire, demote, promote, transfer, or discipline the plaintiff, where harasser was the “mechanic in charge” who assigned and scheduled the plaintiff’s work and could enforce safety practices and procedures; framing the primary issue as being “whether the authority given by the employer to the employee enabled or materially augmented the ability of the latter to create a hostile work environment for his or her subordinates”).

¹⁴⁷ *Vance*, 570 U.S. at 421.

¹⁴⁸ *Id.* at 432. Though the facts in *Vance* concerned a Title VII claim alleging race-based harassment, the holding in *Vance* applies to all Title VII harassment claims. In general courts apply the same legal standards for analyzing actionable harassment under Title VII, whether that be for harassment based on race, sex, national origin, or religion. (continued...)

to direct the victim's daily work, thereby narrowing the definition of supervisor that some lower courts had previously applied and that was reflected in EEOC guidance.¹⁴⁹ Rather, the Court in *Vance* concluded that "the defining characteristic of a supervisor" is the authority to take a tangible employment action.¹⁵⁰ In the Court's view, its definition of supervisor was a clear, readily workable standard that would, in "a great many cases," be known to the litigants even before litigation commenced.¹⁵¹

The Court in *Vance* also pointed out that an employer would still be subject to liability for harassment by employees not considered supervisors under its definition if the employer's negligence led to the hostile work environment.¹⁵² The Court described the negligence standard as providing sufficient protection for employees harassed by an individual who, while not a supervisor, could assign them unpleasant tasks or alter their work environment.¹⁵³

Since *Vance*, federal courts have regularly encountered cases where a harasser has significant authority over the plaintiff but fails to qualify as a supervisor under the Supreme Court's rule.¹⁵⁴ Panels sometimes come to seemingly inconsistent decisions about how to apply *Vance* to cases involving delegated authority—where an employer relies on a harasser's recommendations to take actions relating to the plaintiff and other employees. For example, in *Kramer v. Wasatch County Sheriff's Office*, the Tenth Circuit held that a sergeant in a sheriff's office was the plaintiff's supervisor, as evidence reflected that the defendant employer relied on recommendations from sergeants like him to decide whether to fire, promote, demote, reassign, and discipline, and the evidence also showed that the sergeant wrote the plaintiff's performance evaluations.¹⁵⁵

In *EEOC v. AutoZone, Inc.*,¹⁵⁶ a Sixth Circuit panel (in an unpublished decision) came to a different conclusion. It held that the alleged harasser, a store manager, was not the supervisor of employees at the store he managed¹⁵⁷ even though he could initiate disciplinary proceedings, hire

See, e.g., EEOC v. Cent. Wholesalers, 573 F.3d 167, 174–77 (4th Cir. 2009) (analyzing Title VII harassment claims based on race and sex); EEOC v. WC&M Enters., Inc., 496 F.3d 393, 399–02 (5th Cir. 2007) (analyzing Title VII harassment claims based on religion and national origin).

¹⁴⁹ *Vance*, 570 U.S. at 431 ("We reject the nebulous definition of a 'supervisor' advocated in the EEOC Guidance and substantially adopted by several courts of appeals."); *id.* at 451 (Ginsburg, J., dissenting) (setting forth the EEOC's two-pronged definition of supervisor as follows: "(1) an individual authorized 'to undertake or recommend tangible employment decisions affecting the employee,' including 'hiring, firing, promoting, demoting, and reassigning the employee'; or (2) an individual authorized 'to direct the employee's daily work activities.'").

¹⁵⁰ *Id.* at 440.

¹⁵¹ *Id.* at 441.

¹⁵² *Id.* at 446.

¹⁵³ *Id.* at 445.

¹⁵⁴ *See, e.g.,* Reynaga v. Roseburg Forest Prods., 847 F.3d 678, 689 (9th Cir. 2017) (holding that harasser, who was lead millwright, was not plaintiff's supervisor despite having authority to direct the work of and assign daily tasks to other millwrights like plaintiff each day; record reflected that lead millwrights did not have hiring, firing, or disciplinary authority); Velazquez v. Devs. Diversified Realty Corp., 753 F.3d 265, 272–73 (1st Cir. 2014) (holding that harasser was not plaintiff's supervisor despite having certain responsibility to direct his work, as record supported conclusion that harasser lacked ability to fire or discipline plaintiff); *see also* EEOC v. AutoZone, Inc., 692 F. App'x 280, 283 (6th Cir. 2017) ("Townsel's ability to direct the victims' work at the store and his title as store manager do not make him the victims' supervisor for purposes of Title VII"; stating that harasser "could not fire, demote, promote, or transfer any employees").

¹⁵⁵ 743 F.3d 726, 740–41 (10th Cir. 2014); *see also* Wyatt v. Nissan N. Am., Inc., 999 F.3d 400, 413 (6th Cir. 2021) (holding there was an issue of fact regarding supervisory status because management had to take harasser's input on management decisions).

¹⁵⁶ *AutoZone*, 692 F. App'x at 283.

¹⁵⁷ *Id.* at 281, 283.

hourly employees, and make recommendations to the district manager concerning employees' demotions or promotions. The court held the store manager was not the victims' supervisor under *Vance* because he did not have the authority to "fire, demote, promote, or transfer any employees."¹⁵⁸ The court concluded that the harasser's "ability to influence [the decisionmaker] does not suffice to turn [him] into his victims' supervisor."¹⁵⁹ Moreover, though the evidence showed that the harasser could hire hourly employees, the court concluded that this was immaterial to the analysis of whether he constituted the victims' supervisor, as he "could not and did not hire the employees he harassed, and that's what matters under *Vance*."¹⁶⁰

Some circuits have separately held that a harasser is a supervisor when the individual has the authority to make decisions indirectly affecting an employee's pay and hours.¹⁶¹ This may be the case, for example, if a supervisor eliminates overtime work.¹⁶² In contrast to delegated authority, another circuit has recognized "apparent" authority—that is, that employees, including the plaintiff, reasonably believe that a harasser is a supervisor—as a basis for attaching supervisory status to a harasser for Title VII purposes.¹⁶³

Additional Types of Sexual Harassment

Same-Sex Harassment

Not every claim of workplace harassment is cognizable under Title VII. As harassment claims arise out of Title VII's antidiscrimination provision, harassment under Title VII must be "because of [an] individual's race, color, religion, sex, or national origin."¹⁶⁴ Plaintiffs can sometimes struggle to show that an instance of harassment was "because of" the plaintiff's protected characteristic. This situation is especially common when the harasser and the victim share the same sex. In its 1998 decision in *Oncale v. Sundowner Offshore Services, Inc.*, the Supreme Court held that Title VII claims alleging harassment by a member of the same sex are viable so long as

¹⁵⁸ *Id.* at 283–84.

¹⁵⁹ *Id.* at 283; *see also* *Morrow v. Kroger Ltd. P'ship I*, 681 F. App'x 377, 380–81 (5th Cir. 2017) (holding harasser was not plaintiff's supervisor, though he was responsible for scheduling employees and completing employee performance evaluations and was consulted about hiring decisions; stating that this evidence did not show harasser could "cause a tangible employment action as is required under *Vance*"). *But see* *Mys v. Mich. Dep't of State Police*, 886 F.3d 591, 600 (6th Cir. 2018) ("An employer is also vicariously liable for retaliation that a supervisor initiates against an employee by causing another actor, that might itself lack retaliatory animus, to take an adverse action against the employee.").

¹⁶⁰ *AutoZone*, 692 F. App'x at 284 (citing *Vance v. Ball State Univ.*, 570 U.S. 421, 423 (2013)).

¹⁶¹ *Moody v. Atl. City Bd. of Educ.*, 870 F.3d 206, 216–17 (3rd Cir. 2017) (holding that custodial foreman was plaintiff's supervisor, where he set hours for substitute custodians like plaintiff and thus "had the authority to cause a significant change in [plaintiff]'s benefits by assigning her no hours, thereby eliminating her take-home pay"); *Schlosser v. VRHabilis, LLC*, 113 F.4th 674, 689 (6th Cir. 2024) (holding that team leader qualified as supervisor because he reassigned plaintiff to tasks with less pay).

¹⁶² *Ray v. Int'l Paper Co.*, 909 F.3d 661, 668 (4th Cir. 2018) ("The record before us could support a jury determination that Ray suffered a tangible employment action when McDowell eliminated her voluntary overtime work.").

¹⁶³ *Kramer v. Wasatch Cnty. Sheriff's Off.*, 743 F.3d 726, 742–43 (10th Cir. 2014) (stating that a harasser could still qualify as a supervisor "under apparent authority principles," in which the employer gives the appearance that it has given a second party power to act on its behalf, and which causes a third party to "reasonably and prudently" believe that the second party has such power).

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

the evidence shows that such harassment “meets the statutory requirements”¹⁶⁵—that is, that the harassment occurred “because of [an] individual’s race, color, religion, sex, or national origin.”¹⁶⁶

In *Oncale*, the Supreme Court addressed a hostile work environment claim brought by a male plaintiff, a member of an all-male oil rig crew, who alleged harassment by his coworker and two supervisory personnel.¹⁶⁷ The defendants and amici argued that harassment between members of the same sex should be excluded categorically from Title VII liability, on the theory that recognizing liability for same-sex harassment would “transform Title VII into a general civility code for the American workplace.”¹⁶⁸ The Court disagreed, concluding that the text of Title VII imposes liability where discrimination is “because of . . . sex” and that “nothing in Title VII necessarily bars a claim of [sex discrimination] merely because the plaintiff and the defendant (or the person charged with acting on behalf of the defendant) are of the same sex.”¹⁶⁹ As the Court stated, “[t]he critical issue . . . is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”¹⁷⁰

Although the Court recognized the viability of Title VII claims alleging same-sex harassment in *Oncale*, it stated that such cases face a distinctive challenge in proving that the harassment occurred *because of* the plaintiff’s sex. In the typical sexual harassment case, the Court explained there is often little difficulty in making this showing, as “the challenged conduct typically involves explicit or implicit proposals of sexual activity it is reasonable to assume those proposals would not have been made to someone of the same sex.”¹⁷¹ In same-sex harassment cases, the Court suggested three “routes” by which a plaintiff could prove that the harassing conduct was because of the plaintiff’s sex: (1) “credible evidence” that the harasser was homosexual or motivated by sexual desire; (2) evidence that the harasser used “sex-specific and derogatory terms” reflecting the harasser’s general hostility toward individuals of a particular sex; or (3) comparative evidence about how a harasser treats members of both sexes to show a hostility toward one sex or the other.¹⁷²

The Court in *Oncale* also explained that, much like the analysis of whether harassment is objectively “severe or pervasive,” evaluating whether same-sex harassment occurred because of the plaintiff’s sex turns on a “careful consideration of the social context in which particular behavior occurs.”¹⁷³ As the “real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships,” the Court said that “[c]ommon sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and

¹⁶⁵ 523 U.S. 75, 80 (1998).

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

¹⁶⁷ *Oncale*, 523 U.S. at 77.

¹⁶⁸ *Id.* at 80.

¹⁶⁹ *Id.* at 79.

¹⁷⁰ *Id.* at 80.

¹⁷¹ *Id.*

¹⁷² *Id.* The Court emphasized, however, that harassment is not “automatically discrimination because of sex merely because the words used have sexual content or connotations.” *Id.*

¹⁷³ *Id.* at 81 (stating, for example, that “[a] professional football player’s working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field—even if the same behavior would reasonably be experienced as abusive by the coach’s secretary (male or female) back at the office”).

conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive."¹⁷⁴

Oncale provided important guidelines to lower courts. The first and the third evidentiary routes *Oncale* suggested appear to be the most common routes pursued by plaintiffs seeking to establish same-sex harassment claims.¹⁷⁵ One commentator, looking at 105 same-sex harassment cases, found that 40 used the first evidentiary route, while 25 utilized the third route.¹⁷⁶ In four cases, the plaintiff relied on the second, "general hostility" route.¹⁷⁷ Lower courts have also generally held that the three routes suggested in *Oncale* are not exclusive, allowing plaintiffs pursuing same-sex harassment claims some flexibility in showing that the harassment was because of sex.¹⁷⁸

Some cases illustrate how the *Oncale* evidentiary routes are applied in practice. For example, in *Cherry v. Shaw Coastal*, the Fifth Circuit addressed a case involving the first *Oncale* route—evidence of homosexuality or sexual desire—in which the plaintiff, a male employee, alleged that he faced a series of harassing comments and behavior from his male supervisor, including text messages suggesting sexual attraction and inappropriate touching.¹⁷⁹ Here, the court found "more than sufficient evidence to support the conclusion" that the supervisor's conduct was "sexual in nature."¹⁸⁰ The third *Oncale* route—evidence that the harasser treated members of one sex differently from another—was at issue in *Chavez v. Thomas & Betts Corp.*, where the Tenth Circuit affirmed a jury verdict finding actionable sexual harassment.¹⁸¹ In that case, the plaintiff, a woman, alleged that her female supervisor had harassed her by "target[ing] her as a woman and repeatedly humiliat[ing] her in front of men in the workplace" through humiliating comments about her "body parts" and exposing her underwear to her coworkers, without engaging in any similarly abusive conduct toward men in the workplace.¹⁸² The court concluded that this differential treatment was enough for a reasonable jury to conclude that the plaintiff was harassed because of her sex.¹⁸³

Difficulty may arise when the plaintiff's evidence does not demonstrate either sexual desire or differential treatment, but the harassment is nonetheless sexualized in nature. In one such case, the Sixth Circuit affirmed a grant of summary judgment for the defendant when the plaintiff, a woman, alleged that her female supervisor called herself the "bitch in charge," exposed her breasts, made a vulgar comment and gesture toward the plaintiff's breasts, and repeatedly

¹⁷⁴ *Id.* at 81–82.

¹⁷⁵ Clare Diefenbach, *Same-Sex Sexual Harassment after Oncale: Meeting the Because of...Sex Requirement*, 22 BERK. J. OF GENDER, L. & JUSTICE 42, 49 n.58 (2007).

¹⁷⁶ *Id.* Other cases applied multiple routes or did not apply any specific *Oncale* route.

¹⁷⁷ *Id.* at 70.

¹⁷⁸ *Roberts v. Glenn Indus. Grp., Inc.*, 998 F.3d 111, 121 (4th Cir. 2021) ("*Oncale* does not limit the evidentiary routes by which a plaintiff may prove same-sex sexual harassment to those the Court described."); *EEOC v. Boh Bros. Constr. Co., LLC*, 731 F.3d 444, 455 (5th Cir. 2013) ("Every circuit to squarely consider the issue has held that the *Oncale* categories are illustrative, not exhaustive, in nature."); *see also Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 264 (3d Cir. 2001) ("Based on the facts of a particular case and the creativity of the parties, other ways in which to prove that harassment occurred because of sex may be available." (citing *Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1009 (7th Cir. 1999)).

¹⁷⁹ *Cherry v. Shaw Coastal, Inc.*, 668 F.3d 182, 187–88 (5th Cir. 2012).

¹⁸⁰ *Id.* *See also Johnson v. Dollar Gen. Corp.*, 104 F.E.P. 532 (E.D. Tenn. 2008) (holding that where supervisor made sexually explicit comments, touched plaintiff, and said he was "every gay person's dream" there was sufficient evidence for a jury to find that the harassment was motivated by sexual desire and because of the plaintiff's sex).

¹⁸¹ 396 F.3d 1088, 1093–94 (10th Cir. 2005), *overruled on other grounds as recognized in EEOC v. Picture People, Inc.*, 684 F.3d 981 (10th Cir. 2012).

¹⁸² *Id.* at 1098.

¹⁸³ *Id.*

suggested that the plaintiff did not wear underwear.¹⁸⁴ While the court acknowledged that the conduct was “unacceptable in a work environment,” it concluded that the plaintiff had failed to show that the conduct was motivated by her sex, either in terms of the supervisor’s general hostility toward women or the supervisor’s sexual desire.¹⁸⁵ Some courts have distinguished between sexualized bullying by members of the same sex and harassment “because of” sex,¹⁸⁶ yet the precise line between these two appears to remain unclear.

Some same-sex harassment cases, beyond using the routes suggested in *Oncale*, have succeeded by showing that the plaintiff was harassed for failing to conform to gender stereotypes. In *Price Waterhouse v. Hopkins*—a case involving a woman who argued that she was denied partnership at an accounting firm because she was considered insufficiently feminine—the Supreme Court, in a plurality opinion that has generally been accepted by lower courts,¹⁸⁷ held that sex discrimination under Title VII could occur when an employer discriminates on the basis of the employee’s failure to fit within a sex-based stereotype.¹⁸⁸ Combining the reasoning of that case with *Oncale*, some courts have concluded that harassment on the basis of sex can occur when the plaintiff can show that the harassment resulted from a failure to conform to sex-based stereotypes. For example, in *EEOC v. Boh Brothers Construction Co., LLC*, a same-sex harassment case involving men at a construction site, the Fifth Circuit held that the evidence was sufficient to demonstrate that the alleged harassment was because of the victim’s “sex” based on the plaintiff’s nonconformity to male sex stereotypes.¹⁸⁹ There, the plaintiff provided evidence that the supervisor thought the victim was not a “manly-enough man” and that he used a number of feminine sex-based epithets to refer to the plaintiff.¹⁹⁰

Harassment Because of Sexual Orientation or Gender Identity

The Supreme Court ruled in *Bostock v. Clayton County* that Title VII’s prohibition on discrimination “because of . . . sex” forbids employers from making employment decisions

¹⁸⁴ *Wade v. Automation Pers. Servs.*, 612 F. App’x 291, 294 (6th Cir. 2015).

¹⁸⁵ *Id.* at 297–98 (stating that the plaintiff had only offered “conclusory allegations and unsupported speculation” to support her claim that the harassment was based on her sex). The court held as such despite the allegation that the supervisor had said at one point that if she “were a lesbian, she would date her lesbian friend.” *Id.* at 296. *But see* *Nathan v. Great Lakes Water Auth.*, 992 F.3d 557, 567 (6th Cir. 2021) (holding that female managers’ remarks about plaintiff’s breasts and bra were based on sex and could, if frequent, amount to sex-based harassment, as the “sex-specific and derogatory nature of these comments means that the sex of the harassers does not change the outcome of this case”).

¹⁸⁶ *See* *Lord v. High Voltage Software, Inc.*, 839 F.3d 556, 559 (7th Cir. 2016) (finding insufficient evidence that harassment was because of sex, where a male plaintiff claimed his male coworkers harassed him by making comments with sexual connotations about the plaintiff and a female coworker, and by unwanted physical contact between his legs or on his buttocks four times); *Betz v. Temple Health Sys.*, 659 F. App’x 137, 145 (3d Cir. 2016) (affirming district court’s grant of a motion to dismiss for failure to state a claim on same-sex sexual harassment claim where female plaintiff alleged work environment was sexually offensive, as other female nurses would “regularly ‘joke’ with each other by licking, groping, making lewd gestures, or pretending to grope each other’s breasts and genitals”).

¹⁸⁷ *See, e.g.*, *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 342 (7th Cir. 2017); *Jespersen v. Harrah’s Operating Co.*, 444 F.3d 1104, 1111 (9th Cir. 2006); *Smith v. City of Salem*, 378 F.3d 566, 570 (6th Cir. 2004).

¹⁸⁸ 490 U.S. 228, 241–42 (1989) (plurality opinion), *superseded by statute on other grounds as stated in* *Comcast Corp. v. Nat’l Ass’n of Afr. Am.-Owned Media*, 589 U.S. 327, 337 (2020).

¹⁸⁹ *EEOC v. Boh Bros. Constr. Co., LLC*, 731 F.3d 444, 459–60 (5th Cir. 2013).

¹⁹⁰ *Id.* at 457; *see also* *Roberts v. Glenn Indus. Grp., Inc.*, 998 F.3d 111, 120 (4th Cir. 2021) (concluding that *Oncale* and *Price Waterhouse* support a cause of action for harassment based on “failure to conform to sex stereotypes”); *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 291 (3d Cir. 2009) (holding that plaintiff’s “sex stereotyping” claim survived summary judgment, where plaintiff was harassed for his “effeminate” traits and called nicknames like “Rosebud”); *Nichols v. Azteca Rest. Enter., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001) (holding that verbal abuse of plaintiff accusing him of “walking and carrying his tray ‘like a woman’” stated a valid claim under Title VII).

because of an employee's sexual orientation or gender identity. In reaching that conclusion, the Court focused on the statutory text, which, the Court held, implemented a "but for" causation standard. The Court reasoned that because discrimination based on sexual orientation or gender identity necessarily involves consideration of an individual's sex, such actions are unlawful under Title VII. "An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex," the Court held.¹⁹¹ In other words, an employer who fires a male employee because he dates men acts because of the employee's sex. If the same employee were female, the employer would not have fired her for dating men. Similarly, an employer who fires a man who identifies as a woman acts because of that plaintiff's sex; the employer would not fire a woman who identified as a woman.¹⁹²

Bostock considered claims from employees who faced adverse employment actions. It did not address harassment or explain how its interpretation of sex discrimination under Title VII might apply to harassment claims. Nevertheless, the case has appeared to authorize employees to bring harassment claims when they are discriminated against because of their sexual orientation or gender identity, and courts have adjudicated such claims. As the Fifth Circuit stated, however, "the Court expanded the groups of individuals protected by Title VII" in *Bostock* but "in no way altered the preexisting legal standard for sexual harassment."¹⁹³

Accordingly, courts assessing such claims have considered issues such as the frequency and severity of the mistreatment, as is common in sexual harassment cases, even as they face novel fact patterns. For example, the Sixth Circuit rejected an employee's harassment suit based on claims that coworkers sent him Bible verses after he came out as gay and gave him gifts such as pink nail polish.¹⁹⁴ These actions "could be seen as targeting his sexual orientation," the court acknowledged,¹⁹⁵ but comparing his situation with fact patterns in other sexual harassment cases, the court found that the treatment was not severe or pervasive. Similarly, another Sixth Circuit panel found that an employer mistreated an employee because of his sexual orientation by directing him to act more masculine (removing body piercings and changing his hairstyle) and to take down his relationship status on Facebook (showing he was dating a man),¹⁹⁶ but these isolated actions did not create a hostile work environment in the court's view.¹⁹⁷

In contrast, the Eleventh Circuit in *Copeland v. Georgia Department of Corrections* reversed a district court and concluded that a jury could find that a transgender prison guard endured severe or pervasive harassment.¹⁹⁸ The court pointed to allegations that staff and supervisors consistently

¹⁹¹ *Bostock v. Clayton County*, 590 U.S. 644, 651–52 (2020).

¹⁹² It is unclear if *Bostock*'s interpretation of Title VII extends to employees who are discriminated against because they are nonbinary or bisexual. See *Howse v. Topre Am. Corp.*, No. 3:24-CV-00034, 2025 WL 2174857, at *3 (M.D. Tenn. July 31, 2025) ("[T]he rationale of the [*Bostock*] decision provides no basis to conclude that discrimination against men who are attracted to men is impermissibly 'based on sex,' but discrimination against men who are attracted to men and women is not."); Elizabeth Gross, *Where Is the "B" In Bostock? An Overview of the Supreme Court's Expansion of Title VII's Protection to LGBTQ+ Employees and the Impact of the Supreme Court's Exclusion of Bisexual, Nonbinary, and Other Minority Sexual Identities and Gender Orientation*: *Bostock v. Clayton County*, 48 W. ST. L. REV. 23, 41 (2021); Nancy C. Marcus, *Bostock v. Clayton County and the Problem of Bisexual Erasure*, 115 NW. U.L. REV. ONLINE 223, 228 (2020).

¹⁹³ *Newbury v. City of Windcrest*, 991 F.3d 672, 677 (5th Cir. 2021).

¹⁹⁴ *Kilpatrick v. HCA Hum. Res., LLC*, No. 22-5307, 2023 WL 1961223, at *4 (6th Cir. Feb. 13, 2023).

¹⁹⁵ *Id.*

¹⁹⁶ *Boshaw v. Midland Brewing Co.*, 32 F.4th 598, 601 (6th Cir. 2022).

¹⁹⁷ *Id.* at 606.

¹⁹⁸ *Copeland v. Ga. Dep't of Corr.*, 97 F.4th 766, 770 (11th Cir. 2024).

laughed at and taunted the plaintiff and called him “ma’am” on the prison-wide radio system. This happened daily, three or four times a day, according to the plaintiff.¹⁹⁹ Coworkers also called the plaintiff “that” and “it” and speculated over whether he had a “dildo” in “her” pants.²⁰⁰ At times, coworkers pushed him or blocked his way. The plaintiff identified 34 coworkers who participated in this behavior. They joked about him in front of inmates, who joined in.²⁰¹ This treatment, the court concluded, could qualify as pervasive.²⁰² A factfinder could also find this mistreatment severe, the court concluded, given that supervisors participated and considering the context: work in a correctional institution. Harassing the plaintiff in this environment, the court opined, “sends the message to coworkers that the victim need not receive the support and cooperation necessary to remain safe. It sends the message to inmates that the victim is fair game.”²⁰³

Bostock also reaffirmed that Title VII allows claims based on failure to conform to sex stereotypes, and courts have applied this understanding in harassment cases involving perceived sexual orientation.²⁰⁴ For example, in *Roberts v. Glenn Industries Group*, the Fourth Circuit relied on *Bostock* to allow a worker to sue for harassment by a supervisor who perceived him as gay.²⁰⁵ The supervisor called the worker “gay,” asked him “how much dicks [he] would suck for money,” and physically assaulted him.²⁰⁶ “*Bostock* makes clear that a plaintiff may prove that same-sex harassment is based on sex where the plaintiff was perceived as not conforming to traditional male stereotypes,” the court explained.²⁰⁷

Harassment cases based on gender identity and sexual orientation continue to present new fact patterns. The Court in *Bostock* expressly declined to “address bathrooms, locker rooms, or anything else of the kind.”²⁰⁸ The decision therefore did not give much guidance on whether a Title VII harassment claim is available when transgender employees allege discrimination in same-sex spaces, or what such a claim might look like. *Bostock* did not make clear whether refusing to use an employee’s preferred name or pronoun is harassment or whether it can contribute to a hostile environment. *Bostock* also did not address the potential intersection of employer and employee religious rights and discrimination claims based on sexual orientation and gender identity.²⁰⁹ It remains to be seen how such issues may be addressed by courts in the future.

¹⁹⁹ *Id.* at 771.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.* at 777.

²⁰³ *Id.* at 778. The plaintiff was attacked and injured by an inmate. *Id.*

²⁰⁴ *Bostock v. Clayton County*, 590 U.S. 644, 673 (2020) (stating that Title VII bars firing “men who do not behave in a sufficiently masculine way around the office”).

²⁰⁵ 998 F.3d 111, 121 (4th Cir. 2021).

²⁰⁶ *Roberts v. Glenn Indus. Grp., Inc.*, 998 F.3d 111, 115 (4th Cir. 2021).

²⁰⁷ *Id.* at 121.

²⁰⁸ *Id.* at 681.

²⁰⁹ See *Braidwood Mgmt., Inc. v. EEOC*, 70 F.4th 914, 921, 937 (5th Cir. 2023) (deciding that the Religious Freedom Restoration Act required defendant be given an exemption to Title VII protections for sexual orientation and gender identity).

Sexist Harassment

Sexual harassment includes all harassment based on sex. Mistreatment need not take the form of unwanted sexual advances or other sexual conduct.²¹⁰ Instead, demonstrations of “‘anti-female animus’ can support a sexual harassment claim based on a hostile work environment.”²¹¹ As the Eighth Circuit observed, “intimidation and hostility toward women because they are women can obviously result from conduct other than explicit sexual advances.”²¹² This type of hostile environment is one that “is hostile because it is ‘sexist rather than sexual.’”²¹³

Such harassment might include expressions of hostility toward women in the workplace, targeting a worker for discipline or humiliation on account of her sex, or shows of physical aggression.²¹⁴ In one case, the Eighth Circuit concluded that plaintiffs could show a hostile environment after pointing to a “plethora of offensive incidents,” including a male worker urinating in a female worker’s water bottle and several men urinating in another woman’s gas tank.²¹⁵

A sexist hostile environment may also take the form of frequent gender-specific epithets. For example, as the Seventh Circuit observed, “repeated use of the word ‘bitch’ to demean a female employee could support a claim of sexual harassment if it was sufficiently pervasive or severe and if the context showed a hostility to the plaintiff because she was a woman.”²¹⁶ The court in that case concluded that name-calling alleged by the plaintiff supported a claim of hostile environment because her supervisor used the insult not “in jest” but “together with his threats against [her] employment.”²¹⁷ Sexist behavior must still be severe or pervasive to qualify as harassment.²¹⁸

Title VII also protects against discrimination in employment based on pregnancy and, accordingly, harassment based on pregnancy. In 1978, the Pregnancy Discrimination Act²¹⁹ specified that pregnancy and related medical conditions fall under Title VII’s protections against sex discrimination. Courts have recognized pregnancy harassment, such as managers urging pregnant workers to quit²²⁰ or to terminate a pregnancy,²²¹ can give rise to Title VII claims.²²²

²¹⁰ See *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 80 (1998); *Williams v. Gen. Motors Corp.*, 187 F.3d 553, 565 (6th Cir. 1999) (“Any unequal treatment of an employee *that would not occur but for the employee’s gender* may, if sufficiently severe or pervasive under the *Harris* standard, constitute a hostile environment in violation of Title VII.”).

²¹¹ *Passananti v. Cook County*, 689 F.3d 655, 664 (7th Cir. 2012).

²¹² *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1014 (8th Cir. 1988).

²¹³ *Passananti*, 689 F.3d at 664.

²¹⁴ *Id.*; *Williams*, 187 F.3d at 559 (observing that, among other things, a worker threw boxes at plaintiff).

²¹⁵ *Hall*, 842 F.2d at 1012, 1015.

²¹⁶ *Passananti*, 689 F.3d at 665; *Sharp v. S&S Activewear, L.L.C.*, 69 F.4th 974, 979 (9th Cir. 2023) (holding sexual harassment claim can be based on “use of sexually degrading, gender-specific epithets”).

²¹⁷ *Passananti*, 689 F.3d at 667.

²¹⁸ *Boumehdi v. Plastag Holdings, LLC*, 489 F.3d 781, 789 (7th Cir. 2007) (holding plaintiff could make out a harassment claim where her supervisor “made at least eighteen sexist or sexual comments in less than a year’s time”).

²¹⁹ 42 U.S.C. § 2000e(k).

²²⁰ *Zisumbo v. McCleod USA Telecomms. Servs., Inc.*, 154 F. App’x 715, 726 (10th Cir. 2005).

²²¹ *Bergstrom-Ek v. Best Oil Co.*, 153 F.3d 851, 854–55 (8th Cir. 1998) (discussing plaintiff’s allegation that employer told her at least six times to get an abortion, calling her at home and offering to pay for it); *Hercule v. Wendy’s of N.E. Fla., Inc.*, No. 9:10-CV-80248, 2010 WL 1882181, at *1 (S.D. Fla. May 11, 2010) (describing allegation that manager encouraged plaintiff to have an abortion).

²²² CRS Report R46821, *Pregnancy and Labor: An Overview of Federal Laws Protecting Pregnant Workers*, by April J. Anderson (2023).

Additional Causes of Action for Sexual Harassment

Quid Pro Quo Harassment

Though Title VII sexual harassment claims are often raised as “hostile work environment” claims, a Title VII violation can also be established with evidence of quid pro quo harassment.²²³ Quid pro quo harassment occurs when a supervisor takes a “tangible employment action” against an employee (such as firing the employee or denying her a promotion)²²⁴ in relation to the supervisor’s sexual demands.²²⁵ Though some federal appellate courts require a plaintiff to show a tangible employment action resulting from his or her *refusal* to submit to demands for sexual conduct,²²⁶ other federal appellate courts will also accept a showing that an employee submitted to unwelcome advances to avoid losing job benefits.²²⁷ In some cases, an employee submits to unwanted advances and, when he or she later refuses sexual favors, faces punishment or loss of privileges. In such cases, the change in terms or conditions of employment after a worker refuses sex shows the quid pro quo.²²⁸ Still other federal appellate courts have appeared to acknowledge the possibility of quid pro quo claims under Title VII where the plaintiff submits to a supervisor’s

²²³ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 752 (1998) (distinguishing between quid pro quo and hostile work environment claims); *see also* *Jones v. Needham*, 856 F.3d 1284, 1291 (10th Cir. 2017) (explaining that the terms quid pro quo and “hostile work environment” are “shorthand descriptors to delineate different ways in which sexual harassment can occur”).

²²⁴ “A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.” *Ellerth*, 524 U.S. at 761. Federal courts of appeals use the *Ellerth* definition in evaluating quid pro quo claims. *See, e.g.,* *La Day v. Catalyst Tech., Inc.*, 302 F.3d 474, 482 (5th Cir. 2002); *see also, e.g.,* *Quantock v. Shared Mktg. Servs., Inc.*, 312 F.3d 899, 902, 903 n.1 (7th Cir. 2002) (upholding dismissal of quid pro quo claim because plaintiff’s transfer was not a tangible employment action, as it was a temporary change in her job responsibilities rather than a “‘significant diminishment’ of material responsibilities”).

²²⁵ *See, e.g.,* *Hulsey v. Pride Rests., LLC*, 367 F.3d 1238, 1245 n.4, 1247 (11th Cir. 2004); *Hernandez-Loring v. Universidad Metropolitana*, 233 F.3d 49, 50, 52–54 (1st Cir. 2000).

²²⁶ *See, e.g.,* *Pinkerton v. Colo. Dep’t of Transp.*, 563 F.3d 1052, 1059–60 (10th Cir. 2009) (stating that to prevail on quid pro quo claim, plaintiff “must show that a reasonable jury could find [that her supervisor] conditioned concrete employment benefits on her submission to sexual conduct and had her fired when she did not comply”); *La Day v. Catalyst Tech., Inc.*, 302 F.3d 474, 481 (5th Cir. 2002) (holding that to establish claim, “[t]he plaintiff must show that he suffered a ‘tangible employment action’ that ‘resulted from his acceptance or rejection of his supervisor’s alleged sexual harassment.’” (quoting *Casiano v. AT&T Corp.*, 213 F.3d 278, 283 (5th Cir. 2000))); *Hernandez-Loring*, 233 F.3d at 52 (“Under Title VII, quid pro quo sexual harassment can be shown where a supervisor uses employer processes to punish a subordinate for refusing to comply with sexual demands.”).

²²⁷ *See, e.g.,* *Cram v. Lamson & Sessions Co.*, 49 F.3d 466, 473 (8th Cir. 1995) (requiring evidence of either a refusal that results in a tangible job detriment or submission as an implied or express condition of receiving job benefits); *Huang v. Ohio State Univ.*, 116 F.4th 541, 560 (6th Cir. 2024); *see also* *Molnar v. Booth*, 229 F.3d 593, 602–03 (7th Cir. 2000) (discussing “classic” quid pro quo jury instruction explaining that such harassment “occurs when a supervisor uses his supervisory authority either by making submission to requests for sexual favors a term or condition of the individual’s employment, or by making submission or rejection the basis for decisions affecting the individual”); *Holly D. v. Cal. Inst. of Tech.*, 339 F.3d 1158, 1162–64 (9th Cir. 2003) (describing allegations that plaintiff, a professor’s assistant, alleged that she was forced to engage in sexual intercourse with her supervisor, and that “there was an implication that her continued employment depended on her complying with the professor’s unwelcome sexual advances”; for example, she alleged that when she first rebuffed his sexual behavior and advances, her supervisor gave her a negative performance evaluation and was “‘supercritical’” of her work, but later when she submitted to his sexual advances, she received an evaluation that was “‘excellent’”).

²²⁸ *Starnes v. Butler Cnty. Ct. of Common Pleas*, 50th Jud. Dist., 971 F.3d 416, 427 (3d Cir. 2020) (Considering sex discrimination under Title VII and an equal protection theory and stating allegation that “after they stopped having sex, Starnes alleged that she was denied many terms and conditions of her employment”).

sexual demands, but without expressly holding that such claims are cognizable.²²⁹ The Supreme Court has not addressed this issue.²³⁰

If evidence shows that a tangible employment action occurred, a plaintiff alleging quid pro quo harassment need not also establish that the harassment was sufficiently “severe or pervasive” to alter the conditions of her employment;²³¹ in other words, the legal standard applied to hostile work environment claims does *not* apply to quid pro quo claims. As the Supreme Court explained in *Ellerth*, the tangible employment action resulting from an employee’s refusal to submit to a supervisor’s sexual demands *itself* explicitly alters the terms and conditions of the plaintiff’s employment.²³² Without evidence of a tangible employment action, however, courts will generally analyze the claim as alleging a “hostile work environment,”²³³ and will thus, in that analysis, require a showing that the harassment was “severe or pervasive” enough to constitute a Title VII violation.

Just as an employer is strictly liable for supervisory harassment that results in a tangible employment action, federal courts generally hold that an employer is strictly liable for quid pro quo harassment.²³⁴

²²⁹ *Dulaney v. Packaging Corp. of Am.*, 673 F.3d 323, 329 n. 6 (4th Cir. 2012) (recognizing a “submission theory of liability” but stating that it need not address that issue as it concluded that district court’s grant of summary judgment on plaintiff’s claim was inappropriate on other grounds); *Lutkewitte v. Gonzales*, 436 F.3d 248, 254 (D.C. Cir. 2006) (explaining that the “Supreme Court has not addressed whether an employer can be held strictly liable when an employee submits to her supervisor’s sexual demands because she reasonably believes that her benefits or continued employment are conditioned upon her acquiescence” and stating that it need not decide the legal question given its resolution of the case on other grounds); *see also* *Hicks v. Gates Rubber Co.*, 928 F.2d 966, 968 (10th Cir. 1991) (rejecting quid pro quo claim, stating employee was “not required to submit to sexual conduct or harassment to keep her job”); *Newton v. Cadwell Labs.*, 156 F.3d 880, 883 (8th Cir. 1998) (agreeing with district court that plaintiff had not suffered a tangible employment action for rejecting supervisor’s advances after consensual affair had ended; stating that plaintiff admitted that her supervisor “never conditioned her continued employment on submission to [his] sexual advances”).

²³⁰ The plaintiffs in *Faragher* and *Ellerth* did not argue that they were subject to quid pro quo harassment. *See* *Faragher v. City of Boca Raton*, 524 U.S. 775, 780–83 (1998) (describing allegations the plaintiff’s two supervisors repeatedly subjected her and other female lifeguards to unwanted and offensive touching, including touching her buttocks, and made lewd sexual remarks during her employment; plaintiff eventually resigned); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 747 (1998) (stating the legal issue as whether, under Title VII, “an employee who refuses the unwelcome and threatening sexual advances of a supervisor, yet suffers no adverse, tangible job consequences, can recover against the employer without showing the employer is negligent or otherwise at fault for the supervisor’s actions”). Though the plaintiff in *Meritor* alleged that her supervisor’s harassment included repeated sexual demands to which she submitted “out of what she described as fear of losing her job,” the Court construed her to allege a hostile or abusive working environment. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65–67 (1986); *see also*, *Holly D.*, 339 F.3d at 1167–68 (stating that the “Supreme Court has not yet resolved the question of how the successful coercion of sex by a supervisor who has brought to bear the weight of the business enterprise and thereby compelled an unwilling employee to submit to his sexual demands fits into the *Faragher/Ellerth* dichotomy”); *Jin v. Metro. Life Ins.*, 310 F.3d 84, 96–97 (2d Cir. 2002) (explaining that neither the Supreme Court’s decisions in *Faragher* nor *Ellerth* involved allegations of coerced submission).

²³¹ *See, e.g.*, *Henthorn v. Cap. Commc’ns, Inc.* 359 F.3d 1021, 1027 (8th Cir. 2004) (“A plaintiff in that situation need not prove that the offensive conduct is severe or pervasive because any carried-out threat is itself deemed an actionable change in the terms or conditions of employment.” (citing *Ellerth*, 524 U.S. at 753–54)).

²³² *Ellerth*, 524 U.S. at 753–54.

²³³ *See, e.g.*, *La Day v. Catalyst Tech., Inc.*, 302 F.3d 474, 482–83 (5th Cir. 2002) (concluding that plaintiff failed to establish a quid pro quo claim given the lack of evidence that he was denied a promotion for refusing to submit to his supervisor’s sexual advances; explaining that “[i]f the plaintiff fails to provide sufficient evidence of quid pro quo harassment, he must prove the existence of hostile environment harassment,” and proceeding to analyze whether the plaintiff’s allegations were sufficient to establish a “hostile work environment” claim).

²³⁴ *Hulsey v. Pride Rests., LLC*, 367 F.3d 1238, 1245 (11th Cir. 2004) (explaining that when an employee’s refusal to (continued...)

Constructive Discharge

Rather than firing an employee, an employer may compel the employee to resign, for example, by creating intolerable working conditions. This scenario is known as a “constructive discharge.”²³⁵ In its 2004 decision in *Pennsylvania State Police v. Suders*, the Supreme Court recognized a constructive discharge claim under Title VII in a case involving a woman who sued her former employer, the state police, alleging sexual harassment by her supervisors so intolerable that she was forced to resign.²³⁶ The allegations in *Suders* included that the plaintiff’s supervisors brought up inappropriate subjects, routinely grabbed their genitals, belittled and intimidated her, and had her wrongly arrested for the theft of a set of job-required examinations.²³⁷ The questions presented to the Supreme Court were (1) whether the plaintiff could bring a claim for constructive discharge in the first instance; and (2) if constructive discharge was a viable Title VII claim, whether a defendant could raise the *Ellerth/Faragher* affirmative defense.²³⁸

On the first question, the Court held that constructive discharge in sexual harassment cases is a valid claim, one that can be characterized as an “aggravated case” of sexual harassment or a hostile work environment.²³⁹ According to the Court in *Suders*, a plaintiff bringing a constructive discharge claim must “show working conditions so intolerable that a reasonable person would have felt compelled to resign.”²⁴⁰ The claim is of the “same genre” as hostile work environment claims generally but is a “‘worse case’ harassment scenario, harassment ratcheted up to the breaking point.”²⁴¹ As with the “severe or pervasive” standard, the application of this standard depends on the facts of each case.²⁴² The Court held that the plaintiff in *Suders* had presented sufficient evidence to go to a jury on her claim of constructive discharge.²⁴³

Federal courts, applying *Suders*, generally agree that the conduct involved in a constructive discharge case must be worse than what would suffice to show “severe or pervasive”

submit to a supervisor’s sexual demands results in a tangible employment action taken against her, an employer is liable under Title VII (citing *Ellerth*, 524 U.S. at 765)); *Wyatt v. Hunt Plywood Co.*, 297 F.3d 405, 409 (5th Cir. 2002) (“In a quid pro quo suit, proof that a tangible employment action resulted from a supervisor’s sexual harassment renders the employer vicariously liable, and no affirmative defense can be asserted.”); *Molnar*, 229 F.3d at 602–03 (stating that instruction given to jury was a “classic” quid pro quo instruction, where jury was instructed that the employer “was strictly liable for quid pro quo harassment”).

²³⁵ *Constructive Discharge*, BLACK’S LAW DICTIONARY (12th ed. 2024) (defining constructive discharge as an “employer’s creation of working conditions that leave a particular employee or group of employees little or no choice but to resign”).

²³⁶ 542 U.S. 129, 133 (2004). Appellate courts have since applied the constructive discharge theory to other claims of harassment, such as age-based harassment, *Stamey v. Forest River, Inc.*, 37 F.4th 1220, 1225 (7th Cir. 2022), and racial harassment, *Chislett v. N.Y.C. Dep’t of Educ.*, 157 F.4th 172, 193 (2d Cir. 2025).

²³⁷ *Suders*, 542 U.S. at 135–36.

²³⁸ *Id.* at 139 (As explained above, the *Ellerth/Faragher* defense represents a complete defense to liability when the defendant can establish it, so its applicability to constructive discharge may be significant).

²³⁹ *Id.* at 146–47.

²⁴⁰ *Id.* at 147.

²⁴¹ *Id.* at 147–48.

²⁴² *See supra* “The ‘Severe or Pervasive’ Standard.” *See also* *Mandel v. M&Q Packaging Corp.*, 706 F.3d 157, 169–70 (3d Cir. 2013) (“In determining whether an employee was forced to resign, we consider a number of factors, including whether the employee was threatened with discharge, encouraged to resign, demoted, subject to reduced pay or benefits, involuntarily transferred to a less desirable position, subject to altered job responsibilities, or given unsatisfactory job evaluations.”); *Easterling v. Sch. Bd. of Concordia Par.*, 196 F. App’x 251, 253 (5th Cir. 2006); *Plautz v. Potter*, 156 F. App’x 812, 818 (6th Cir. 2005).

²⁴³ *Pa. State Police v. Suders*, 542 U.S. 129, 152 (2004).

harassment.²⁴⁴ In other words, if a plaintiff cannot show actionable harassment, the plaintiff's constructive discharge claim must fail as well.²⁴⁵ Relatedly, it is possible to establish "severe or pervasive" harassment without reaching the level necessary to show a constructive discharge.²⁴⁶

The second question before the Court in *Suders* was whether an employer could ever raise the *Faragher-Ellerth* affirmative defense to a constructive discharge claim. Drawing from the reasoning of its *Faragher* and *Ellerth* decisions, the Court concluded that the defense would not be available if an "official act" caused the constructive discharge. An employer *cannot* avail itself of the defense, the Court held, "if the plaintiff quits in reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation, for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions."²⁴⁷

This conclusion opened the door to a new question: When is a constructive discharge the result of an "official act"? The Court in *Suders* defined an "official act" as "an employer-sanctioned adverse action officially changing [the plaintiff's] employment status or situation."²⁴⁸ It also discussed two lower court examples to illustrate the concept. First, the Court cited *Reed v. MBNA Marketing Systems, Inc.*, a case where the plaintiff raised a constructive discharge claim based on a supervisor's sexual comments and sexual assault. The Court agreed with the First Circuit that there was no "official act" there; the supervisor's conduct was "exceedingly unofficial and involved no direct exercise of company authority."²⁴⁹ As a result, the defendant could raise the affirmative defense.²⁵⁰ By contrast, the Court pointed to *Robinson v. Sappington*. In that case, after the plaintiff complained about sexual harassment by a judge for whom she worked, the presiding judge had her transferred to another judge who did not want her on staff.²⁵¹ The Court agreed with the Seventh Circuit that this "official act" of transferring the plaintiff precluded the defendant from raising the *Faragher-Ellerth* defense.²⁵²

Since *Suders*, lower courts have construed an "official act" to require a showing that some supervisor made a formal change in the employee's status. In *Chapp v. 202 Lake Street Partners*, for example, a federal district court reviewed a sixteen-year-old restaurant employee's allegations that his supervisor touched his groin area and sent him inappropriate text messages.²⁵³ The employee quit, and the court held that the restaurant could assert an affirmative defense given that it took no official action against the employee.²⁵⁴ In contrast, in *Horace v. ARIA*, the Eleventh Circuit observed that a worker complaining of racial harassment resigned, in part, after the

²⁴⁴ See, e.g., *Evans v. Int'l Paper Co.*, 936 F.3d 183, 193 (4th Cir. 2019); *Porter v. Erie Foods Int'l, Inc.*, 576 F.3d 629, 640 (7th Cir. 2009) (involving racial discrimination claim); *Fischer v. Forestwood Corp.*, 525 F.3d 972, 981 (10th Cir. 2008) (finding no constructive discharge where employee alleged he was heckled at work and was subject to anonymous messages criticizing him regarding his religion).

²⁴⁵ See, e.g., *Fincher v. Depository Tr. & Clearing Corp.*, 604 F.3d 712, 725 (2d Cir. 2010).

²⁴⁶ *Bryant v. Jones*, 575 F.3d 1281, 1298 (11th Cir. 2009) ("Establishing a constructive discharge claim is a more onerous task than establishing a hostile work environment claim.").

²⁴⁷ *Suders*, 542 U.S. at 134.

²⁴⁸ *Id.* at 148.

²⁴⁹ *Id.* at 150 (quoting *Reed v. MBNA Mktg. Sys., Inc.*, 333 F.3d 27, 33 (1st Cir. 2003)).

²⁵⁰ *Id.*

²⁵¹ *Id.* (citing *Robinson v. Sappington*, 351 F.3d 317, 333–36 (7th Cir. 2003)).

²⁵² *Id.*

²⁵³ *Chapp v. 202 Lake St. Partners, LLC*, No. 1:23-CV-416, 2025 WL 1664644, at *6 (W.D. Mich. June 12, 2025).

²⁵⁴ *Id.* at *9.

company refused to correct an error in his rate of pay.²⁵⁵ This, the court held, could qualify as an official act.²⁵⁶

Whether a plaintiff can meet the standard for a constructive discharge claim, as opposed to showing severe or pervasive harassment that does not rise to the level of constructive discharge, has implications for the damages available. The Court stated in *Suders* that “a prevailing constructive discharge plaintiff is entitled to all damages available for formal discharge. The plaintiff may recover postresignation damages, including both backpay and, in fitting circumstances, frontpay.”²⁵⁷ By contrast, as explained below, a plaintiff who prevails on a harassment claim not involving discharge would not be eligible for lost compensation.²⁵⁸

Sexual Harassment and Retaliation Under Title VII

Title VII’s anti-retaliation provision makes it unlawful for an employer to discriminate against an employee for reporting a Title VII violation. The provision bars adverse action taken because an employee “has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.”²⁵⁹ Because federal courts interpret Title VII to prohibit sexual harassment, employees who report such harassment in the workplace may be protected from unlawful retaliation—such as termination or demotion—for making that report.²⁶⁰

To establish a Title VII retaliation claim, a plaintiff must show that he or she engaged in “protected activity” responding to a potential Title VII violation;²⁶¹ reprisals for unprotected behavior will not give rise to a claim. Title VII covers two types of protected activity: “opposition,”²⁶² when an employee “has opposed any practice” Title VII prohibits, and

²⁵⁵ No. 23-12414, 2024 WL 1174398, at *5 (11th Cir. Mar. 19, 2024).

²⁵⁶ *Id.*

²⁵⁷ *Pa. State Police v. Suders*, 542 U.S. 129, 147 n.8 (2004).

²⁵⁸ *Mallinson-Montague v. Pocrnick*, 224 F.3d 1224, 1237 (10th Cir. 2000).

²⁵⁹ 42 U.S.C. § 2000e-3(a).

²⁶⁰ *See, e.g., Foster v. Univ. of Md. E. Shore*, 787 F.3d 243, 254 (4th Cir. 2015) (holding that evidence would allow reasonable jury to conclude that the defendant fired the plaintiff in retaliation for reporting that she had been sexually harassed, and for her later complaints of ongoing retaliation after); *Magyar v. Saint Joseph Reg’l Med. Ctr.*, 544 F.3d 766, 773–74 (7th Cir. 2008) (holding that evidence created a triable issue that employer restructured plaintiff’s job and ultimately fired her in retaliation for reporting harassment by her coworker, and for reporting concern about how the hospital was addressing her harassment complaint).

²⁶¹ *See, e.g., Kelly v. Howard I. Shapiro & Assocs. Consulting Eng’rs, P.C.*, 716 F.3d 10, 14 (2d Cir. 2013) (stating that elements of prima facie case include evidence: that the plaintiff engaged in protected activity, the employer knew about that activity, the employee suffered a materially adverse action, and causation between the protected activity and that adverse action); *Collazo v. Bristol-Myers Squibb Mfg., Inc.*, 617 F.3d 39, 46 (1st Cir. 2010) (listing prima facie elements as engaging in protected activity, suffering an adverse employment action, and showing the adverse action was causally connected to the protected activity).

²⁶² *See Hertz v. Luzenac Am., Inc.*, 370 F.3d 1014, 1015–16 (10th Cir. 2004) (“Protected opposition can range from filing formal charges to voicing informal complaints to superiors.”). *See generally Crawford v. Metro. Govt. of Nash. and Davidson Cnty.*, 555 U.S. 271, 276–78 (2009) (discussing definitions of “oppose” and describing examples, and explaining that reasonable jurors could conclude that plaintiff’s report was in opposition to the harasser’s conduct “if for no other reason than the point argued by the Government and explained by an EEOC guideline: ‘When an employee communicates to her employer a belief that the employer has engaged in . . . a form of employment discrimination, that communication’ virtually always ‘constitutes the employee’s opposition to the activity.’”) (quoting Brief for United States as Amicus Curiae 9, *Crawford*, 555 U.S. 271 (No. 06-1595)).

“participation,” when an employee has “participated in any manner in an investigation, proceeding, or hearing” under the statute.²⁶³

Protected “opposition” encompasses a wide range of activities. For instance, the Supreme Court has ruled that reporting in the context of an employer’s investigation can be protected opposition. In *Crawford v. Metropolitan Government of Nashville and Davidson County*, the Court held that an employee who reports “discrimination not on her own initiative, but in answering questions during an employer’s internal investigation,” may be protected under the opposition clause of Title VII’s anti-retaliation provision.²⁶⁴ In that case, the Court addressed a worker’s Title VII claim that she was fired in retaliation for reporting harassment during her employer’s internal investigation of a male manager.²⁶⁵ The plaintiff—in response to questions from a human resources officer about whether she had ever witnessed “inappropriate behavior” by the male manager—described several instances of his sexually harassing behavior.²⁶⁶

With respect to protected “participation,” courts have held that participation in a Title VII proceeding after a charge of discrimination has been filed with the EEOC counts.²⁶⁷ In the EEOC’s view, participation in an employer’s internal equal employment complaint process counts as well.²⁶⁸ The *Crawford* Court did not decide whether participation in an employer’s internal investigation counts as protected “participation” in a Title VII proceeding,²⁶⁹ but several federal courts of appeals have held that an employee’s participation in such an investigation, when no EEOC charge has been filed, is not protected participation.²⁷⁰ Protected “participation” is broader than “opposition” in one respect—it does not consider the employee’s motive. Even if a worker does not support a claimant, participating as a witness in a Title VII proceeding is protected.²⁷¹

Reporting Sexual Harassment

An employee may be protected from retaliation even if he or she reports behavior that does not qualify as a Title VII violation. To be engaged in protected behavior, a plaintiff must have a “good faith” or objectively “reasonable” belief that the conduct he or she reported was unlawful under

²⁶³ See, e.g., *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1185 (11th Cir. 1997) (holding that plaintiff, by giving deposition testimony in a Title VII proceeding, engaged in protected participation under Title VII).

²⁶⁴ *Crawford*, 555 U.S. at 273–80 (2009).

²⁶⁵ *Id.* at 273–74.

²⁶⁶ *Id.* at 274.

²⁶⁷ *Abbott v. Crown Motor Co.*, 348 F.3d 537, 543 (6th Cir. 2003).

²⁶⁸ *Questions and Answers: Enforcement Guidance on Retaliation and Related Issues*, EEOC (Aug. 26, 2016), <https://www.eeoc.gov/laws/guidance/questions-and-answers-enforcement-guidance-retaliation-and-related-issues> [<https://perma.cc/JS35-WDY2>] (“EEOC’s view is that this extends to participation in an employer’s internal EEO complaint process, even if a charge of discrimination has not yet been filed with the EEOC.”).

²⁶⁹ *Crawford*, 555 U.S. at 276, 280 (explaining that because the plaintiff’s conduct “is covered by the opposition clause, we do not reach her argument that the Sixth Circuit misread the participation clause as well.”).

²⁷⁰ See, e.g., *Townsend v. Benjamin Enters., Inc.*, 679 F.3d 41, 49 (2d Cir. 2012) (“Every Court of Appeals to have considered this issue squarely has held that participation in an internal employer investigation not connected with a formal EEOC proceeding does not qualify as protected activity under the participation clause.”); *Hatmaker v. Mem’l Med. Ctr.*, 619 F.3d 741, 747 (7th Cir. 2010) (holding that an employee’s participation in a “purely internal investigation” is not an investigation, proceeding, or hearing under Title VII’s participation clause, but taking no position on “whether participation in an internal investigation begun after a charge is filed with the EEOC should be treated” as protected participation); *Hamade v. Valiant Gov’t Servs., LLC*, 807 F. App’x 546, 550 (6th Cir. 2020) (holding defense contractor employee’s participation in an internal Army discrimination investigation was not “participation” under Title VII).

²⁷¹ *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1187 (11th Cir. 1997).

Title VII.²⁷² Sometimes referred to as the “reasonable belief” standard,²⁷³ courts will dismiss retaliation claims if the employee was unreasonable in believing the reported conduct was harassment,²⁷⁴ even if evidence reflects that the plaintiff was fired or otherwise acted against shortly after making the report.²⁷⁵ The “reasonable belief” standard applies when employees report their own harassment,²⁷⁶ when an employee reports seeing another employee being harassed,²⁷⁷ and when an employee supports another employee’s harassment report.²⁷⁸ Federal courts have developed a body of case law on what constitutes a reasonable belief that unlawful conduct has occurred under Title VII. In determining whether the plaintiff’s harassment report was reasonable, federal courts often evaluate whether the harassing conduct the plaintiff reported was “close enough” to an actual Title VII violation.²⁷⁹ Thus, a court’s “reasonableness” analysis in a Title VII retaliation case involving an underlying report of perceived sexual harassment can rely significantly on its precedent deciding what conduct is sufficiently “severe or pervasive” to make out a Title VII discrimination claim.²⁸⁰

²⁷² *EEOC v. Rite Way Serv., Inc.*, 819 F.3d 235, 237 (5th Cir. 2016); *Westendorf v. W. Coast Contractors of Nev., Inc.*, 712 F.3d 417, 422 (9th Cir. 2013); *Magyar v. Saint Joseph Reg’l Med. Ctr.*, 544 F.3d 766, 771 (7th Cir. 2008); *Kelly v. Howard I. Shapiro & Assocs. Consulting Eng’rs, P.C.*, 716 F.3d 10, 14 (2d Cir. 2013).

²⁷³ *See, e.g., Rite Way*, 819 F.3d at 242 (stating that “the reasonable belief standard recognizes there is some zone of conduct that falls short of an actual violation but could be reasonably perceived to violate Title VII”).

²⁷⁴ *See, e.g., Greene v. A. Duie Pyle, Inc.*, 170 F. App’x 853, 856 (4th Cir. 2006) (dismissing retaliation claim because plaintiff lacked objectively reasonable belief that employer was violating Title VII by permitting sexually explicit material in the workplace; describing plaintiff’s testimony as “boil[ing] down to a few observations of lewd magazines and inappropriate jokes or drawings” in the workplace). In general, courts have held that the posting of explicit or derogatory images in the workplace may support or establish a Title VII harassment claim. *See, e.g., Harris v. Mayor and City Council of Balt.*, 429 F. App’x 195, 202 (4th Cir. 2011) (holding that reasonable jury could conclude that plaintiff faced severe or pervasive harassment based on evidence of “profane” language and that “sexually explicit pictures of scantily clad or naked women were located throughout” the workplace, which plaintiff was exposed to every day).

²⁷⁵ *See, e.g., Greene*, 170 F. App’x at 855–56 (holding that retaliatory termination claim failed because plaintiff was unreasonable in believing that employer was acting unlawfully by permitting material the plaintiff viewed as sexually offensive in the workplace, even though the plaintiff was fired at the meeting at which he reported the material).

²⁷⁶ *See, e.g., Westendorf*, 712 F.3d at 422 (applying reasonable belief test to report of employee who believed she had faced actionable sexual harassment).

²⁷⁷ *See, e.g., Rite Way*, 819 F.3d at 240–42 (concluding that the objectively reasonable belief test applies to a report made by an employee who witnessed what she believed to be unlawful sexual harassment, and who made that report during her employer’s internal sexual harassment investigation).

²⁷⁸ *Collazo v. Bristol-Myers Squibb Mfg., Inc.*, 617 F.3d 39, 43–44, 47–48 (1st Cir. 2010) (applying reasonable belief test to plaintiff’s acts of support to another employee who had told him she was being sexually harassed; among other acts, plaintiff arranged a meeting between victim and human resources to report the harassing behavior, attended that meeting with the victim, and attended a follow-up meeting with victim and human resources).

²⁷⁹ *See, e.g., Summa v. Hofstra Univ.*, 708 F.3d 115, 126 (2d Cir. 2013) (holding plaintiff satisfied showing of objective reasonableness, as the conduct she reported “was close enough in severity” to conduct the court has previously held to constitute unlawful sexual harassment); *Clover v. Total Sys. Servs., Inc.*, 176 F.3d 1346, 1351 (11th Cir. 1999) (stating that an employee’s objective reasonableness “must be measured against existing substantive law” and referring to “severe or pervasive” standard); *see also, e.g., Tatt v. Atlanta Gas Light Co.*, 138 F. App’x 145, 147–48 (11th Cir. 2005) (stating plaintiff reported conduct that her male coworker weekly pretended to unzip his pants and urinate on the office paperwork, evaluating that alleged conduct in light of its hostile work environment precedent and holding that plaintiff did not hold objectively reasonable belief, as coworker’s “acts were not close to being the kind of severe or pervasive conduct that constitutes actionable sexual harassment”).

²⁸⁰ *See Summa*, 708 F.3d at 126. *But see Montell v. Diversified Clinical Servs., Inc.*, 757 F.3d 497, 504–05 (6th Cir. 2014) (making determination of plaintiff’s objective reasonableness without reference to its hostile work environment precedent; rather, reasoning that because comments directed at plaintiff were sexual, and were made by her supervisor, such facts showed that plaintiff had a good faith, reasonable belief that she was reporting unlawful sexual harassment).

Courts do not assume employees know such precedent. In one case, the Tenth Circuit explained that it adopted “an objective reasonableness inquiry that considers the law against what a reasonable employee would believe, not what a reasonable labor and employment attorney would believe.”²⁸¹ In another case, the Seventh Circuit held that the plaintiff was objectively reasonable in believing the conduct she reported to her supervisor was harassment when she reported that her male coworker, unwelcome and unsolicited, sat on her lap and whispered into her ear about her appearance.²⁸² The court explained that its hostile work environment precedent “has often recognized in the past that unwanted physical contact falls on the more severe side for purposes of sexual harassment,” that the reported conduct was “the type of occurrence that, if it happened often enough, could constitute sexual harassment,” and that the plaintiff was thus reasonable in believing that conduct to be unlawful.²⁸³

By contrast, in another case, the Eleventh Circuit held that the plaintiff did not reasonably believe she had suffered unlawful harassment where her supervisor commented on her breasts and breast size more than once, including laughing as he told her “‘you just look like you’re going to burst’” out of a new shirt she was wearing, and telling her that there were no aprons big enough to accommodate her breasts.²⁸⁴ The court concluded that “the conduct [plaintiff] described is insufficient to support an objectively reasonable belief that [her manager] was engaging in an unlawful employment practice,” describing the conduct as “simple teasing.”²⁸⁵

When a court characterizes reported harassment as a “single incident,” a retaliation claim based on the report may be particularly vulnerable to dismissal under the reasonable belief standard.²⁸⁶ In these circumstances, courts often cite the Supreme Court’s 2001 per curiam decision in *Clark County School District v. Breeden*.²⁸⁷ The Fifth Circuit, for example, has characterized *Breeden* as “holding that a plaintiff did not engage in protected activity because ‘no reasonable person could have believed that’ a single, non-serious incident ‘violated Title VII’s standard.’”²⁸⁸

In *Breeden*,²⁸⁹ the plaintiff met with her male coworker and male supervisor to review the psychological evaluation reports of several job applicants.²⁹⁰ One job applicant had written that he had once said to a coworker, “‘I hear making love to you is like making love to the Grand

²⁸¹ *Reznik v. inContact, Inc.*, 18 F.4th 1257, 1262 (10th Cir. 2021) (holding racial harassment complaints were protected activities, even though the overseas employees who made them were excluded from Title VII’s coverage).

²⁸² *Magyar v. Saint Joseph Reg’l Med. Ctr.*, 544 F.3d 766, 771–72 (7th Cir. 2008).

²⁸³ *Id.*; see also *Wallace v. Performance Contractors, Inc.*, 57 F.4th 209, 225 (5th Cir. 2023) (“Though one sexual-harassment incident is sometimes not enough to establish a Title VII claim, sometimes it can be.”) (holding that coworker’s sexual comment and nonconsensual massaging were enough to support employee’s sexual harassment complaint as reasonable).

²⁸⁴ *Henderson v. Waffle House, Inc.*, 238 F. App’x 499, 502–03 (11th Cir. 2007).

²⁸⁵ *Id.* at 503 (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998)).

²⁸⁶ See, e.g., *id.*; *Satterwhite v. City of Houston*, 602 F. App’x 585, 588–89 (5th Cir. 2015) (holding that plaintiff lacked objectively reasonable belief to show he engaged in protected opposition; stating that the plaintiff “acknowledges that [the] comment was a single and isolated incident. He could not have reasonably believed that this incident was actionable under Title VII, and therefore, it ‘cannot give rise to protected activity.’”); *Therault v. Dollar Gen.*, 336 F. App’x 172, 174 (3rd Cir. 2009) (“Here, Therault did not engage in protected activity because she complained only of a single incident that no reasonable person could have believed violated Title VII.”).

²⁸⁷ 532 U.S. 268, 269 (2001).

²⁸⁸ See *Satterwhite*, 602 F. App’x at 588 n.12 (parenthetically describing *Breeden* as “dismissing a retaliation claim because ‘[n]o reasonable person could have believed that the single incident recounted above violated Title VII’s standard.’” (quoting *Breeden*, 532 U.S. at 271)); *Therault*, 336 F. App’x at 174–75 (citing *Breeden*, 532 U.S. at 269–70) (parenthetically describing the holding in *Breeden*).

²⁸⁹ *Breeden*, 532 U.S. at 271.

²⁹⁰ *Id.* at 269.

Canyon.”²⁹¹ The plaintiff’s supervisor read the comment out loud and told the plaintiff he did not know what the comment meant, to which the plaintiff’s male coworker responded by saying he would explain it later, and both men chuckled.²⁹² In holding that the plaintiff was *not* objectively reasonable in believing this exchange to be unlawful harassment, the Court explained that the plaintiff’s job “required her to review the sexually explicit statement in the course of screening job applicants,” cited the district court record reflecting that the plaintiff was not bothered or upset by reading the statement in the file, and stated that her fellow employees’ conversation about the statement was, “at worst an ‘isolated incident[t]’ that cannot remotely be considered ‘extremely serious,’ as our cases require.”²⁹³ In that context, the Court stated that “[n]o reasonable person could have believed that the single incident recounted above violated Title VII’s standard.”²⁹⁴ Though the Court analyzed the plaintiff’s objective reasonableness in *Breeden*, the Court did not “rule on the propriety” of the reasonable belief test itself.²⁹⁵

Some federal appellate courts have construed *Breeden* to mean that reporting an “isolated incident” is objectively unreasonable,²⁹⁶ while others have held that reporting an “isolated incident” can be objectively reasonable if the incident concerns humiliating or physically threatening conduct.²⁹⁷ Still other courts have focused on the circumstances and context of the plaintiff’s report rather than the number of incidents reported.²⁹⁸

In *Montell v. Diversified Clinical Services, Inc.*, for example, the Sixth Circuit rejected the defendant’s argument that the plaintiff could not have reasonably believed that her supervisor’s “few comments” could be unlawful sexual harassment.²⁹⁹ Stating that the “argument [could] be quickly dispatched,” the court explained that the plaintiff could have had an objectively reasonable belief that her supervisor was engaging in unlawful sexual harassment when he told her he was turned on by a woman in a red dress and heels, while the plaintiff was wearing a red dress and heels.³⁰⁰ The court reasoned that the comment was sexual in nature and came from a supervisor directed at his subordinate and stated that the supervisor had prefaced his comment by telling her she could get him in trouble with the human resources department for making the

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.* at 271 (quoting *Faragher*, 524 U.S. at 788).

²⁹⁴ *Id.*

²⁹⁵ *Id.* at 270 (referring to Ninth Circuit precedent applying the reasonable belief standard, stating, “We have no occasion to rule on the propriety of this interpretation, because even assuming it is correct, no one could reasonably believe that the incident recounted above violated Title VII.”).

²⁹⁶ See *Satterwhite*, 602 F. App’x at 588 n.12 (citing *Breeden*, 532 U.S. at 271); *Theriault*, 336 F. App’x at 174 (citing *Breeden*, 532 U.S. at 269–70).

²⁹⁷ *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 284 (4th Cir. 2015) (en banc) (“In sum, under the standard that we adopt today with guidance from the Supreme Court, an employee is protected from retaliation for opposing an isolated incident of harassment when she reasonably believes that a hostile work environment is in progress, with no requirement for additional evidence that a plan is in motion to create such an environment or that such an environment is likely to occur. The employee will have a reasonable belief that a hostile environment is occurring if the isolated incident is physically threatening or humiliating.”).

²⁹⁸ See, e.g., *EEOC v. Rite Way Serv., Inc.*, 819 F.3d 235, 243–44 (5th Cir. 2016) (stating that “opposition clause claims grounded in isolated comments are not always doomed to summary judgment” and holding that employee was objectively reasonable in believing conduct she reported was unlawful harassment, when employee reported that her supervisor looked at and commented on the buttocks of a female subordinate; stating that the conduct was from a supervisor to a subordinate and considering “the context in which the comment was made,” including that the employee who made the report had seen the same supervisor, a week earlier, pretend to slap the behind of the same female subordinate).

²⁹⁹ *Montell v. Diversified Clinical Servs., Inc.*, 757 F.3d 497, 504 (6th Cir. 2014).

³⁰⁰ *Id.*

comment.³⁰¹ The court concluded that the evidence was sufficient to show she could have had an objectively reasonable belief, and that whether she did in fact have such a belief, “a question of credibility, must be left to a jury.”³⁰²

When Harassment May Constitute Unlawful Retaliation

Beyond prohibiting retaliation in the form of adverse employment actions like termination or demotion, Title VII also bars retaliatory harassment—that is, when a plaintiff reports a potential Title VII violation of any kind, and the employer reacts by harassing the employee. Circuit courts disagree on how to analyze such claims, however. Specifically, they diverge on whether the “severe or pervasive” standard from *Harris v. Forklift Systems, Inc.* applies to retaliatory harassment claims, or whether *Burlington Northern v. White*³⁰³ (which generally controls Title VII retaliation claims) provides the appropriate standard.

The Supreme Court decided *Burlington Northern v. White* in 2006, setting the legal standard for evaluating actionable retaliation. Before *Burlington Northern*, some circuits found retaliation only if an employer fired or demoted an employee, while others did not limit actionable retaliation to such “ultimate” employment decisions.³⁰⁴ The Supreme Court expressly rejected the interpretation limiting actionable retaliation to only “workplace-related or employment-related retaliatory acts and harm.”³⁰⁵ Instead, the Court held that actionable retaliation is any conduct that “could well dissuade a reasonable worker from making or supporting a charge of discrimination.”³⁰⁶ The Court also observed that the purpose of the anti-retaliation provision—that is, preventing an employer from interfering with an employee’s efforts to report unlawful conduct—could not be achieved if actionable retaliation was limited only to employment-related actions.³⁰⁷ Such a limited construction, the Court stated, “would not deter the many forms that effective retaliation can take.”³⁰⁸

Circuit courts have applied the *Burlington Northern* standard to conclude that Title VII covers a wide variety of alleged retaliatory conduct, including, for example, changing shift times and work locations or issuing an unfavorable performance review.³⁰⁹ Some circuit courts also apply *Burlington Northern* to Title VII claims alleging retaliatory harassment, asking whether harassing conduct would dissuade a reasonable person from making or reporting a claim of discrimination. Other circuits, by contrast, have turned to *Harris* in retaliatory harassment cases, requiring that retaliatory harassment be severe or pervasive enough to create a hostile work environment in order to be actionable.

³⁰¹ *Id.* at 504–05 (also citing evidence that when the plaintiff reported the comment, human resources investigated to determine whether the comments were made).

³⁰² *Id.* at 505.

³⁰³ 548 U.S. 53, 56 (2006).

³⁰⁴ *Id.* at 60.

³⁰⁵ *Id.* at 67.

³⁰⁶ *Id.* at 57.

³⁰⁷ *Id.* at 63.

³⁰⁸ *Id.* at 64.

³⁰⁹ *See, e.g.,* Hicks v. Baines, 593 F.3d 159, 169–70 (2d Cir. 2010) (holding that changing plaintiffs’ shift times and work locations constituted actionable retaliation, particularly as such changes resulted in plaintiffs having to work alone in inmate facility); Moore v. City of Phila., 461 F.3d 331, 346 (3rd Cir. 2006) (holding that disproportionately severe discipline constituted actionable retaliation).

The Third Circuit has expressly held that under *Burlington Northern*, a plaintiff alleging retaliatory harassment need not establish that the harassment was severe or pervasive.³¹⁰ The court explained that following *Burlington Northern*, “such claims may go forward upon a showing by the plaintiff that ‘a reasonable employee would have found the alleged retaliatory actions materially adverse.’”³¹¹ The court viewed “materially adverse” to mean an action that “‘well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.’”³¹² The Second Circuit has also applied *Burlington Northern* to retaliatory harassment,³¹³ and the Eleventh Circuit, after issuing contradicting decisions, clarified its precedent in 2020 to adopt “the *Burlington Northern* ‘well might have dissuaded’ standard.”³¹⁴

On the other hand, the Sixth Circuit has determined that *Burlington Northern* does not apply in the retaliatory harassment context and that a retaliatory harassment claim needs to include evidence of severe or pervasive mistreatment.³¹⁵ The Ninth Circuit similarly requires a showing of severe or pervasive harassment for conduct to constitute actionable retaliation.³¹⁶

In other circuits the standard is unclear, with analyses blending language from *Harris* (“severe or pervasive”) and *Burlington Northern* (“dissuade a reasonable worker”). Citing *Burlington Northern*, for example, the Fourth Circuit requires that a plaintiff show conduct “sufficiently severe or pervasive that it would dissuade a reasonable worker from making or supporting a charge of discrimination.”³¹⁷ Similarly, the Seventh Circuit concluded that a retaliatory harassment claim failed because there was no evidence that the alleged retaliation “was *severe* enough to dissuade a reasonable employee from exercising his Title VII rights,” though in a different case the court stated it saw no reason to analyze harassment motivated by retaliation any differently from harassment based on a protected characteristic (such as sex).³¹⁸ The First Circuit has, within the same case, cited *Burlington Northern*’s requirement that a retaliatory action is one that would “dissuade a reasonable person from making or supporting a charge of discrimination”

³¹⁰ *Hare v. Potter*, 220 F. App’x 131–32 (3rd Cir. 2007) (citing *Moore*, 461 F.3d at 341).

³¹¹ *Id.* at 132.

³¹² *Id.* at 128 (quoting *Burlington N.*, 548 U.S. at 68).

³¹³ *Carr v. N.Y.C. Transit Auth.*, 76 F.4th 172, 180 (2d Cir. 2023); *Spector v. Bd. of Trustees of Cmty. Tech. Colls.*, 316 F. App’x 18, 20–21 (2d Cir. 2009). *see also Carr*, 76 F.4th at 181 (“Our Court, and district courts in this Circuit, have on occasion failed to apply the *Burlington N.* standard faithfully.”).

³¹⁴ *Monaghan v. Worldpay US, Inc.*, 955 F.3d 855, 862 (11th Cir. 2020); *see also Tonkyro v. Sec’y, Dep’t of Veterans Affs.*, 995 F.3d 828, 833 (11th Cir. 2021).

³¹⁵ *Ogbonna-McGruder v. Aus. Peay State Univ.*, 91 F.4th 833, 842 (6th Cir. 2024) (ruling on age-based discrimination and retaliation claims) (“*Burlington* does not apply in the context of a retaliatory hostile work environment claim.”), *abrogated on other grounds as stated in Kellar v. Yunion, Inc.*, 157 F.4th 855, 871 (6th Cir. 2025). In *Wyatt v. Nissan N. Am., Inc.*, 999 F.3d 400, 419, 426–27 (6th Cir. 2021), the court cited *Burlington N.* when discussing plaintiff’s retaliation claims generally, and then, when addressing retaliatory harassment, applied the *Harris* standard.

³¹⁶ *Ray v. Henderson*, 217 F.3d 1234, 1245 (9th Cir. 2000) (stating that retaliatory harassment must be sufficiently severe or pervasive).

³¹⁷ *Laurent-Workman v. Wormuth*, 54 F.4th 201, 218 (4th Cir. 2022).

³¹⁸ *Poullard v. McDonald*, 829 F.3d 844, 858 (7th Cir. 2016) (citing *Burlington N.*, 548 U.S. at 68–69) (emphasis added). *But see Boss v. Castro*, 816 F.3d 910, 920 (7th Cir. 2016) (stating that court saw no reason retaliation-based harassment “must somehow be less objectively offensive than in the context of sex or race,” and then analyzing a retaliation claim under the factors in *Harris*). More recently, in *Rongere v. City of Rockford*, 99 F.4th 1095, 1105 (7th Cir. 2024), the court appeared to combine the retaliatory harassment standard with *Harris*: “To survive summary judgment on a hostile work environment claim, a plaintiff must show: (1) her work environment was objectively and subjectively offensive; (2) the harassment was based on membership in a protected class or in retaliation for protected behavior; (3) the conduct was severe or pervasive.” *Id.* at 1105.

and then required that retaliatory harassment be “severe or pervasive.”³¹⁹ The D.C. Circuit has similarly mixed *Harris* and *Burlington Northern* standards in assessing retaliatory harassment claims,³²⁰ and the Fifth Circuit has yet to recognize a retaliatory harassment cause of action.³²¹

As reflected above, there is considerable disagreement among courts as to how to analyze retaliatory harassment claims. Whether a court elects to apply *Harris* or *Burlington Northern* has significant consequence: retaliatory conduct under *Harris* must be severe or pervasive to constitute actionable retaliation, which appears to be a more demanding standard to meet than the “dissuade a reasonable worker” standard set forth in *Burlington Northern*.

Remedies

The Civil Rights Act of 1991 permits a plaintiff to recover compensatory damages in any case of intentional discrimination, including sexual harassment.³²² Compensatory damages can include the sum of “future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.”³²³ A plaintiff may also recover punitive damages against nongovernmental entities upon a showing of “malice or with reckless indifference to the federally protected rights” of the complainant.³²⁴ The total amount of combined compensatory and punitive damages that a plaintiff can recover is limited by statute. For employers with more than 14 but fewer than 101 employees, a plaintiff’s maximum damages are limited to \$50,000; for employers with fewer than 201 employees, \$100,000; for employers with fewer than 501 employees, \$200,000; for employers with 501 or more employees, damages are capped at \$300,000.³²⁵ As mentioned previously, a worker who was discharged, constructively or otherwise, may also be eligible for awards of backpay or frontpay.³²⁶

³¹⁹ *Rae v. Woburn Pub. Schs.*, 113 F.4th 86, 101, 109 (1st Cir. 2024), *cert. denied*, 145 S. Ct. 1431 (2025) (mem.) (adjudicating claims of disability discrimination).

³²⁰ *Baird v. Gotbaum*, 792 F.3d 166, 171–72 (D.C. Cir. 2015) (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)).

³²¹ The Fifth Circuit has stated that it has not “recognized a retaliatory hostile work environment cause of action.” *Heath v. Bd. of Supervisors for S. Univ. and Agric. and Mech. Coll.*, 850 F.3d 731, 741 n.5 (5th Cir. 2017); *see also* *Blanchard v. Tulane Univ.*, 636 F. Supp. 3d 642, 654–55 (E.D. La. 2022) (“A retaliatory hostile work environment claim is not recognized by the Fifth Circuit.”).

³²² 42 U.S.C. § 1981a.

³²³ *Id.* § 1981a(b)(3).

³²⁴ *Id.* § 1981a(b)(1).

³²⁵ *Id.* § 1981a(b)(3)(A)–(D).

³²⁶ *Pa. State Police v. Suders*, 542 U.S. 129, 147 n.8 (2004) (“The plaintiff [in a constructive discharge case] may recover postresignation damages, including both backpay and, in fitting circumstances, frontpay . . .”); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975) (“It follows that, given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.”).

Along with damages, a Title VII sexual harassment plaintiff may also seek injunctive relief.³²⁷ In general, “[a] district court has broad discretionary powers to craft an injunction to the specific violations found to ensure that the employer complies with the law.”³²⁸ For example, in *EEOC v. Wilson Metal Casket*, the Sixth Circuit upheld an injunction which prohibited the harassing supervisor from “asking any female employee to accompany him off the premises of the Company unless accompanied by at least one other employee, and kissing or placing his hands on any female employee in the work place.”³²⁹ The court upheld this injunction even though not all of the enjoined conduct was itself, standing alone, likely illegal; the court stated that the injunction “appropriately enjoins conduct which allowed sexual harassment to occur.”³³⁰

In addition, reasonable attorney’s fees are available to a prevailing party, either a plaintiff or a defendant, under Title VII.³³¹ Prevailing plaintiffs generally recover fees unless special circumstances preclude such recovery.³³² A prevailing plaintiff is one who obtains relief which “materially alters the legal relationship between the parties”; for example, the appropriate attorney’s fee when a plaintiff receives an award limited to nominal (\$1) damages is generally “no fee at all.”³³³ Defendants who prevail are entitled to fees only if the plaintiff’s claim was frivolous, unreasonable, or groundless.³³⁴

Considerations for Congress

Antiharassment doctrine is largely judge-made, and many antiharassment obligations are not fully codified. Congress could consider adding specific antiharassment provisions to antidiscrimination laws. Congress could either broaden or narrow the range of actionable harassment claims. For example, it could change the “severe or pervasive” standard to make it either easier or more difficult for plaintiffs to show harassment. In areas where courts are divided, such as whether Title VII covers retaliatory harassment and which standards apply to these claims, Congress could clarify the rules. It could also lay out standards for employer liability, considering harassment committed by coworkers, supervisors (which Congress may choose to define), or third parties such as customers.

Congress has considered harassment-related legislation addressing additional reform options. In 2026, lawmakers introduced H.R. 7583/S. 3865, the BE HEARD in the Workplace Act of 2026. (A version was originally proposed in 2019.) The proposed Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination in the Workplace Act of 2026 aims to “prevent and reduce prohibited discrimination, including harassment, in employment.”³³⁵ The

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

³²⁸ *EEOC v. Wilson Metal Casket*, 24 F.3d 836, 842 (6th Cir. 1994).

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ 42 U.S.C. § 2000e-5(k).

³³² *Newman v. Piggie Park Enter., Inc.*, 390 U.S. 400, 402 (1968) (analyzing Title II of the Civil Rights Act).

³³³ *Farrar v. Hobby*, 506 U.S. 103, 111 (1992) (evaluating identical language in the context of 42 U.S.C. § 1988).

³³⁴ *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978) (evaluating identical language in the context of 42 U.S.C. § 1988).

³³⁵ BE HEARD in the Workplace Act, H.R. 7583, 119th Cong. § 3 (2d Sess. 2026).

bill would also clarify how courts should apply *Bostock* by specifying how employers need to accommodate variations in gender identity.³³⁶ The bill would impose fines for offenders,³³⁷ and it would expand Title VII's reach by amending it to apply to small employers (as those with fewer than fifteen employees are currently excluded).³³⁸

In addition, the BE HEARD Act would establish standards of proof for discrimination and employment harassment, codifying some of the judicial developments discussed above. It would specify quid pro quo harassment as unlawful and it would define other harassment as conduct having "the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."³³⁹ The Act would amend several employment-discrimination laws to address disability, age, and religious harassment.

The BE HEARD Act would also restrict mandatory arbitration and pre-employment confidentiality agreements.³⁴⁰ As another illustration of congressional interest in the area of disclosure, H.R. 4599, the Protections and Transparency in the Workplace Act, would require covered publicly traded companies to report claims of harassment, defined as potential violations of listed federal antidiscrimination statutes.³⁴¹ (A version was introduced in the 116th, 117th, and 118th Congresses.) Settlements, judgments, and payments for covered discrimination and harassment claims would also require disclosure.³⁴²

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³³⁶ *Id.* § 1101.

³³⁷ *Id.* § 101.

³³⁸ *Id.* § 202; 42 U.S.C. § 2000e(b).

³³⁹ BE HEARD in the Workplace Act, H.R. 7583, § 204.

³⁴⁰ *Id.* at §§ 302, 303.

³⁴¹ Protections and Transparency in the Workplace Act, H.R. 4599, 119th Cong. (1st Sess. 2025).

³⁴² *Id.* § 2(b).