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THE "SEVERE AND PERVERS-IVE" STANDARD OF HOSTILE WORK ENVIRONMENT LAW: BEHOLD THE MOTIVATING FACTOR TEST

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TABLE OF CONTENTS

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INTRODUCTION

Building a career in an atmosphere of harassment is like trying to construct a house in a storm. No one should be the victim of a boss's unwanted advances or fear retaliation for refusing his sexual propositions. No one should have to endure the anxiety and humiliation that come with the feeling of powerlessness.[1] Yet many women who are simply trying to do their jobs must navigate a workplace rife with hostility.[2]

Section 2000e-2(a) of the Civil Rights Act of 1964 prohibits discrimination "because of . . . sex."[3] Broadening the protections provided by the 1964 Civil Rights Act, § 2000e-2(m) of the 1991 Civil Rights Act prohibits discrimination that was a motivating factor with respect to a term or condition of employment.[4] These sections create as sweeping a prohibition of discrimination as Congress could have made.

1. *See infra* note 230 and accompanying text (discussing the psychological impact of harassment on victims).

2. *See* CHAI R. FELDBLUM & VICTORIA A. LIPNIC, EQUAL EMP'T OPPORTUNITY COMM'N, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE 8 (June 2016) (reporting that between 25% and 85% of working women have been victimized by sexual harassment); Brianna Zawada, Note, *Me Too: The EEOC, Workplace Sexual Harassment, and the Modern Workplace*, 33 WIS. J.L. GENDER & SOC'Y 199, 199–200 (2018) (pointing out the pervasiveness of sexual harassment in the workplace).

3. 42 U.S.C. § 2000e-2(a) (2018).

4. *Id.* § 2000e-2(m).

The Supreme Court in *Meritor Savings Bank, FSB v. Vinson* ruled that a hostile work environment is an actionable form of sex discrimination.[5] *Meritor* might have provided a powerful force against sex-related workplace harassment. *Meritor*, however, burdened victims with having to prove elements that exceed the requirements of Title VII.[6]

Over the thirty years since *Meritor*, the Supreme Court has issued a series of rulings that have weighed heavily on victims of harassment,[7] and many federal courts have vigorously applied these holdings.[8] Plaintiffs must dodge one barrier after another to secure a remedy, and for many victims there is no remedy at all.[9] Victims are twice aggrieved. First by harassment, and second by an inhospitable legal framework. Scores of claims based on predatory misconduct fall prey to summary judgment.[10] The incentive to invest time, money, and the hope of

5. 477 U.S. 57 (1986). The courts have recognized two types of sexual harassment: *quid pro quo* and hostile work environment. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 751 (1998). The Supreme Court in *Ellerth* explained the difference between the two. Harassment based on threats that are carried out constitutes *quid pro quo*. *Id.* All other forms of harassment, if severe or pervasive, fall under the definition of hostile work environment. *Id.* The Court instructed that the terms *quid pro quo* and hostile work environment are descriptive and have limited utility in determining an employer's liability for a supervisor's harassment of a subordinate. *Id.* The key to such liability is whether the supervisor took a tangible employment action such as demoting or firing the subordinate. *Id.* at 753–54. Thus, in a hostile work environment case, if a supervisor takes a tangible employment action against a subordinate without making a threat, the employer will be strictly liable. Conversely, in a *quid pro quo* case, if a supervisor carries out a threat that falls short of a tangible employment action, the employer will not be strictly liable.

6. *Meritor*, 477 U.S. at 67–70; *see infra* Part III (criticizing *Meritor* and its progeny).

7. *See* Vance v. Ball State Univ., 570 U.S. 421, 424 (2013) (limiting the definition of "supervisor" to those with authority to take tangible employment actions); Pa. State Police v. Suders, 542 U.S. 129, 134 (2004) (holding that, in a hostile work environment case, a plaintiff wishing to prove constructive discharge must show that the working conditions were "so intolerable" that resignation was a fitting response); Oncale v. Sundowners Offshore Servs., Inc., 523 U.S. 75, 80–81 (1998) (expanding the reach of hostile work environment claims to same-sex harassment but overreacting to concerns that the law will devolve into a "general civility code"); *Ellerth*, 524 U.S. at 765 (creating an affirmative defense for employers when harassing supervisors do not take a tangible employment action); Faragher v. City of Boca Raton, 524 U.S. 775, 807–08 (1998) (justifying the adoption of the *Ellerth* affirmative defense); Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993) (holding that a plaintiff alleging a hostile work environment claim must prove that a reasonable person would have found and that the victim subjectively found the work environment abusive).

8. *See infra* note 183 and accompanying text (citing examples of circuit court decisions that have ruled against plaintiffs with compelling facts supporting claims of hostile work environment).

9. *See infra* Parts III.C, IV.B.5 & IV.C.3 (analyzing the roadblocks to plaintiffs alleging a hostile work environment based on sex).

10. *See infra* note 183 and accompanying text (detailing strong sexual harassment cases that federal courts found legally deficient).

achieving justice and deterring future abuse wanes when disillusionment is the probable outcome.

Part I of this Article reviews the development of employment discrimination, which is the foundation of the law of sexual harassment. This Part discusses *McDonnell Douglas Corp. v. Green,* which introduced a three-step burden shifting framework for analyzing discrimination cases.[11] This Part then examines *Price Waterhouse v. Hopkins* in which a plurality of the Court adopted the motivating factor test[12] and the 1991 Civil Rights Act, which codified that test.[13] Faced with two competing analytical approaches—the motivating factor test of the 1991 Civil Rights Act and the *McDonnell Douglas* framework—courts experienced confusion when having to decide which approach to apply.[14] *Desert Palace, Inc. v. Costa* held that the motivating factor test applied to all individual disparate treatment cases, that is, all cases involving intentional discrimination.[15] The *McDonnell Douglas* framework,

11. 411 U.S. 792, 802–04 (1973) (establishing a framework where (1) a plaintiff must prove a prima facie case, which disposes of some common arguments that would disqualify the plaintiff for relief, (2) the defendant must articulate a nondiscriminatory reason for the challenged employment action, and (3) the defendant must prove the employer's articulated reason is a pretext for discrimination).

12. 490 U.S. 228, 240 (1989) (stating that discrimination "must be irrelevant to employment decisions").

13. Pub. L. 102-166, 105 Stat. 1071.

14. *See* Desert Palace, Inc. v. Costa, 539 U.S. 90, 95 (2003) (discussing the division among the circuit courts as to the appropriate evidentiary standard to apply to discrimination cases).

15. *Id.* at 92–94. Disparate impact theory is the other principal branch of employment discrimination law. *Griggs v. Duke Power Co.* announced this doctrine. 401 U.S. 424, 429–30 (1971). *Griggs* held that a Title VII claim exists when a facially neutral employment practice has a disproportionately negative impact on a protected class. *Id.* The Court, however, recognized a business necessity defense, which excused an unintentional disparate impact if the employer proved a legitimate business justification for the statistical imbalance. *Id.* at 431. *Watson v. Fort Worth Bank & Trust* extended this theory to cases where the disparate impact resulted from subjective criteria and *Smith v. City of Jackson* expanded disparate impact theory to age discrimination cases. 487 U.S. 977, 990 (1988); 544 U.S. 228, 240, 242 (2005). The doctrine ran into a snag in *Ricci v. DeStefano.* 577 U.S. 557 (2009). In *Ricci,* New Haven faced a daunting situation. It administered an examination for promotion. *Id.* at 562. When African-American firefighters challenged the examination because of its disparate impact on them, New Haven withdrew the examination. *Id.* In response other firefighters, who would have qualified for a promotion based on their examination scores, sued New Haven for disparate treatment. *Id.* at 562–63. The Supreme Court held that New Haven could avoid liability for the disparate treatment suit if it proved a "strong basis in evidence" that had it not discarded the examination scores, it would have been liable for disparate impact. *Id.* at 563. The problem is that employers facing this demanding standard may decide to retain the practice challenged as having an unlawful disparate impact rather than to lose a case alleging disparate treatment. *Id.* at 629 (Ginsburg, J., dissenting). Some scholars fear that *Ricci* will dissuade employers from abandoning employment practices with disparate impacts. *See, e.g.*, Henry L. Chambers,

however, continues to provide plaintiffs with an alternative for proving intentional discrimination.[16]

Part II of this Article traces the development of hostile work environment law. In *Meritor Savings Bank, FSB v. Vinson*, the Supreme Court recognized that a hostile work environment is a forbidden form of sex discrimination.[17] Although this holding seemed a cause for celebration, it provided victims of harassment with a mixed blessing. The Court set a high standard of liability, which many victims have been unable to meet. *Meritor* held that, to establish a hostile work environment, a plaintiff must prove unwelcome words or conduct of a sexual nature that are so severe or pervasive that they alter the plaintiff's work environment and render the conditions abusive.[18] In *Harris v. Forklift System*, the Court raised the bar even higher, holding that a successful plaintiff must prove that the harassment altered the work environment both objectively and subjectively.[19]

Part III criticizes hostile work environment law. Congress expressed its determination to excise discrimination from the workplace by proscribing discrimination "with respect to" a term or condition of employment.[20] *Meritor*, however, contradicted this zero-tolerance standard by requiring a victim of harassment to prove that the misconduct was severe or pervasive and rendered the work environment

Jr., *The Supreme Court Chipping Away at Title VII: Strengthening It or Killing It?*, 74 LA. L. REV. 1161, 1178–80 (2014) (fearing that *Ricci* results in the perpetuation of practices causing disparate impact and consequently impairs the salutary effect of Title VII). *But see* Kenneth R. Davis, *The Equality Principle: How Title VII Can Save Insider Trading Law,* 39 CARDOZO L. REV. 199, 241 (2017) (suggesting that the risk posed by the strong-basis-in-evidence test may be limited to cases with fact patterns similar to *Ricci*); Melissa Hart, *From* Wards Cove *to* Ricci*: Struggling Against the "Built-In Headwinds" of a Skeptical Court*, 46 WAKE FOREST L. REV. 261, 277 (2011) (doubting that *Ricci* will adversely affect disparate impact law).

16. *See, e.g.*, Swierkiewicz v. Sorema N.A., 534 U.S. 506, 508 (2002) (holding that *McDonnell Douglas*'s prima facie case is an evidentiary standard but not a pleading standard); Reeves v. Sanderson Plumbing Prod., Inc., 530 U.S. 133, 142–43, 147 (2000) (confirming the continued viability of the *McDonnell Douglas* framework and reaffirming *St. Mary's Honor Center v. Hicks*); Babb v. Sec'y of Veteran Aff., 743 F. App'x 280, 287 (11th Cir. 2018) (applying the *McDonnell Douglas* framework to an age discrimination case); Vaughn v. Woodforest Bank, 665 F.3d 632, 636 (5th Cir. 2011) (applying the *McDonnell Douglas* framework to a race discrimination case); *see also* St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993) (holding that if a plaintiff disproves a defendant's articulated nondiscriminatory reason, the jury may but is not required to make a finding of intentional discrimination).

17. 477 U.S. 57, 67 (1986).

18. *Id.*

19. 510 U.S. 17, 371 (1993).

20. 42 U.S.C. § 2000e-2(a)(1) (2018).

abusive.[21] Thus, *Meritor* required a plaintiff to prove more than the statute requires. Section 2000e-2(m) of the 1991 Civil Rights Act further demonstrated Congress's commitment to eradicating workplace discrimination by codifying the minimalist motivating factor test.[22] The "severe or pervasive" element requires plaintiffs of harassment to prove far more than a discriminatory motivating factor. The contradiction between Title VII and the framework adopted in *Meritor* and *Harris* is not a mere abstraction. Numerous victims of shocking abuses have seen their cases dismissed at the summary judgment and trial stages of litigation.[23]

In addition, Part III recommends conforming sexual harassment law to the requirements of Title VII. The proposed standard would prohibit words or conduct of a sexual or gender-related nature that, when taken as a whole, would be highly offensive to a reasonable person and were highly offensive to the victim. Consistent with the statute, this approach would advance the federal policy to compensate victims of harassment and to eradicate harassment from the workplace.

Yet another flawed decision plagues the law of hostile work environment. Part IV of this Article examines *Burlington Industry, Inc. v. Ellerth*, which provides employers with an affirmative defense to harassment claims.[24] The defense may apply when a supervisor who has harassed a subordinate did not punish the victim with a tangible employment action such as firing, demoting, or withdrawing significant benefits. In such cases, the employer has a complete defense if it proves that (1) it adopted reasonable preventive and corrective measures, and (2) the victim unreasonably failed to take advantage of those measures or otherwise failed to avoid harm.[25] This defense clashes with § 2000e-5(g)(2)(B) of the 1991 Civil Rights Act, which showed Congress's intent to deprive employment discrimination defendants of a complete defense by rejecting the "same decision" defense articulated in *Price Waterhouse* and replacing it with a partial defense that merely limited available remedies.[26] In effect, this section imposed strict liability on an employer motivated by discriminatory intent. Because the *Ellerth* affirmative

21. *Meritor*, 477 U.S. at 67.

22. 42 U.S.C. 2000e-2(m) (2018).

23. *See infra* Parts III.C, IV.B.5 & IV.C.3 (showing how Supreme Court precedents have led federal courts in numerous cases to award defendants with summary judgment).

24. 524 U.S. 742 (1998). *Faragher v. City of Boca Raton*, the companion case to *Ellerth,* also announced the affirmative defense. 524 U.S. 775, 807 (1998). For the sake of brevity, this Article will refer to the affirmative defense as the "*Ellerth* affirmative defense."

25. *Ellerth*, 524 U.S. at 765.

26. 42 U.S.C. § 2000e-5(g)(2)(B) (2018); Price Waterhouse v. Hopkins, 490 U.S. 228, 242 (1989).

defense provides employers with complete exoneration, it conflicts with § 2000e-5(g)(2)(B) of the 1991 Civil Rights Act.

Part IV also criticizes *Vance v. Ball State University*.[27] That case held that to qualify as a supervisor under *Ellerth* an employee needed to have the authority to take tangible employment actions.[28] This narrow definition of "supervisor" steepened the uphill climb of plaintiffs because employers are not vicariously liable for the harassment of non-supervisors.[29]

The Article concludes that sections of the 1964 Civil Rights Act and the 1991 Civil Rights Act create a cohesive pattern demonstrating the congressional intent to cleanse the workplace of invidious discrimination. The law of hostile work environment is incompatible with this congressional intent. Hostile work environment law therefore needs adjustment. The Supreme Court can implement this change. It should prohibit words or conduct that would be highly offensive to a reasonable person and were highly offensive to the victim.

I. INDIVIDUAL DISPARATE TREATMENT LAW

Many are surprised to learn that Congress has never enacted a law explicitly condemning sexual harassment in the workplace. Rather, the Supreme Court has inferred such a ban from Title VII of the Civil Rights Act of 1964, which prohibits "discriminat[ion] against any individual with respect to his compensation, terms, conditions, or privileges or employment because of such individual's . . . sex."[30] Though derived from Title VII, the law of sexual harassment has developed on a separate course from the law banning all other forms of workplace discrimination. Compared to other victims of workplace discrimination, victims of sexual harassment are burdened with an unduly high standard of establishing liability.[31] Not only is the standard for establishing a hostile work

27. 570 U.S. 421 (2013).

28. *Id.* at 424.

29. *Id.* at 439.

30. The subsection provides in full: "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." 42 U.S.C. § 2000e-2(a)(1) (2018).

31. *Compare* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801–02 (1973) (establishing the three-step burden shifting framework for individual disparate treatment cases), *with* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986) (holding that plaintiffs alleging a hostile work environment claim must prove that sexual words or conduct were so severe or pervasive that they altered the plaintiff's working conditions and rendered the work environment abusive).

environment at odds with the requirements for establishing other types of sex discrimination, but it also contradicts the very source of federal discrimination law—Title VII of the 1964 Civil Rights Act.[32]

A. Dual Tracks for Resolving Individual Disparate Treatment Cases

Title VII forbids intentional workplace discrimination against members of a protected class. This type of discrimination is called individual disparate treatment.[33] Title VII, however, does not prescribe a standard of liability for such a violation. The Supreme Court first grappled with the task of filling this void in *McDonnell Douglas v. Green.*[34]

1. *McDonnell Douglas Corp. v. Green*: Pretext Cases

Percy Green, a mechanic and laboratory technician for McDonnell Douglas, lost his job in a general reduction in force.[35] A long-time civil rights activist, he then participated in a "stall-in," an organized protest against McDonnell Douglas's allegedly racist policies, where participants in stalled vehicles blocked access to a McDonnell Douglas plant.[36] Protesters also organized a "lock-in" where participants locked the plant from the outside preventing occupants from leaving the premises.[37] Green's involvement in the lock-in was uncertain.[38] Shortly after the lock-in, McDonnell Douglas advertised openings for mechanics, and Green applied for a job.[39] Because of Green's involvement in the two protests against the company, McDonnell Douglas denied his application for re-employment.[40] In response, he brought a Title VII action.[41]

32. *See infra* Part III (discussing the failure to hostile work environment law to meet the requirements of Title VII).

33. *See* Ricci v. DeStefano, 557 U.S. 557, 577 (2009) (identifying the two principal types of discrimination forbidden by Title VII: disparate treatment and disparate impact); William R. Corbett, *Mike Zimmer, McDonnell Douglas and "A Gift that Keeps Giving,"* 20 EMPLOYEE RTS. & EMP. POL'Y J. 303, 320 (2016) (criticizing the incoherence of individual disparate treatment law).

34. 411 U.S. 792 (1973).

35. *Id.* at 794.

36. *Id.* The police arrived on the scene, and they requested that Green move his vehicle. *Id.* at 795.When he refused, the police arrested him. *Id.* He pleaded guilty to obstructing traffic and was fined. *Id.*

37. *Id.* at 795.

38. *Id.*

39. *Id.* at 796.

40. *Id.*

41. *Id.*

Noting that the judges of the Eighth Circuit did not reach consensus on the allocations and burdens of proof in a Title VII case, a unanimous *McDonnell Douglas* Court articulated the applicable framework.[42] First, the plaintiff must establish a prima facie case.[43] In a refusal to hire case, the plaintiff may meet this burden by showing that: (1) he was a member of a protected class, (2) he applied and was qualified for a job opening, (3) he was rejected, and (4) after his rejection, the position remained open.[44] The burden of production then shifts to the employer to articulate a nondiscriminatory reason for the employee's rejection.[45] The plaintiff then has the opportunity to prove by a preponderance of the evidence that the employer's articulated, nondiscriminatory reason is a pretext for discrimination.[46] If the plaintiff meets this burden of proof, the factfinder may, absent direct evidence of discrimination, find for the plaintiff.[47] In

42. *Id.* at 793, 801–02.

43. *Id.* at 802.

44. *Id.*

45. *Id.* at 802–03.

46. *Id.* at 804. The Court specified several factors bearing on whether McDonnell Douglas's alleged nondiscriminatory reason for not hiring Green—his involvement in illegal actions directed against the company—was a pretext for discrimination. *Id.* at 804–05. The Court mentioned several considerations relevant to a finding of pretext: (1) whether the company retained or rehired white workers involved in comparable acts directed against the company, (2) how the company the treated Green during his prior term of employment, (3) how the company reacted to legitimate civil rights activities, and (4) what policies and practices the company followed regarding minority employment. *Id.*

47. *Id.* at 804–05. The *McDonnell Douglas* Court stated: "On retrial, respondent must be afforded a fair opportunity to demonstrate that petitioner's assigned reason for refusing to re-employ was a pretext or discriminatory in its application. If the District Judge so finds, he must order a prompt and appropriate remedy." *Id.* at 807. In *Texas Department Community Affairs v. Burdine*, the Court reaffirmed the *McDonnell Douglas* holding. 450 U.S. 248, 256 (1981). The Court stated: "The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate burden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Id.* These pronouncements are clear enough: if the plaintiff disproves the defendant's articulated nondiscriminatory reason for the challenged employment action, the plaintiff wins the case. Yet, a decade later, in *St. Mary's Honor Center v. Hicks*, a newly constituted Supreme Court spotted ambiguities in the language of both *McDonnell Douglas* and *Burdine*. 509 U.S. 502, 511 (1993). The *Hicks* Court reinterpreted those cases, holding that when the plaintiff disproves defendant's nondiscriminatory reason, the fact finder may but is not compelled to rule in favor of the plaintiff. *Id. See* Mark S. Brodin, *The Demise of Circumstantial Proof in Employment Discrimination Litigation:* St. Mary's Honor Center v. Hicks*, Pretext, and the "Personality" Excuse*, 18 BERKELEY J. EMP. & LAB. L. 183, 229 (1997) (criticizing *Hicks* for overturning *McDonnell Douglas*'s basic holding that when a plaintiff disproves the defendant's nondiscriminatory reason the plaintiff has conclusively established discrimination);

other words, the court or jury can infer discrimination.[48]

McDonnell Douglas provided a framework for cases involving a binary issue: either the adverse employment action was caused by discrimination or it was not. That framework was inappropriate for cases involving both a discriminatory and nondiscriminatory motive. *Price Waterhouse v. Hopkins*[49] addressed the issue how to resolve such mixed-motive cases.

2. *Price Waterhouse v. Hopkins*: Mixed-Motive Cases

Ann Hopkins, a staff attorney at the accounting firm of Price Waterhouse, was eligible for partnership.[50] Many aspects of her five-year record at the firm supported her bid for advancement. For example, she played a key role in securing a lucrative government contract for the firm.[51] More generally, partners familiar with her work praised her intelligence, skill, and productivity.[52] Despite Hopkins's impressive credentials, the firm rejected her application for partnership. The firm justified its decision based on Hopkins's harsh treatment of staff.[53] Hopkins challenged the decision, pointing to numerous instances of sex stereotyping.[54] One partner described her as "macho," and several objected to her use of profanities.[55] The partner who advised her why the firm had declined to promote her said she should, "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[56]

Judge Gesell, who presided at the trial, found that both a nondiscriminatory reason—Hopkins abrasiveness—and a discriminatory reason—the firm's stereotyping of Hopkins—contributed to the firm's denial of her application for partnership.[57] His finding of mixed motives

Kenneth R. Davis, *Price-Fixing: Refining the* Price Waterhouse *Standard and Disparate Treatment Law*, 31 FLA. ST. U. L. REV. 859, 866–69 (2004) (discussing how *Hicks* eviscerated the *McDonnell Douglas* framework by thwarting its purpose to simplify the daunting task of proving discriminatory intent).

48. *McDonnell Douglas*, 411 U.S. at 807.
49. 490 U.S. 228 (1989).
50. *Id.* at 233.
51. *Id.* at 233–34.
52. *Id.* at 234.
53. *Id.* at 234–35.
54. *Id.* at 235–36.
55. *Id.* at 235.
56. *Id.*
57. *Id.* at 236–37.

raised a novel question: What causal role must the discriminatory factor play for that misconduct to violate Title VII?[58]

The statute's lack of specificity on causation invited various interpretations. Price Waterhouse argued that, to establish a defendant's liability, a plaintiff must prove that discrimination was a but-for cause of the challenged employment practice.[59] Thus, if the discriminatory cause were eliminated, the challenged employment action would not have occurred.[60] Hopkins argued that, if the plaintiff can prove that discrimination played any part in the employment decision, the employer should be liable.[61] She conceded that, if the employer can prove that it would have made the challenged decision based on a nondiscriminatory reason alone, the plaintiff should lose her right to equitable relief.[62]

A plurality of the Supreme Court held, as Hopkins argued, that by forbidding an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate . . . because of such individual's . . . sex" the statute implied that a discriminatory motive may not play any part in an adverse employment decision.[63] The plurality reasoned that Congress had expressed the statutory command not to discriminate "because of sex" in such straightforward language that it could not have meant to burden plaintiffs with the complexity of parsing out the effects of two independent causes.[64] Implicitly, the Court, which recognized the "momentous" nature of Title VII's prohibition of unlawful discrimination, interpreted the statute with a broad remedial gloss.[65] The Court also observed that Title VII permits sex discrimination when it is a "bona fide occupational qualification [("BFOQ")] reasonably necessary to . . . th[e] particular business or enterprise."[66] If under this special circumstance discrimination is permissible, it must be impermissible under other circumstances.[67] Finally, the plurality noted that Title VII's disparate

58. Judge Gesell ruled that Price Waterhouse could avoid equitable relief if it could prove by clear and convincing evidence that it would have denied Hopkins's quest for partnership based on the legitimate factor alone. *Id.* at 237. The D.C. Circuit affirmed Judge Gesell's conclusion but on somewhat different reasoning. It ruled that if a plaintiff proves that discrimination played a part in an employment decision, the defendant will avoid all liability, equitable and otherwise, if it can prove that it would have made the same decision based on the nondiscriminatory decision alone. *Id.*

59. *Id.* at 240.

60. *Id.* at 237–38.

61. *Id.* at 238.

62. *Id.*

63. *Id.* at 240 (emphasis omitted) (quoting 42 U.S.C. § 2000e-2(a)(1) (2018)).

64. *Id.* at 241–42.

65. *Id.* at 239.

66. *Id.* at 242 (quoting 42 U.S.C. § 2000e-2(e) (2018)).

67. *Id.* Although facially persuasive, this argument seems circular because it is based on the assumption that Congress created the BFOQ defense to permit discrimination to

impact theory forbids unintentional discrimination arising from facially neutral employment practices that have a disproportionate effect on a protected class.[68] If Title VII's ban on discrimination is so stringent that it bans unintentional discrimination, then disparate treatment theory must prohibit any act of intentional discrimination, even when discrimination merely played a minor role in the adverse employment decision.[69]

The plurality's adoption of the motivating factor test showed its recognition of the congressional policy to eradicate workplace discrimination. By adopting this standard, the Court placed a minimal burden of proof on plaintiffs; the motivating factor standard is the most plaintiff-friendly standard possible.

The plurality, however, was not finished. It recognized that Title VII seeks to balance the right of workers to be free of invidious discrimination with the reasonable prerogatives of employers to control their business operations.[70] The BFOQ defense provides an example of Title VII's concern to protect employer rights.[71] Similarly, Title VII prescribes the so-called "business necessity" defense, which applies to disparate impact cases.[72] This defense absolves employers of liability when a legitimate business reason supports an employment practice that results in disparate impact against a protected class.[73] The Court also cited Title VII's legislative history to support the proposition that anti-discrimination law, though focused primarily on eliminating workplace

play a role in an adverse employment decision. From this assumption, the plurality concludes that Title VII bans such discrimination. It is possible, however, that Title VII bans only discrimination that is a but-for cause of discrimination, and that Congress created the BFOQ defense to permit discrimination to be a but-for cause of discrimination under circumstances reasonably justifying such discrimination. Perhaps a better argument supporting the plurality's interpretation of Title VII's causation standard is that the statute should be accorded the broadest reasonable interpretation to achieve the crucial public policy of eradicating invidious discrimination from the workplace.

68. *Id.*; *see* Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 986–87 (1988); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

69. *See Price Waterhouse*, 490 U.S. at 242.

70. *Id.*; *see* McDonnell Douglas v. Green, 411 U.S. 792, 801 (1973) ("The broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions. In the implementation of such decisions, it is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise.").

71. *Price Waterhouse*, 490 U.S. at 242–43.

72. *Id.* at 242–43; *see also* Watson v. Fort Worth Bank & Tr., 487 U.S. 977, 991 (1988); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

73. *Price Waterhouse*, 490 U.S. at 242–43.

discrimination, also seeks to safeguard legitimate employer rights.[74] Balancing these two concerns, the plurality articulated an affirmative defense applicable to employment discrimination cases.[75] This "same-decision" defense frees an employer of liability if it proves that it would have reached the same employment decision if discrimination had not played any role.[76] In other words, the employer would have reached the same decision based solely on a nondiscriminatory reason.[77]

Justice O'Connor believed that the plurality's motivating factor test would establish an unreasonably permissive causation standard of liability, unfairly shifting the burden of persuasion to the employer to prove the same-decision defense.[78] She proposed a higher standard of causation requiring plaintiffs to prove that discrimination was a substantial factor causing the adverse employment decision.[79] Only upon such a showing would the burden of proving the same-decision defense shift to the employer.[80]

Justice O'Connor also argued that to shift the burden of proof to the employer the plaintiff would have to provide direct, rather than circumstantial, evidence of discrimination.[81] This pronouncement raised the question: How should the law treat circumstantial evidence cases?

74. *Id.* at 243–44; *see also* 110 CONG. REC. 7247 (1964) (statement of Sen. Case) (noting that Title VII "expressly protects the employer's right to insist that any prospective applicant, Negro or white, must meet the applicable job qualifications").

75. *Price Waterhouse*, 490 U.S. at 258. Justice White objected to the plurality's remark that most employers would need to present "objective evidence" to support the same-decision defense. He stated that "where the legitimate motive found would have been ample grounds for the action taken, and the employer credibly testifies that the action would have been taken for the legitimate reasons alone, this should be ample proof." *Id.* at 261 (White, J., concurring).

76. *Id.* at 244–45. The plurality pointed out that an employer's proof of nondiscriminatory grounds justifying the adverse employment decision is not the same as proof that the employer would have made the decision based on the nondiscriminatory grounds. *Id.* at 252.

77. *Id.* at 252. Opting to apply the conventional burden of proof, the plurality rejected the lower court's imposition of the "clear and convincing" standard, stating that employers might establish the same-decision defense by a preponderance of evidence. *Id.* at 252–53.

78. *Id.* at 275–79 (O'Connor, J., concurring). If a plaintiff could not meet this burden of proof, she would proceed with the framework formulated in *McDonnell Douglas v. Green* and *Texas Department of Community Affairs v. Burdine*. 411 U.S. 792 (1973); 450 U.S. 248 (1981).

79. *Price Waterhouse*, 490 U.S. at 278 (O'Connor, J., concurring). Based on the numerous comments of sex stereotyping, Justice O'Connor concluded that Hopkins had shown evidence that discrimination was a substantial factor in Price Waterhouse's decision not to elevate Hopkins to partnership. Thus, in this case, the burden shifted to Price Waterhouse to prove by a preponderance of evidence that it would have denied her partnership because of her abrasiveness. *Id.* at 272 (O'Connor, J., concurring).

80. *Id.* at 278 (O'Connor, J., concurring).

81. *Id.* at 276.

Justice O'Connor answered this question by invoking the *McDonnell Douglas* burden-shifting framework.[82]

Justice O'Connor thus integrated *Price Waterhouse* and *McDonnell Douglas* into a unitary framework. Where a plaintiff relied on circumstantial evidence of discrimination, as Green did, the *McDonnell Douglas* framework would provide the plaintiff with the opportunity to disprove the employer's nondiscriminatory reason and allow the factfinder to infer discrimination.[83] On the other hand, by offering direct evidence of discrimination, as Ann Hopkins did, a plaintiff established a prima facie case, and, in essence, earned the right to shift the burden of persuasion, forcing the employer to prove the same-decision defense.[84]

3. The Civil Rights Act of 1991: Codification of the Motivating Factor Test

Because Justice O'Connor's vote, when added to the four Justice *Price Waterhouse* plurality, created a majority, her view became the holding of the case.[85] This approach governed individual disparate treatment cases until Congress passed the 1991 Civil Rights Act.[86] Enacted to nullify several Supreme Court decisions that favored employers,[87] this Act codified the motivating factor test enunciated by the *Price Waterhouse* plurality.[88] The Act, however, did not adopt all of the *Price Waterhouse* decision. Taking a more pro-plaintiff stance than *Price Waterhouse*, the 1991 Civil Rights Act tempered the same-decision defense. The Act provided that if the employer proves that it would have made the same employment decision based on a nondiscriminatory factor alone, the

82. *Id.* at 278–79; *see* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

83. *Price Waterhouse*, 490 U.S. at 278–79 (O'Connor, J., concurring).

84. *Id.* at 279.

85. Joined by Chief Justice Burger and Justice Scalia, Justice Kennedy dissented. *Id.* at 279 (Kennedy, J., dissenting).

86. Pub. L. 102-166, 105 Stat. 1071.

87. *See* Landgraf v. USI Film Prod., 511 U.S. 244, 250 (1994). Perhaps the two most significant cases that the 1991 Civil Rights Act overruled or modified are *Price Waterhouse v. Hopkins* and *Wards Cove Packing Co. v. Atonio*. *See* 490 U.S. 228, 276 (1989) (O'Connor, J., concurring) (asserting that the plaintiff must prove discrimination by direct evidence to shift the burden of persuasion to the defendant to prove the same-decision complete defense); 490 U.S. 642, 659 (1989) (shifting the burden of persuasion to the plaintiff to disprove the defendant's proffered business-necessity defense).

88. 42 U.S.C. § 2000e-2(m) (2018). The motivating factor test does not apply to other civil rights claims that are not governed by § 2000e-2(m). *See* Univ. of Tex. Med. Ctr. v. Nassar, 570 U.S. 338, 360 (2013) (holding that but-for causation applies to Title VII retaliation claims); Gross v. FBL Fin. Serv., Inc., 557 U.S. 167, 176 (2009) (holding that but-for causation applies to federal age discrimination claims).

plaintiff would still prevail in her claim of discrimination, but she would lose the right to receive damages.[89]

4. *Desert Palace, Inc. v. Costa*: The Universality of the Motivating Factor Test

The issue in *Desert Palace, Inc. v. Costa* was whether the 1991 Civil Rights Act rejected Justice O'Connor's approach to individual disparate treatment cases by allowing a plaintiff to qualify for the motivating factor analysis, regardless of whether the plaintiff presented direct or circumstantial evidence.[90] Desert Palace employed Catarina Costa as warehouse worker and heavy equipment operator.[91] Costa clashed with co-workers repeatedly, which resulted in escalating disciplinary actions culminating in her dismissal from employment.[92] Alleging that she was singled out for harsher treatment than men, given less favorable assignments than men, and stalked by a supervisor, she brought a discrimination claim under Title VII.[93]

At trial, the district court, over defendant's objection, instructed the jury that it should evaluate Costa's claim under the motivating factor test.[94] Desert Palace objected to this instruction on the ground that Costa had not presented any direct evidence of discrimination, that is, her evidence, unlike Ann Hopkins proof of sex stereotyping, was entirely circumstantial.[95]

Justice Thomas, writing for a unanimous Court, focused on the language of the statute.[96] He observed that § 2000e-2(m) requires a plaintiff to "demonstrate" that sex was a "motivating factor for any employment practice."[97] The section does not impose a heightened burden on plaintiffs, let alone mentioning any requirement of direct evidence.[98] He further noted that the statute defines "demonstrates" to mean "meets

89. 42 U.S.C. § 2000e-5(g)(2)(B) (2018).
90. 539 U.S. 90, 92 (2003).
91. *Id.* at 95.
92. *Id.*
93. *Id.* at 96.
94. *Id.* at 97.
95. *Id.* Strictly speaking, Hopkins's evidence of discrimination was circumstantial because, even the statement that she should walk, talk, and dress more femininely required an inference before one could conclude that she was the victim of discrimination. Nevertheless, truly direct evidence such as "we denied Hopkins partnership because she is a woman," is rare and requiring such evidence before shifting the burden of proving the affirmative defense to the defendant would impose an unreasonable burden.
96. *Id.* at 98.
97. *Id.* at 94; 42 U.S.C § 2000e-2(m) (2012).
98. *Costa*, 539 U.S. at 99.

the burdens of production and persuasion."[99] If Congress meant to impose a heightened standard, it would have said so, as it had in several other statutes.[100] Justice Thomas also pointed out that a party in civil litigation may offer any admissible evidence, whether direct or circumstantial, and he saw no indication in Title VII that Congress intended to depart from this convention.[101] Circumstantial evidence, he emphasized, may be more probative than direct evidence, and it is viewed as persuasive as direct evidence even in criminal cases.[102] Finally, he noted that § 2000e-5(g)(2)(B) provides that an employer will not have to pay an employee damages if the defendant "demonstrates" that it would have made the same employment decision absent any discriminatory motive.[103] This provision is part of the same statutory framework that prescribes the motivating factor test and does not require direct evidence.[104] It would therefore violate any sensible method of statutory construction to impute a different meaning to the word "demonstrates" in a sister section.[105]

Costa correctly interpreted the 1991 Civil Rights Act by providing that the motivating factor test applies to any plaintiff who invokes it. The result is a standard that benefits plaintiffs with an appropriately minimal burden of proof, promoting the policy to eradicate all workplace discrimination. As shown in Part II, sexual harassment law has followed a very different path.

II. HOSTILE WORK ENVIRONMENT LAW

Fashioned by a series of Supreme Court decisions, hostile work environment law saddles victims of sexual harassment with a heavy burden not imposed on other civil rights plaintiffs. As a result of this

99. *Id.* at 91 (quoting 42 U.S.C. § 2000e(m) (2018)).

100. *Id.* at 99; *see*, *e.g.*, 8 U.S.C. § 1158(a)(2)(B) (2018) (requiring that an immigrant demonstrate by "clear and convincing evidence" that he applied for asylum within one year of entering the United States); 42 U.S.C. 5851(b)(3)(D) (2018) (foreclosing the grant of relief to a whistleblower where an employer accused of retaliation "demonstrates by clear and convincing evidence that it would have taken the same" employment action regardless of the whistleblowing).

101. *Costa*, 539 U.S. at 99.

102. *Id.* at 100.

103. 42 U.S.C. § 2000e-5(g)(2)(B) (2018); *id.* at 100–01.

104. *See* 42 U.S.C. § 2000e-2(m) (2018); *Costa*, 539 U.S. at 99.

105. *Id.* at 101. Justice O'Connor concurred in the decision. *Id.* at 102 (O'Connor, J., concurring). She argued that, prior to passage of the 1991 Civil Rights Act, her position on the evidentiary burdens imposed by *McDonnell Douglas* and *Price Waterhouse* was correct. *Id.* The 1991 Civil Rights Act, however, changed the law by allowing a Title VII plaintiff to invoke the motivating factor test based on circumstantial evidence. *Id.*

heightened burden, lower courts routinely dismiss claims alleging sexual misconduct that is sometimes flagrant.[106]

A. Meritor Savings Bank, FSB v. Vinson*: The Heightened Burden for Hostile Work Environment Claims*

Sidney Taylor, a branch manager of Meritor Savings Bank, hired Mechelle Vinson as a teller-trainee.[107] Over the course of the next four years, Vinson advanced to teller, head teller, and assistant branch manager.[108] After Vinson took an extended sick leave for over two-months, the bank discharged her.[109] In response, she brought an action against the bank and Taylor for sexual harassment.[110]

Vinson testified at trial that at the end of her probationary period Taylor invited her to dinner, and during their meal suggested that they go to a motel to have sex.[111] After refusing, she feared retaliation and succumbed to his advance.[112] Following this first episode, Taylor demanded to have sex with her during and after work between forty and fifty times.[113] Vinson also testified that Taylor fondled her in front of other employees, followed her into the women's room, exposed himself to her, and raped her.[114] These abuses continued for three years until Vinson told Taylor that she had a steady boyfriend.[115]

Taylor categorically denied all of Vinson's charges, and the bank denied any knowledge of wrongdoing.[116]

The district court did not resolve the conflicting testimony.[117] Instead, it held that if Vinson and Taylor had had a sexual relationship, it was consensual.[118] The D.C. Circuit recognized that sexual harassment

106. *See, e.g.*, *infra* note 183 and accompanying text (describing cases where federal courts dismissed cases with serious allegations of sexual harassment).

107. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 59 (1986).

108. *Id.* at 59–60.

109. *Id.* at 60.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *See id.* Vinson called on other women to testify that Taylor had touched them inappropriately. *Id.* at 60–61. The trial court allowed some of this testimony, but limited it, instructing Vinson that she might be able to present this testimony as rebuttal evidence. *Id.* at 61. Vinson, however, did not offer this evidence in rebuttal. *Id.*

116. *Id.* Noting that the bank had an anti-discrimination policy, the district court also held that, because the bank had not received notice of Taylor's alleged misconduct, the bank was exonerated from liability. *Id.* at 62.

117. *Id.* at 61.

118. *Id.*

may be actionable as sex discrimination even where, as in Vinson's case, employment benefits are not conditioned on sexual favors.[119] Because the district court had not considered whether Taylor was engaged in this form of sexual harassment, the D.C. Circuit remanded the case to the trial court.[120] Furthermore, the D.C. Circuit questioned the district court's conclusion that the sexual relationship between Vinson and Taylor was consensual, stressing that if Taylor made sex a condition of employment, he coerced her consent.[121]

The Supreme Court agreed with the D.C. Circuit and held that words or conduct of a sexual nature may constitute discrimination "because of . . . sex."[122] Such misconduct becomes actionable under Title VII when unwelcome sexual advances create a hostile work environment.[123] Conceding this proposition, Meritor argued that Title VII provides redress only for victims who have suffered economic loss.[124] The Supreme Court correctly rejected Meritor's argument, quoting the statute's broad language, which prohibits discrimination "with respect to compensation, terms, conditions, or privileges" of employment.[125] This all-inclusive ban, the Court reasoned, strikes at all forms of workplace discrimination.[126] The Court also looked to Equal Employment Opportunity Commission ("EEOC") guidelines, which provided that unlawful sexual harassment may occur even if the offending words or conduct were not linked to an economic consequence.[127]

As noted, the district court found that because Vinson had engaged voluntarily in a sexual relationship with Taylor, Vinson forfeited her claim of harassment.[128] The Supreme Court rejected this argument, recognizing that fear of retaliation may spawn consent.[129] The critical issue, the Court held, was whether the sexual advances were unwelcome.[130]

119. *Id.* at 62.

120. *Id.*

121. *Id.* Surmising that the district court's finding of consent may have relied on voluminous testimony of Vinson's dress and fantasies, the D.C. Circuit instructed the trial court that such prejudicial testimony "had no place in this litigation." *Id.* at 63.

122. *See id.* at 64.

123. *Id.*; *see also* Henson v. Dundee, 682 F.2d 897, 902 (11th Cir. 1982) (recognizing a claim for sexual harassment under the theory of hostile work environment).

124. *Meritor*, 477 U.S. at 64.

125. *Id.*

126. *Id.*

127. *Id.* at 65 (citing 29 C.F.R. § 1604.11(a) (1985)); *see also* Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971) (recognizing a Hispanic employee's claim for hostile work environment where an employer discriminated in the service it provided to Hispanic customers).

128. *Meritor*, 477 U.S. at 68.

129. *See id.* at 63, 68.

130. *Id.* at 68.

Having recognized that a hostile work environment may violate Title VII, the Court limited the breadth of what might constitute such a violation.[131] In doing so, the Court deftly changed the wording of the statute. Though the statute prohibits discrimination "*with respect to* compensation, terms, conditions, or privileges of employment," the Court stated that not all harassing workplace misconduct "*affects* a 'term, condition, or privilege' of employment."[132] As shown in Part III, this word substitution is significant because it introduces a causation element into the analysis that goes beyond the express requirements of Title VII. By engaging in this subtle language switch, the Court gave itself license to tighten the requirements for hostile work environment claims. The Court held that for such claims to be actionable the harassment must be "sufficiently severe or pervasive 'to *alter* the conditions of [the victim's] employment and create an abusive working environment.'"[133] By rewriting the statutory language to include a causation element, the Court exceeded the bounds of acceptable judicial interpretation.[134]

B. Harris v. Forklift Systems, Inc.*: The Bar Rises Higher*

Harris v. Forklift Systems, Inc.[135] imposed an even higher burden on plaintiffs alleging a hostile work environment, requiring them to prove that (1) a reasonable person would have found the working environment abusive, and (2) that the plaintiff subjectively found an abusive alteration in working conditions.[136] As noted, however, Title VII does not

131. *Id.* at 67.

132. *Id.* at 63, 67 (emphasis added); *see also Rogers*, 454 F.2d at 238 (holding that the "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" is not actionable under Title VII).

133. *Meritor*, 477 U.S. at 67 (emphasis added) (quoting Henson v. Dundee, 682 F.2d 897, 904 (1982)).

134. Neither the language nor the congressional purpose of Title VII supports the Court's innovative interpretation. Thus, by recasting Title VII's language the Court followed neither textualism nor liberal constructionism. *Compare* Oncale v. Sundowners Offshore Servs., Inc., 523 U.S. 75, 79 (1998) (reading the text of Title VII to determine that the statute prohibits same-sex harassment), *with* Price Waterhouse v. Hopkins, 490 U.S. 228, 243–44 (1989) (referring to the legislative history of Title VII to infer the statute's causation standard). *See also* Marjorie O. Rendell, *What Is the Role of a Judge in Our Litigious Society?*, 40 VILL. L. REV. 1115, 1125 (1995) (asserting that judges should implement the purpose and intent of statutes); *Justice Breyer on the Supreme Court*, C-SPAN (Apr. 22, 2019), https://www.c-span.org/video/?459962-1/justice-breyer-discusses-life-supreme-court&start=884 (contrasting Justice Scalia's textual originalist approach to constitutional interpretation with Justice Breyer's approach, which weighs text, policy, contemporary values, and probable consequences).

135. 510 U.S. 17 (1993).

136. *Id.* at 21–22.

require that the discriminatory conduct *affected* the conditions of employment.

Teresa Harris worked as a manager for Forklift Systems, a heavy equipment rental company.[137] Throughout Harris's period of employment, Charles Hardy, her boss, subjected her to sexually-suggestive and gender-related slurs.[138] This pattern of misconduct included repeatedly impugning her competence in front of others because of her gender and, on one occasion, calling her a "dumb ass woman."[139] Taunting Harris and other female employees, he asked them to remove coins from his pants pockets, and, throwing objects on the ground, he asked Harris and other female employees to pick them up.[140] He also made sexual comments about Harris's clothing.[141] When Harris complained, Hardy expressed surprise, apologized, and promised to stop his boorish behavior, but soon thereafter he reverted to his abusive pattern.[142] Harris then quit and commenced a Title VII action.[143]

The district court found that, although offensive, Hardy's conduct was not sufficiently severe or pervasive to affect Harris's psychological well-being or to inflict psychological harm on a reasonable woman.[144] The Sixth Circuit affirmed.[145]

The Supreme Court reversed the judgment and remanded the case for further proceedings.[146] It held that a plaintiff alleging a hostile work environment need not prove psychological injury.[147] Rather, a plaintiff must prove that (1) a reasonable person would have found the working environment abusive, and (2) the victim found the working environment

137. *Id.* at 19.
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.* at 19–20.
145. *Id.*
146. *Id.* at 23. Justice Scalia objected to the vagueness of the standard the Court enunciated, which, he argued, encouraged undeserving plaintiffs to sue. However, admittedly unable to formulate a more precise standard under the equally vague statutory language, he reluctantly concurred. *See id.* at 24–25 (Scalia, J., concurring). Justice Ginsburg argued that a plaintiff should prevail if a reasonable person, under the plaintiff's circumstances, would have found it more difficult to perform on the job because of the altered working conditions. *See id.* at 25 (Ginsburg, J., concurring). Justice Ginsburg found the majority opinion in harmony with her view. *Id.* at 26.
147. *Id.* at 22 (majority opinion). The Court stressed that Taylor's appalling misconduct in *Meritor* does not establish a threshold for liability. *See id.* Less egregious misconduct that discourages an employee from remaining on the job may evidence a violation of Title VII. *See id.*

abusive.[148] The Court recognized that Teresa Harris's allegations of harassment were not nearly as shocking as the allegations of Mechelle Vinson.[149] Although the Court warned against using Vinson's allegations in *Meritor* as the threshold for a violation, many federal courts seem to have ignored this admonition.[150]

The *Harris* decision is also noteworthy because it relied on gender-related insults, rather than on words or conduct expressing sexual desire.[151] By doing so, the Supreme Court impliedly expanded the reach of the hostile work environment doctrine. In *Oncale v. Sundowners Offshore Services., Inc.*,[152] the Court expressly held that gender-related words or conduct, absent expressions of sexual desire, may constitute a hostile work environment.

C. Oncale v. Sundowners Offshore Services, Inc.*: Expansion and Contraction of the Theory*

Joseph Oncale worked for Sundowners as a roustabout on an oil platform.[153] Some of his co-workers repeatedly subjected him to demeaning sex-related actions, culminating in physical assault and the threat of rape.[154] After his supervisors responded dismissively to his complaints, Oncale quit his job.[155] The issue was whether Title VII covered same-sex harassment.[156] Writing for a unanimous Court, Justice Scalia reconfirmed that Title VII provides a broad remedial shield against discrimination. He therefore concluded that the prohibition of discrimination "because of sex" applies to men and women.[157] Justice Scalia pointed out that, although same-sex discrimination may not have

148. *Id.* The Court instructed that "Title VII comes into play before the harassing conduct leads to a nervous breakdown." *Id.* The Court also made clear that the "appalling conduct alleged in *Meritor*" does not set the threshold for a hostile work environment. *Id.* It appears, however, that many federal courts have disregarded this guideline. *See infra* note 183 and accompanying text (revealing the extreme view of many courts of what constitutes severe or pervasive misconduct).

149. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993).

150. *Id.*; *see infra* note 183 and accompanying text (citing cases where federal circuit courts have applied an unreasonably strict standard when assessing the sufficiency of hostile work environment complaints).

151. *Id.* at 19.

152. 523 U.S. 75, 80 (1998) (broadening the scope of hostile work environment claims to include all forms of harassment based on sex).

153. *Id.* at 77.

154. *Id.*

155. *Id.*

156. *See id.* The United States District Court for the Eastern District of Louisiana and the Fifth Circuit concluded that Title VII does not apply when the harasser and the target are of the same sex. *Id.*

157. *Id.* at 78.

been Congress's principal concern when it passed Title VII, remedial statutes often receive generous interpretations.[158]

Justice Scalia emphasized that "harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex."[159] A hostile work environment may also result from "derogatory terms . . . motivated by general hostility to the presence of women in the workplace."[160] This expansion of the scope of hostile work environment claims created an overlap between such claims and typical sex discrimination claims. Both prohibit the same misconduct, that is, discriminatory conduct directed against a member of a protected class.[161] Yet the standard for establishing liability under the two approaches is drastically different. The most striking difference is that a hostile work environment claim must be so severe or pervasive to alter the plaintiff's working conditions and create an abusive environment.[162] Plaintiffs alleging typical sex discrimination claims face no such requirement.

Part III of this Article explores more thoroughly the tension between the requirements of typical claims of sex discrimination and the requirements of claims of hostile work environment.

III. A CRITIQUE OF HOSTILE WORK ENVIRONMENT LAW

Meritor, *Harris* and *Oncale* prescribe the elements and boundaries of a hostile work environment claim. As shown below, this framework is flawed in two related respects. First, it contradicts the terms of Title VII. Second, it foists on victims of workplace abuse an unduly demanding standard of liability. The result is the dismissal of claims alleging highly offensive misconduct.[163]

158. *See id.* at 79.

159. *Id.* at 80.

160. *Id.*

161. *See The Supreme Court, 1997 Term—Leading Case*, 112 HARV. L. REV. 325, 334 (1998) (pointing out that both standard employment discrimination law and sexual harassment law prohibit sex stereotyping).

162. Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993) (noting that "the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII's broad rule of workplace equality"); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986) (holding that minor instances of misconduct such as a single offensive utterance do not create a hostile work environment and that to violate Title VII the misconduct must be severe or pervasive).

163. *See infra* Section III.C (discussing the tendency of federal courts to grant employers summary judgment in cases where plaintiffs have alleged serious facts of sexual harassment).

A. The Misinterpretation of the Core Provisions of the Title VII

Section 2000e-2(a) of the 1964 Civil Rights Act sets forth unlawful employment practices. The prohibition of sex discrimination provides: "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex."[164] It is lamentable that the Supreme Court has misinterpreted the language of this foundational section of federal civil rights law.

By enacting Title VII, Congress condemned in the strongest terms possible any form of workplace discrimination based on race or gender.[165] The Supreme Court has acknowledged that Title VII was a "momentous" piece of legislation.[166] Congress adopted strikingly broad language in its effort to rid the workplace of discrimination. It used four employment attributes—compensation, terms, conditions, and privileges—rather than using only one or two.[167] The inclusion of such catchall words as "conditions" and "privileges" shows Congress's determination to ban all employment discrimination regardless of which aspect of employment was discriminatory. No discriminatory act escapes culpability. Congress took a similarly broad view of what, if any, impact a discriminatory act must have to violate the statute. Thus, Congress did not require that a discriminatory act alter or affect the terms or conditions of employment. By using the words "alter" or "affect" the statute would have required a causal relationship between a discriminatory act and a change in working conditions. To maximize the prophylactic reach of the statute, Congress chose not to use either word. Rather, the statute merely prohibits discrimination *with respect to* the terms or conditions of employment.[168] The phrase "with respect to" does not require a causal

164. 42 U.S.C. § 2000e-2(a)(1) (2018).

165. The legislative history of Title VII was primarily concerned with eradicating racial discrimination from the workplace. Senator Humphrey summed up the purpose of Title VII by stressing that it addresses "the plight of the Negro in our economy." 110 CONG. REC. 6548 (1964) (statement of Sen. Humphrey). Senator Clark observed that Title VII sought to remedy "a social malaise and social situation which we should not tolerate." *Id.* at 7220 (statement of Sen. Clark). By including "sex" alongside "race" as a protected class under Title VII, Congress manifested the same urgency to eliminate sex discrimination as it expressed when explaining the urgency to eliminate race discrimination. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 243 n.9 (1989) (remarking that Title VII's condemnation of racial discrimination applies equally to sex discrimination).

166. *See Price Waterhouse*, 490 U.S. at 239 ("In passing Title VII, Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees.").

167. 42 U.S.C. § 2000e-2(a)(1) (2018).

168. *Price Waterhouse*, 490 U.S. at 240.

relationship between a discriminatory act and a change in working conditions.[169] It does not require *any* change in working conditions. This phrase merely requires that the discriminatory act "reference[s]" a term, condition or privilege of employment.[170] Congress's choice of inclusive rather than restrictive language seems deliberate. The draftsmanship of § 200e-2(a)(1) shows no signs of inadvertence. When Congress meant to require a causal link between a discriminatory act and its effect on a member of a protected class it did so with the phrase "because of." Thus, the statute prohibits discrimination "because of" race or sex. If Congress had meant to establish a causal link between a discriminatory act and a change in working conditions, it would have written the statute to express that meaning.

B. The Misapplication of the Motivating Factor Test

In the 1991 Civil Rights Act, Congress codified the motivating factor test advocated by the *Price Waterhouse* plurality.[171] Section 2000e-2(m) provides: "[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, sex, religion, or national origin was a motivating factor for any employment practice . . . ."[172] This test prescribes the minimal degree of linkage that discrimination must have with an adverse employment practice to establish an actionable claim. Congress could have adopted a number of more demanding causation standards ranging from sole cause[173] to but-for cause to substantial cause.[174] As Justice O'Connor correctly observed in her concurring opinion in *Price Waterhouse*, a motivating factor is not a cause at all.[175] The following two illustrations show its lack of causal force. First, if a mere motivating factor were removed from the mix of causes, the adverse employment action would nevertheless have occurred. Second, a motivating factor alone would not be sufficient to cause the adverse employment action. A motivating factor is cause in limbo, a lost cause, an ineffectual tagalong to the actual cause. The language of § 2000e-2(m) supports Justice O'Connor's point: the section refers to a

169. *See Respect*, DICTIONARY, https://www.dictionary.com/browse/respect (last visited Dec. 26, 2019).

170. *Id.*

171. *Price Waterhouse*, 490 U.S. at 242 (adopting the motivating factor test).

172. 42 U.S.C. § 2000e-2(m) (2018).

173. Congress rejected an amendment that would have required that, to be actionable, discrimination must have been the sole cause of discrimination in the workplace. 110 CONG. REC. 2728, 13837 (1964).

174. *See Price Waterhouse*, 490 U.S. at 276 (O'Connor, J., concurring) (proposing adoption of the substantial factor test).

175. *Id.* at 277–78.

motivating "factor," not a motivating "cause." To advance the policy condemning any workplace discrimination against a member of a protected class, Congress enacted a standard that afforded victims of discrimination the broadest possible protection. It banned any and all acts of discrimination, even those that had no causal effect on the victim's employment.

C. The Aggressive Elements of a Hostile Work Environment Claim

Sexual harassment is a form of sex discrimination that should be subject to the standard of liability prescribed in Title VII.[176] Yet *Meritor* violates Title VII by establishing a more demanding standard for hostile work environment claims than the statute prescribes.[177] *Meritor* holds that for a hostile work environment claim to be actionable a plaintiff must prove that the misconduct was "sufficiently severe or pervasive 'to alter the conditions of the victim's employment and create an abusive working environment.'"[178] This pronouncement requires a plaintiff to prove two elements that exceed the requirements of Title VII: (1) the harassment was severe or pervasive, and (2) the harassment so altered the victim's working conditions that it created an abusive working environment.[179]

Adopted in 1980, the original EEOC guideline on sexual harassment did not mention the need for severe or pervasive misconduct.[180] The guideline provided: "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment . . . ."[181] The guideline also provided that such conduct constitutes sexual harassment where it "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[182] The EEOC did not support the extreme viewpoint later imposed by the Supreme Court.

176. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) (recognizing that a hostile work environment is a form of sex discrimination under Title VII).

177. *See id.* at 67 (establishing that severe or pervasive misconduct is an element of a hostile work environment claim).

178. *See id.* (quoting Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

179. *Id.*

180. 29 C.F.R. § 1614.11(a) (1997).

181. *Id.*

182. *Id.* The guideline provides a third alternative to establish sexual harassment: When "submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual." *Id.*

Requiring victims of hostile work environments to prove severe or pervasive misconduct imposes a burden not placed on disparate treatment victims who seek redress under theories other than hostile work environment law. The consequences of this heightened burden are distressing. The "severe or pervasive" element has proven fatal to innumerable claims of hostile work environment where the victims alleged serious and sometimes predatory misconduct.[183] For example, in

183. *See, e.g.*, Graves v. Dayton Gastroenterology, Inc., 657 F. App'x 485, 485–86 (6th Cir. 2016) (affirming district court's order of summary judgment for defendants where the victim alleged that her harasser sent her two sexually explicit texts, and after she complained, retaliated by assigning her difficult tasks, denying her lunch breaks, and throwing a chair at her); Velasquez-Perez v. Developers Diversified Realty Corp., 753 F.3d 265, 267–69 (1st Cir. 2014) (affirming district court's order of summary judgment for defendant where the male victim alleged that a female with some authority over him attempted by force to enter his hotel room, sent him sexually provocative emails, and threatened to have him fired and influenced the decision to fire him because he rebuffed her); Clayton v. City of Atlantic City, 538 F. App'x 124, 125–26 (3d Cir. 2013) (affirming summary judgment for defendants where a female police officer alleged that her co-employee: repeatedly asked her on dates, commented on her physical features, massaged her foot near his genitals, and read her a love poem; and, when he became her supervisor, retaliated against her by altering her work and vacation schedules, reprimanded her unfairly after the chief of police grabbed her buttocks in public and said "that's the only thing she had going for her," and singled her out for disciplinary action not imposed on male employees); Hearron v. Voith Indus. Serv., Inc., 483 F. App'x 453, 454 (10th Cir. 2012) (affirming district court's order of summary judgment for defendant where plaintiff alleged that her supervisor flirted with her, made inappropriate personal remarks to her, and patted her on the buttocks and said, "you need a spanking and you're gonna like it"); Sutherland v. Missouri Dept. of Corr., 580 F.3d 748, 750 (8th Cir. 2009) (affirming district court's order of summary judgment for defendant where the victim alleged her co-worker put his hand on her shoulder, made sexually provocative remarks to her, and then grabbed her breast); Scruggs v. Garst Seed Co., 587 F.3d 832, 835–36, 839 (7th Cir. 2009) (affirming district court's order of summary judgment for defendant where plaintiff alleged that her co-worker said she looked like a "dyke," was "made for the back seat of a car," was in charge of "cookies with sprinkles," was not "smart enough," sabotaged her work, and on one occasion struck her); Mitchell v. Pope, 189 F. App'x 911, 913 n.3, 915 (11th Cir. 2006) (affirming district court's order of summary judgment for defendants where the victim alleged that a higher ranking officer in a sheriff's department: (1) attempted to kiss her at a party and that when she refused he called her a "frigid bitch," (2) appeared several times in the driveway at her home, once drunk, and told her son that he loved her, (3) told her that when she walked into a room he got "an erection," (4) rubbed against her and put his arm across her chest, (5) tiptoed to peek down her shirt, (6) chased her around the office, (7) called her a "frigid bitch" again when she refused to join him at a hotel's hot tub, (8) commented that her "ass" looked fine and made a comment to her about strippers squirting golf balls out of their vaginas); Brooks v. City of San Mateo, 229 F.3d 917, 921, 927 (9th Cir. 2000) (affirming district court's order of summary judgment for defendant where victim alleged that her co-employee grabbed her bare breast while blocking her from escaping); Lacy v. Amtrak, 205 F.3d 1333 (4th Cir. 2000) (per curiam unpublished table decision) (affirming district court's order of summary judgment for defendant where a female maintenance worker alleged that a manager called her a "black bitch," a lewd cartoon was left on her locker, and managers instructed her foreman to overload her with work); *see also*

Anderson v. Family Dollar Stores, Inc. ("Family Dollar"),[184] Family Dollar hired Anderson as a manager trainee and fired her after only one day.[185] Anderson complained to the Human Resources Department that the man who had conducted the job interview, Drew White, had made her uncomfortable by commenting inappropriately on her appearance and questioning her about her marital status.[186] Subsequently, White rehired Anderson, and she began a five-week training program during which she met with White once per week for one-hour testing sessions.[187] During these training sessions, White rubbed Anderson's shoulders, back, and hands.[188] On one occasion he cupped her chin.[189] He punctuated the physical contact with an implicit threat: "You know, how far do you want to go in this company, because it's me that makes you be here anyway . . . . I can make or break you."[190] White harassed Anderson at each testing session until Anderson told him to stop.[191] When Anderson completed the trainee program, White assigned her to manage a Family Dollar store.[192] During her first week on the job, Anderson encountered managerial problems, which she conveyed to White.[193] He responded that she should join him in a motel room in Florida, saying, "you ought to be right here in bed with me."[194] On another occasion when she relayed store-related issues to him, he said, "I'll deal with it, baby doll."[195] Later on, when White visited the store, Anderson mentioned that she had injured her back unloading a truck and that she wished to submit paperwork to document the accident.[196] White then grabbed her arm,

Alfano v. Costello, 294 F.3d 365, 369–70 (2d Cir. 2003) (reversing jury verdict for victim where she proved at trial that her co-employees repeatedly taunted her by joking about oral sex and by using carrots and potatoes to simulate male genitalia); Holbrook v. Reno, 196 F.3d 255, 257–59 (D.C. Cir. 1999) (affirming district court's judgment as a matter of law for defendant where the jealous instructor of a female FBI agent in training suspected that she was having an improper sexual relationship with her FBI physical trainer and helped initiate a four-hour interrogation during which agents probed her for the intimate details of her entire sexual history, despite her protests that she had suffered sexual abuse as a child).

184. 579 F.3d 858 (5th Cir. 2009).

185. *Id.* at 860.

186. *Id.* Before the interview, the manager of the store, Sherry Smith told Anderson "that if you are nice to White, he will be nice to you." *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.* at 861.

196. *Id.*

dragged her into the storeroom, and warned, "Are you going to work with me? Are you going to be nice?" Apparently frustrated, he continued, "You're just not going to be one of my girls, are you?"[197] Then he fired her.[198]

These facts justified Anderson's right to a trial where she could express her grievances and perhaps secure a remedy. Based on the substantiality of these allegations, a reasonable factfinder might well conclude that White's sexual designs on Anderson motivated his discriminatory words and actions, which culminated in her dismissal. The Fifth Circuit, however, affirmed the districts court's order of summary judgment in favor of Family Dollar.[199] Despite Anderson's allegations of highly offensive harassment, the court concluded that she had not alleged facts sufficient to raise an inference that the harassment was either severe or pervasive.[200]

Some courts have chosen to evaluate instances of harassment separately, as if each was an unrelated event. Then, not having found any of the events to have been "severe," these courts assess whether the frequency of the harassment was so pervasive that it altered the work environment. The result of this runaround has sometimes been dismissal of the complaint.[201] In *Mitchell v. Pope*,[202] the Eleventh Circuit dismissed a claim based on sixteen separate incidents of harassment. Former deputy sheriff, Donya Mitchell, alleged that Michael Overbey, a major in the sheriff's department, twice called her a "frigid bitch," stalked her at her home, rubbed against her, simulated humping in her presence, chased her around the office, remarked about her "ass," and told her she gave him an erection.[203] The court considered these events in isolation and concluded that none was severe.[204] Then, as a separate matter, the court decided that the pattern of harassment was not pervasive.[205]

197. *Id.*
198. *Id.*
199. *Id.* at 860.
200. *Id.* at 862. Despite White's inappropriate, suggestive remarks including implicit demands for sex, Anderson's unresponsiveness to White's remarks, and the circumstances of Anderson's discharge, the court held that White did not take a tangible employment action against Anderson. *Id.* at 683. It seems that a jury might reasonably have found differently.
201. *See, e.g.*, Mitchell v. Pope, 189 F. App'x 911 (11th Cir. 2006) (per curiam).
202. 189 F. App'x at 913–14; *see also* Hockman v. Westward Commc'ns, LLC, 407 F.3d 317, 329 (5th Cir. 2004) (analyzing separately several incidents of verbal and physical abuse by a supervisor, including trying to kiss plaintiff, slapping her behind and brushing up against her breasts, and ruling that none of the incidents was severe and that the frequency of abuse was not pervasive).
203. *Mitchell*, 189 F. App'x at 913 n.3 (detailing the sixteen incidents of harassment).
204. *Id.* at 913–14.
205. *Id.* at 914.

Current law breeds yet another opportunity for injustice. An employee might endure severe harassment, and in response the employer might transfer or discharge the offender or even transfer the victim. In such cases, despite the harassment's severity, the victim, because of the transfer, would not have faced an abusive alteration in his or her working conditions. Though the facts showing sex discrimination might be compelling, such a claim could not withstand a motion for summary judgment.

Stancombe v. New Process Steel LP[206] is such a case. Stancombe was working for New Steel, a steel processing company, when Woodfin, a co-worker, hugged him and grabbed his behind three times.[207] Stancombe reported the incident to management, which moved Stancombe, not Woodfin, to a different department.[208] Two days later, Woodfin located Stancombe at work, grabbed his head, and made three thrusts of his crotch into Stancombe's face.[209] In response, Stancombe quit his job.[210] Affirming the district court's grant of summary judgment for Woodfin and New Steel,[211] the Eleventh Circuit noted that if Stancombe had not quit, "he would have been working a different shift than [sic] Woodfin."[212] The court therefore concluded that, "while the second incident arguably was severe," the totality of the facts did not alter the conditions of Stancombe's working environment.[213] The Court's conclusion may find

206. 652 F. App'x 729 (11th Cir. 2016) (per curiam); *cf.* Stewart v. Miss. Transp. Commc'n, 586 F.3d 321, 325 (5th Cir. 2009) (discounting several physical and verbal instances of harassment because the employer took remedial action, and considered only additional verbal instances of harassment occurring after the remedial action); Meriwether v. Caraustar Packaging Co., 326 F.3d 990, 994 (8th Cir. 2003) (dismissing a claim where the employer took effective remedial action in a case where the plaintiff alleged that her co-employee grabbed her buttocks and later taunted her about his misconduct).

207. *Stancombe*, 652 F. App'x at 731.

208. *Id.*

209. *Id.*

210. *Id.* New Steel conducted an investigation into Stancombe's allegations. *Id.* Other workers in the plant did not corroborate any of Stancombe's charges against Woodfin. *Id.* The results of the investigation are not surprising given that Stancombe was a temporary employee with only one month on the job when the incidents occurred. *Id.* Woodfin, however, admitted to putting his arm around Stancombe, and New Process suspended him for three days. *Id.* The suspension resulted not only from Woodfin's admission but also as punishment for a previous incident in which Woodfin had hit another employee's buttocks while the employee was bent at a refrigerator. *Id.* at 732.

211. *Id.* at 730–31.

212. *Id.* at 735. This strained reasoning conflicts with the circumstances of the second incident where Woodfin sought out Stancombe, although New Steel had reassigned Stancombe to a different department. *Id.* at 731.

213. *Id.* at 736.

support in Supreme Court precedent,[214] but it conflicts with the very language of Title VII.[215]

One might wonder how courts and scholars justify the excessive requirements of hostile work environment law. Some do so by accepting the mistaken premise that a Title VII discrimination claimant must allege and prove an adverse employment action.[216] The list of adverse employment actions includes refusing to hire, failing to promote, firing, reassigning with a significant reduction in responsibility, and withdrawing significant benefits.[217] All these employment actions are employment decisions that drastically alter or end the employment. A hostile work environment results from abusive words or conduct such as taunting, offensive stereotyping, or unwanted touching. Ordinarily, it does not involve any of the adverse employment decisions on the list. Some argue therefore that a hostile work environment claim, unlike all other discrimination claims, lacks the element of an adverse decision.[218] According to this viewpoint, the "severe or pervasive" requirement is a proxy for such a decision.[219]

214. *See, e.g.*, Harris v. Fork Lift Sys., Inc., 510 U.S. 17, 21–22 (1993) (requiring that a successful plaintiff prove alteration of the working environment).

215. *See* 42 U.S.C. § 2000e-2(a)(1), (m) (2018).

216. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 768 (1998) (Thomas, J., dissenting) ("A disparate treatment claim require[s] a plaintiff to prove an adverse employment consequence."); Price Waterhouse v. Hopkins, 490 U.S. 228, 265 (1989) (O'Connor, J., concurring) ("Congress clearly conditioned legal liability on a determination that the consideration of an illegitimate factor *caused* a tangible employment injury of some kind.").

217. *See Ellerth*, 524 U.S. at 761 ("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."); Faragher v. City of Boca Raton, 524 U.S. 775, 808 (1998) (providing examples of tangible employment actions such as "discharge, demotion, or undesirable reassignment").

218. *See Faragher*, 524 U.S. at 786 (implying that the requirement in hostile work environment cases of severe or pervasive harassment sufficient to alter the victim's working conditions and create an abusive working environment substitutes for an adverse employment decision in other sex discrimination cases); *see also* Henry L. Chambers, Jr., *A Unifying Theory of Sex Discrimination*, 34 GA. L. REV. 1591, 1622 (2000) (arguing that for a plaintiff to state a hostile work environment claim "[s]everity or pervasiveness is required to ensure that the employee's terms of employment have sufficiently changed when no actual job detriment has occurred" and that "[t]he 'severe or pervasive' requirement thus acts as a proxy for actual job detriment in the pre-*quid pro quo* harassment context"); Steven L. Willborn, *Taking Discrimination Seriously:* Oncale *and The Fare of Sexual Harassment Law*, 7 WM. & MARY BILL RTS. J. 677, 692 (1999) (explaining that "the standard model of sexual harassment correctly recognizes an alternative route for meeting the 'affect' element: harassment can be sufficiently severe or pervasive to 'affect' the working environment").

219. *See* Chambers, *supra* note 218.

Title VII, however, does not require an adverse employment decision as a condition to establish liability. Harassing words or actions that are highly offensive both objectively and subjectively meet the statute's requirements. As noted, § 2000e-2(a)(1) condemns discrimination with respect to a *condition* of employment, rather than condemning only adverse employment decisions.[220] A victim of harassment endures an abusive *condition* of her employment.

The statutory language of the motivating factor test also contradicts the argument that an adverse employment action is a necessary element of a discrimination claim. Section 2000e-2(m) refers to an "employment practice" rather than to an "employment decision."[221] By using the more inclusive term "employment practice," Congress broadened the reach of the motivating factor test to apply to all adverse employment practices, including discriminatory words or acts of harassment.[222] This interpretation of § 2000e-2(m) comports with the House Report on the bill destined to become the 1991 Civil Rights Act, which provides that "[t]o establish liability . . . the complaining party must demonstrate that discrimination actually contributed or was otherwise a factor in an employment decision or *action*."[223] The Report could not have been clearer. Not limited to adverse employment decisions, the prohibitions of Title VII apply to discriminatory actions such as harassing behavior.

There is still another reason a valid hostile work environment claim does not require a concrete adverse employment decision. *Meritor* held that "economic" or "tangible" injury is not an element of a hostile work environment claim.[224] As noted, the catalogue of tangible employment actions includes decisions to hire, fire, promote, demote, or reassign at reduced pay or job responsibility.[225] All or nearly all such decisions inflict economic harm.[226] If severe or pervasive misconduct is a proxy for such decisions, then tangible employment actions with economic consequences

220. 42 U.S.C. § 2000e-2(a)(1) (2018).

221. *Id.* § 2000e-2(m).

222. The English Oxford Dictionary defines "practice" as follows: "The actual application or use of an idea, belief, or method, as opposed to theories relating to it." *Practice*, ENG. OXFORD DICTIONARY, https://www.lexico.com/en/definition/practice (last visited Dec. 26, 2019).

223. H.R. REP. NO. 102-40(I), at 586 (1991) (emphasis added).

224. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986).

225. *See supra* text accompanying note 217.

226. *See* Vance v. Ball State Univ., 570 U.S. 421, 464 (2013) (Ginsburg, J., dissenting) (speculating that the supervisor's power to reassign might be a tangible action if "the reassignment carries economic consequences"); Burlington Indus., Inc., v. Ellerth, 524 U.S. 742, 761–62 (1998) ("A tangible employment action in most cases inflicts direct economic harm."); *see also* Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) (noting that to be actionable a sexual harassment claim must meet a threshold of seriousness).

have slipped through the back door and have become an element of a hostile work environment claim. Such a result defies *Meritor*'s holding that economic injury is not an element of a hostile work environment claim.[227]

In *Oncale v. Sundowners Offshore Services Inc.*,[228] Justice Scalia assured the public that the law of hostile work environment would not devolve into a "civility code."[229] He focused on the wrong concern. The law has perpetuated a code of insensitivity. Some employers seem to view workplace harassers as parents view their mischievous children. Boys will be boys. Harassment, however, is not a boyish prank. Many judges seem to have internalized society's tolerance for sexual harassment that falls short of sexual predation. Judges who deny plaintiffs legal recourse underestimate the devastating effects that highly offensive sexual abuse inflicts.

The emotional toll of sexual harassment can be at least as harmful as a reassignment with reduced responsibility, or the denial of a raise or a promotion. The victim may suffer symptoms ranging from guilt and humiliation to anxiety and clinical depression.[230] A blow to the pocketbook is not as punishing as a blow to one's human dignity. This is particularly so when a wrongdoer violates a victim's boundaries of sexual intimacy. If reassignment and the denial of benefits are adverse employment actions sufficient to support a violation of Title VII, so too should highly offensive harassment, even if it falls short of severe or pervasive misconduct that abusively alters the work environment.

227. *See Meritor*, 477 U.S. at 64 (rejecting the argument that hostile work environment plaintiffs must prove economic injury).

228. 523 U.S. 75 (1998).

229. *See id.* at 80–81 (stating that Title VII forbids only severe or pervasive harassment that is objectively offensive and "does not reach genuine but innocuous differences in the ways men and women routinely interact with members of the same sex, and of the opposite, sex").

230. *See, e.g.*, Tuli v. Brigham & Women's Hosp., 656 F.3d 33, 44 (1st Cir. 2011) (summarizing the sexual harassment victim's symptoms, including anxiety, anger, fear, abdominal pain, and nausea); Schagene v. Spencer, No. 13cv333-WQH(RBB), 2018 WL 1210682, at *1 (S.D. Cal. Mar. 8, 2018) (detailing the sexual harassment victim's symptoms, including insomnia, nightmares, and post-traumatic stress disorder); Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 461 n.97, 462 (1997) (disclosing that psychological injuries, ranging from cardiac and gynecological ailments to nightmares and suicide attempts, have afflicted victims of harassment); Deborah Epstein, *Can a "Dumb Ass Woman" Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Speech*, 84 GEO. L.J. 399, 405 (1996) (reporting the results of a study detailing the harm that sexual harassment inflicts on women).

D. Unwelcome Sexual Advances

To prevail in a hostile work environment claim, a plaintiff must prove that the sexual advances were unwelcome.[231] The *Meritor* Court recognized that even voluntary sexual behavior may be unwelcome because of pressure, either explicit or implicit, that a supervisor exerted on a subordinate.[232] Whether sexual advances were unwelcome is an issue of voluntary consent. If the plaintiff initiated or consented to sexual advances without any coercion, the plaintiff should not have a case. But a court should take into account pressure that taints consent with implied coercion.

In *Blake v. MJ Optical, Inc.*,[233] the Eighth Circuit seemed dismissive of such pressures. Bobbette Blake worked as a bench technician for MJ Optical and its predecessor company.[234] Marty Hagge, the son of the owner of MJ Optical, was Blake's supervisor.[235] Beginning in 1999 and continuing until 2013, Marty subjected Blake to a pattern of harassing behavior.[236] The pattern began at Blake's husband's funeral when Marty grabbed Blake's behind.[237] It seems that Marty viewed her husband's death as a license to accost her. After the funeral, Marty, on a recurring basis, smacked and grabbed Blake's behind at work.[238] She responded at least once with annoyance.[239] Marty often told Blake that "she needed a man" and once asked her if her nipples were the "size of nick[el]s or quarters."[240] Embarrassed, she bought padded underwear.[241] In 2013, Marty and Blake became embroiled in a conflict over a work assignment.[242] This conflict led to her resignation, and thereafter she instituted a lawsuit alleging a hostile work environment.[243]

231. *Meritor*, 477 U.S. at 68 (holding that "[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome'") (quoting 29 C.F.R. § 1604.11(a) (1985)).

232. *See Meritor*, 477 U.S. at 68.

233. 870 F.3d 820, 827–28 (8th Cir. 2017).

234. *Id.* at 822.

235. *Id.*

236. *Id.* at 823–24.

237. *Id.* at 823.

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.* at 823–24.

243. *Id.* at 824–25. The circumstances leading to Blake's resignation began when she discerned a problem with a large number of eyeglass frames. *Id.* at 823–24. After Marty determined that the machinery was operating properly, he asked Blake to refrain temporarily from doing her work of fitting lenses into frames while other employers took over for her. *Id.* at 824. Two or three days later, Blake, without Marty's approval, resumed

Affirming the district's court order of summary judgment for MJ Optical,[244] the Eighth Circuit stressed Blake's *admission* that her relationship with Marty was positive most of the time.[245] That honest appraisal implies that Marty harassed her some of the time. Surely, the court could not mean that, to be actionable, the harassment needed to persist every moment of every workday. The court also noted that during the long period of the alleged harassment, Blake never complained to Marty or anyone else at MJ Optical.[246] Blake's reluctance to complain at work is understandable. She testified at her deposition that complaining "[w]ouldn't have done any good."[247] Marty was her boss and his mother was the company president.[248] They could have disciplined Blake for any reason and fired her at will. She had no safe harbor to file a complaint. As *Meritor* instructs, acquiescence, under implied pressure, does not prove voluntary consent.[249] Nevertheless, she did show disapproval of Marty's behavior with unambiguous nonverbal communication.[250] It seems that the court discounted her acts of embarrassment and humiliation.

To defeat a motion for summary judgment, a party must merely raise a material issue of fact.[251] As the Eighth Circuit recognized, the non-moving party is entitled to all reasonable inferences in its favor and forfeits the right to a trial only if its position is irrational based on the record.[252] Blake's proof that Marty's harassment was unwelcome, though perhaps not overwhelming, was sufficient to meet the test of rationality.

Under current law, Blake should have had the opportunity to present her case to an impartial jury. Even so, the law should be changed. As

working at her mounting station. *Id.* This act infuriated Marty, who ranted that Blake was responsible for his having dropped out of school and having remained at MJ Optical. *Id.* Blake reported this outburst to the president of MJ Optical, Marty's mother, who told Blake to "go home and plant flowers." *Id.* The next day Blake resigned. *Id.* Marty's tantrum and his mother's unresponsiveness to Blake's complaint explain why she never formally complained about the sexual harassment.

244. *Id.* at 822.

245. *Id.* at 829.

246. *Id.*

247. *Id.* at 823.

248. *Id.* at 822, 824.

249. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 68 (1986) (instructing that "the fact that sex-related conduct was 'voluntary,' in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII").

250. *Blake*, 870 F.3d at 823.

251. FED. R. CIV. P. 56(a) (providing that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law").

252. *Blake*, 870 F.3d at 825.

shown in Part III.E, a victim of sexual harassment should not have to prove the harassment was unwelcome.[253]

E. A Workable Alternative

A hostile work environment claim, like any federal discrimination claim, must meet the minimal requirement of the motivating factor test.[254] It follows that a hostile work environment claim needs to meet the same minimal requirement.[255] Because the elements needed to establish a hostile work environment exceed this standard, the Supreme Court should adopt a new standard compatible with Title VII.

It might appear that any discriminatory act, no matter how trifling, would meet the motivating factor test. This cannot be and is not so. Congress did not intend to compensate harassment plaintiffs who merely complain of "stray remarks"[256] or "bruised egos."[257] As a general rule, only a plaintiff who suffers a cognizable injury is entitled to relief.[258] This principle applies to all plaintiffs, including those who sue for sexual harassment. As Justice O'Connor observed, a principle goal of Title VII

253. A showing of voluntary consent would disprove injury, which is a necessary element of a hostile work environment claim. *See* Larsa K. Ramsini, *The Unwelcome Requirement in Sexual Harassment: Choosing a Perspective and Incorporating the Effect of Supervisor-Subordinate Relations*, 55 WM. & MARY L. REV. 1961, 1997–98 (2014) (arguing that the burden of proving that sexual advances were welcome should be on the defendant, and that, to succeed in this defense, the defendant must show that the plaintiff instigated the sexual advances through her words, not her conduct).

254. 42 U.S.C. § 2000e-2(m) (2018); *see* Chambers, *supra* note 218, at 1641–42 (asserting that the motivating factor test applies to all types of discrimination, including sexual harassment); Willborn, *supra* note 218, at 688–91 (urging courts to adopt the motivating factor test in sexual harassment cases and asserting that in hostile work environment cases the motivating factor test is met when severe or pervasive misconduct affected the work environment); Margaret E. Johnson, Comment, *A Unified Approach to Causation in Disparate Treatment Cases: Using Sexual Harassment by Supervisors as the Causal Nexus for the Discriminatory Motivating Factor in Mixed Motives Cases*, 1993 WIS. L. REV. 231, 245–46 (arguing that the motivating factor test and mixed-motives analysis should apply to cases meeting the existing elements of a hostile work environment).

255. *See supra* note 254 and accompanying text (discussing the broad applicability of the motivating factor test).

256. Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring) (commenting that "stray remarks in the workplace, while perhaps probative of sexual harassment . . . cannot justify requiring the employer to prove that its hiring or promotion decisions were based on legitimate criteria"); *see also Meritor*, 477 U.S. at 67 (quoting Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971) (noting that a "mere utterance" will not establish a hostile work environment)).

257. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998) (internal citation omitted).

258. *See, e.g.*, CHARLES ALAN WRIGHT ET AL., FED. PRACTICE AND PROCEDURE 13A § 3531.4 (3d ed. 2008) (discussing the constitutional requirement that a plaintiff must suffer an injury to be entitled to compensation).

is "to make persons whole for injuries suffered on account of unlawful employment discrimination."[259] Reading the element of harm into remedial statutes is a standard practice of statutory interpretation. For example, § 10(b) of the Securities Exchange Act of 1934[260] prohibits the use of "any deceptive or manipulative device" in connection with the purchase or sale of any security.[261] The section does not explicitly require a victim of securities fraud to prove injury, but the courts imply injury as a necessary element of a securities-fraud claim.[262] The same convention of statutory interpretation should apply to § 2000e-2(m), the motivating factor test of Title VII. The injury implied into the motivating factor test must meet a reasonable threshold. The law does not provide a remedy for *de minimus* harms.[263] Although the injury need not be extreme, it should not be trivial.[264]

Sexual harassment law needs a sensible and workable standard of liability that is consistent with Title VII and includes an injury element. The standard must also prevent courts from viewing harassing incidents as isolated snapshots rather than as parts of a broader picture. A standard that meets these criteria would require a plaintiff to prove that she was subjected to sexual or gender-related words or conduct that, when taken as a whole, would be highly offensive to a reasonable person and were highly offensive to her.[265]

To establish injury under this standard, the plaintiff would have to meet both an objective and subjective test. The objective test requires that the misconduct would have been highly offensive to a reasonable person. This test prevents a hypersensitive person from prevailing when

259. *Price Waterhouse*, 490 U.S. at 265 (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975)); *see also* Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 121 (2002) (acknowledging "Title VII's remedial purpose").

260. 15 U.S.C. § 78j(b) (2018).

261. *Id.*

262. *See, e.g.*, Amgen., Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 460–61 (2013) (setting forth the elements of a private § 10(b) claim, which include "economic loss"); Herman & MacClean v. Huddleston, 459 U.S. 375, 387 (1983) (noting that parties suing under § 10(b) seek monetary compensation); Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 730 (1975) (reconfirming the implied right of action for damages under § 10(b) and Rule 10b-5).

263. *See, e.g.*, LONNIE E. GRIFFITH, JR., CORPUS JURIS SECUNDUM, 1A Actions § 71 (Mar. 2019) (explaining that the maxim "de minimus non curat lex" expresses the principle that the law awards no damages for a trifling or immaterial harm).

264. *Id.*

265. *See* Kenneth R. Davis, *Strong Medicine: Fighting the Sexual Harassment Pandemic*, 79 OHIO ST. L.J. 1057, 1102 (2018) (proposing that Congress empower the EEOC with quasi-judicial authority to hear sexual harassment claims and that the EEOC find liability when a plaintiff demonstrates that the harassment would have been highly offensive to a reasonable person).

she alleged no more than relatively inconsequential misbehavior. The subjective test requires that the plaintiff found the misconduct highly offensive. This test is necessary because misconduct that is highly offensive to a reasonable person might not offend and therefore not injure someone who is imperturbable. When the objective and subjective tests are combined, the result is a cognizable injury.

Implementation of this standard would relieve the plaintiff of having to prove that the harassment was unwelcome. Whether the words or conduct were unwelcome, however, would remain material to the analysis. Evidence that the misconduct was unwelcome would support the inference that the plaintiff found it highly offensive. The defendant in rebuttal would have the opportunity to prove that the behavior was welcome. Such a showing would disprove injury.

No formula could determine what would be highly offensive to a reasonable person. Such a determination would depend on the type of harassment, that is, whether the harasser used words or conduct, what words the harasser used, and what conduct he engaged in. Another factor would be whether and to what extent the harasser physically touched or assaulted the victim. The frequency of the misbehavior would also be relevant. Yet another consideration would be whether the harasser threatened the victim with reprisals such as termination of employment or undeserved disciplinary action. The power relationship between the harasser and the victim would also be significant. For example, if the harasser had the power to fire or demote the victim, the harassment would tend to be more offensive than if the harasser were a co-employee of the victim. These considerations are familiar. They are applied under the current standard.[266] It is important to remember, however, that the proposed standard would not require that the offensive behavior was so severe or pervasive to alter the victim's working conditions and create an abusive working environment.

Factors relevant to whether the harassment was highly offensive to the plaintiff would include: (1) whether without explicit or implicit pressure she condoned, encouraged or participated in the misbehavior, (2) how she reacted in words and conduct, and (3) whether and when she complained formally or informally within the company or to anyone outside the company. Her perception of whether the harassment altered the work environment would be irrelevant to her claim.

The proposed standard would lower the bar but not unreasonably. It would align the elements of sexual harassment with the requirements of

266. *See, e.g.*, Faragher v. City of Boca Raton, 524 U.S. 775, 786–90 (1998) (discussing the factors relevant to determining whether misconduct rises to the level of forbidden sexual harassment).

Title VII. Harassing behavior would be actionable if discrimination was a motivating factor with respect to the compensation, terms, conditions, or privileges of the plaintiff's employment, and if the victim suffered an injury. The statute requires nothing more.

F. New York's New Sexual Harassment Law

On August 12, 2019, New York State adopted a sexual harassment statute that eliminated the "severe or pervasive" requirement of a hostile work environment claim brought under the New York State Human Rights Law.[267] The new law provides that an unlawful hostile work environment claim may be valid "whether such harassment would be considered severe or pervasive under precedent applied to harassment cases."[268] The section establishes an affirmative defense for conduct that "does not rise above the level of what a reasonable victim of discrimination with the same protected characteristic would consider petty slights or trivial inconveniences."[269]

In signing the bill into law, Governor Cuomo said, "By ending the absurd legal standard that sexual harassment in the workplace needs to be 'severe or pervasive' and making it easier for workplace sexual harassment claims to be brought forward, we are sending a strong message that time is up on sexual harassment in the workplace and setting the standard for equality for women."[270] Governor Cuomo's observation is correct. The "severe or pervasive" element of a hostile environment claim has scuttled claims that any reasonable person would find valid.

IV. THE DYSFUNCTIONAL AFFIRMATIVE DEFENSE

Although *Meritor* recognized the viability of hostile work environment claims, it declined to decide whether employers might have an affirmative defense.[271] It was not until twelve years later that the Supreme Court resolved this issue.[272]

267. 2019 N.Y. LAWS ch. 160.

268. *Id.*

269. *Id.*

270. Nick Reisman, *Cuomo Signs Sweeping Sexual Harassment Legislation*, SPECTRUM NEWS (Aug. 12, 2019, 1:08 PM), https://spectrumlocalnews.com/nys/central-ny/politics/2019/08/12/cuomo-signs-sweeping-sexual-harassment-legislation.

271. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 72 (1986) (declining "the parties' invitation to issue a definitive rule on employer liability" but agreeing with the EEOC that Congress intended agency principles to resolve the issue).

272. Two companion cases, *Burlington Industry, Inc. v. Ellerth* and *Faragher v. City of Boca Raton*, resolved this issue. 524 U.S. 742, 765 (1998); 524 U.S. 775, 804 (1998).

A. Burlington Industries, Inc. v. Ellerth*: Aided by the Agency*

In *Burlington Industries, Inc. v. Ellerth*,[273] Kim Ellerth, a salesperson for Burlington, alleged that one of her supervisors, Ted Slowik, subjected her to a pattern of harassment.[274] Her complaint emphasized three incidents.[275] The first occurred while they were on a business trip, and Slowik invited Ellerth to meet him in the hotel lounge.[276] Because Slowik was her boss, Ellerth felt compelled to accept, but when Slowik commented about her breasts, Ellerth bristled and discouraged him.[277] He responded by telling her to "loosen up" and warned that he could make her life "very hard or very easy at Burlington."[278] The second incident occurred when Slowik expressed reservations at Ellerth's promotion interview because she was not "loose enough" and rubbed her knee.[279] Later, when Slowik called to inform her that she received the promotion, he commented that she would be working with men who "like women with pretty butts [and] legs."[280] The final incident occurred when Ellerth called Slowik to ask permission to attach a customer's logo to a sample.[281] Slowik responded by asking Ellerth what she was wearing, and she reacted by cutting off the call.[282] A day or two later, because she needed an answer to the customer's request, she followed up with another call.[283] He denied the request, adding that she could make her job easier by wearing short skirts.[284] Shortly thereafter, Ellerth quit.[285] Though Ellerth knew that Burlington had an anti-harassment policy, she did not complain to anyone in authority at Burlington about Slowik's misconduct.[286]

273. 524 U.S. 742 (1998).

274. Ellerth did not report directly to Slowik, who was a midlevel manager two levels above Ellerth. *Id.* at 747.

275. *Id.*

276. *Id.* at 748.

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.* Shortly after the third incident, Ellerth's immediate supervisor told her to be more prompt in returning telephone calls from customers. In response, Ellerth quit. Her resignation letter did not mention sexual harassment as a reason for her departure from Burlington, but three weeks later, she informed Burlington that she had quit her job because of Slowik's harassment. *Id.*

286. *Id.* She chose not to report Slowik's behavior to her immediate supervisor because it would have been his responsibility to report the harassment. *Id.* at 749. On one occasion, she told Slowik that his behavior was inappropriate. *Id.*

Ellerth filed a federal lawsuit, charging Burlington with sexual harassment.[287] The district court granted Burlington's motion for summary judgment because Ellerth had declined to use Burlington's internal complaint procedures, and therefore Burlington had no way of knowing that Slowik had harassed her.[288] The Seventh Circuit en banc reversed the district court's decision but was unable to arrive at a consensus for the standard of employer liability for sexual harassment committed by an employee's supervisor.[289]

The Supreme Court turned to agency law to answer this question.[290] It observed that, as a general rule, a supervisor who harasses a subordinate does not advance the interests of his employer, and such harassment is therefore not within the scope of the supervisor's employment.[291] The Court then noted that, under certain circumstances, an employer may be vicariously liable for the acts of an employee not acting within the scope of his employment.[292] One such circumstance is where the employee "was aided in accomplishing the tort by the existence of the agency relation."[293] The Court acknowledged that any injury inflicted on an employee by a supervisor was arguably aided by his agency powers because the employment relationship provided the supervisor with a "captive pool of potential victims."[294] Such a broad interpretation of the "aided in the agency" standard, the Court noted, would result in strict employer liability in every case, a position not taken by the EEOC or any lower federal court.[295] The Supreme Court held instead that a supervisor is aided by his agency powers when the supervisor takes a tangible employment action.[296] Such an action, which always or nearly always inflicts direct economic harm, effects a significant change in employment status.[297] As noted above, examples are decisions to hire, to fire, to promote, to reassign with significantly

287. *Id.* at 749.

288. *Id.* The district court also dismissed Ellerth's constructive discharge claim. *Id.*

289. *Id.* at 749–50. The Court compared *quid pro quo* cases, where threats are made and carried out, to hostile work environment cases, a term which covers all other situations. *Id.* at 751. This distinction, the Court stressed, is descriptive and not helpful in determining vicarious liability. *Id.*

290. *Id.* at 754.

291. *Id.* at 756–57.

292. *Id.* at 758.

293. *Id.* (quoting RESTATEMENT (SECOND) OF AGENCY § 219(2)(d) (AM. LAW INST. 1957)) (listing the situations in which an employer is liable for the torts of an employee, although the employee did not act within the scope of his authority).

294. *Id.* at 760.

295. *See id.*

296. *Id.*

297. *Id.* at 761–62.

different responsibilities, or to alter benefits significantly.[298] The authority a company conferred on a supervisor would have enabled all these adverse actions.[299] Therefore, when a harasser is aided by his agency powers to take a tangible employment action against a subordinate, the company is strictly liable.[300]

The Court went on to consider an employer's liability for a supervisor who does not take a tangible employment action against the victim.[301] Title VII's purpose of deterrence shaped the Court's decision.[302] Encouraging employers to adopt anti-harassment policies and encouraging victims of harassment to report the offending conduct would foster Title VII's policy of deterrence.[303] The Court therefore fashioned an affirmative defense composed of two elements.[304] The first element is that "the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior."[305] Although this element does not require the employer to adopt and enforce a formal anti-harassment policy, the Court stressed that such a policy would generally meet this element.[306] The second element is that "the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[307] A showing that an employee failed to follow the complaint procedures prescribed in an anti-harassment policy would usually meet the second element.[308]

298. *Id.* at 761.

299. *Id.* at 762 (pointing out that any employee can break the arm of another employee, but only someone in a position of authority can dock an employee's pay, and also noting that such actions are usually documented and therefore subject to the scrutiny of higher-level managers).

300. *Id.* at 762–63.

301. *Id.* at 763.

302. *Id.* at 764.

303. *Id.* at 765.

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.* Joined by Justice Scalia, Justice Thomas dissented. *Id.* at 766 (Thomas, J., dissenting). He argued that, when a supervisor does not take a tangible employment action, the standard of employer liability should be negligence. *Id.* at 769. Thus, an employer would be liable for such harassment only if he knew or had reason to know of the harassment and failed to take remedial action. *Id.* at 769–70. To his view, Justice Thomas observed the difficulty employers face when burdened with the task of preventing sexual harassment. *Id.* He went so far as to suggest that the extraordinary means needed to rid the workplace of sexual harassment are incompatible with a free society. *Id.* It would seem, however, that all forms of workplace bigotry and prejudice hide in quiet corners in offices, cafeterias, and even restrooms; they all resist eradication. Nothing unique about sexual harassment makes it more nuanced or less detectable than any other form of invidious discrimination. *Id.*

B. The Deficiencies of the Affirmative Defense

The Supreme Court's rationale for the *Ellerth* framework is superficially appealing. When a supervisor, aided by his agency powers, takes a tangible employment action against a subordinate, it makes sense to hold the employer strictly liable. Absent a tangible employment action, it likewise seems sensible not to hold the employer strictly liable and apply an affirmative defense. The defense ostensibly encourages preventive and corrective actions as well as prompt reporting.[309] On deeper scrutiny, however, not only may the purported benefits of the affirmative defense be illusory,[310] but also the affirmative action runs afoul of Title VII.[311]

1. Incompatibility with Title VII

The *Ellerth* Court's affirmative defense is inconsistent with § 2000e-5(g)(2)(B) of the 1991 Civil Rights Act.[312] This provision established that, once a plaintiff has met the motivating factor test, the defendant may limit the plaintiff's remedy by proving the same-decision defense, but the defendant may not altogether escape liability.[313] By codifying this partial defense, Congress rejected the *Price Waterhouse* affirmative defense that would have exonerated employers.[314] Section 2000e-5(g)(2)(B) shows Congress's intolerance for any level of intentional employment discrimination: Congress established strict liability.[315] Hostile work environments are examples of intentional employment discrimination

309. Although the first prong of the affirmative defense might seem to encourage deterrence, it might also distract attention from deeper infestations of harassment in the workplace. *See* Tristin K. Green, *Was Sexual Harassment Law a Mistake? The Stories We Tell*, 128 YALE L.J.F. 152, 164 (2018) (arguing that the *Ellerth* and *Faragher* affirmative defense focuses on the behavior of a single supervisor rather than considering the broader workplace environment which may be contaminated by other employees who have tolerated, condoned, or participated in the supervisor's misconduct).

310. *See* 2019 N.Y. LAWS ch. 160 (eliminating the *Ellerth* affirmative defense from the New York State Human Rights Law); *see also* Zakrzewska v. The New School, 928 N.E.2d 1035, 1039 (2010) (noting that the New York City Human Rights law does not recognize the *Ellerth* affirmative defense).

311. *See infra* Part IV.B.1 (discussing the conflict between the affirmative defense and 42 U.S.C. § 2000e-5(g)(2)(B)).

312. 42 U.S.C. § 2000e-5(g)(2)(B) (2018).

313. *Id.*

314. Price Waterhouse v. Hopkins, 490 U.S. 228, 252–53 (1989) (adopting the same-decision defense and holding that the defense need be proved by a preponderance of the evidence, rather than by clear and convincing evidence).

315. *See* 42 U.S.C. § 2000e-5(g)(2)(B) (2018).

subject to strict liability imposed by § 2000e-5(g)(2)(B).[316] By creating an affirmative defense for hostile work environment cases, *Ellerth* violated congressional intent.[317]

Ironically, the Supreme Court had no persuasive policy justification for departing from the requirements of Title VII. Though ostensibly adopted to deter harassment, the *Ellerth* affirmative defense does not effectively advance this goal.[318]

2. The Ineffectiveness of the Affirmative Defense

Those sympathetic to victims' rights might question whether an anti-harassment policy removes the threat of reprisals for reporting harassment, especially when the offender wields the authority of an upper echelon manager.[319] Cynics might question the efficacy of policies when adopted as shields against litigation and as public relations strategies.[320] On the other hand, if anti-harassment policies are effective, it follows that adopting general anti-discrimination policies and encouraging employees to report all violations would deter all forms of discrimination.[321] Yet the Supreme Court has not recognized a broad affirmative defense that applies across the board. To the contrary, employers are strictly liable for their employees' non-harassment discrimination.[322]

There may be wisdom in imposing strict liability on employers. An unyielding standard may be a more effective deterrent than the *Ellerth*

316. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986).

317. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 807–08 (1998).

318. *See infra* Part IV.B.2 (discussing the ineffectiveness of the *Ellerth* affirmative defense).

319. *See Ellerth*, 524 U.S. at 764–65; *see also* Marion Crain & Ken Matheny, *Sexual Harassment and Solidarity*, 87 GEO. WASH. L. REV. 56, 73 (2019) (questioning the wisdom of the second prong of the affirmative defense because most victims do not report internally in fear of retaliation).

320. *See* Elizabeth C. Tippett, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229, 244–45 (2018) (summarizing the views of sociologists who believe that some companies adopt anti-harassment policies for cynical reasons such as mere symbolism and that such policies are therefore ineffective).

321. *See* Christopher P. Barton, *Between the Boss and a Hard Place: A Consideration of* Meritor Savings Bank, FSB v. Vinson *and the Law of Sexual Harassment,* 67 B.U. L. REV. 445, 457–58 (1987).

322. *See id.* (noting that Title VII imposes strict liability on employers for the discriminatory acts of their employees); Anne C. Levy, *The Change in Employer Liability for Supervisor Sexual Harassment After* Meritor: *Much Ado About Nothing*, 42 ARK. L. REV. 795, 795 (1989) (citing commentators have who suggested that *Meritor* signaled a departure from the prevailing standard of strict employer liability).

affirmative defense. Employers faced with strict liability will do everything in their power to prevent discrimination. Their only means of avoiding liability is to stop discrimination before it starts. A glossy anti-discrimination policy in the employment handbook will not help the victim when a supervisor goes rogue.

The primary rationale for not applying the affirmative defense in non-harassment cases is that such cases ordinarily involve tangible employment actions.[323] The Court has instructed us that when a supervisor takes a tangible employment action, he was aided by his agency powers.[324] Thus, the law imposes strict liability in harassment and non-harassment cases alike when a supervisor takes tangible employment action.[325] Though this approach might initially seem sensible, it is flawed. The Supreme Court could have held that, regardless of taking tangible employment actions, supervisors who harass subordinates are always aided by their agency powers. Employers would therefore always be strictly liable for the harassment committed by their supervisors. The support for this position is straightforward. A company clothes supervisors with power over subordinates. The power to discipline is the power to intimidate. A noncompliant victim faces the threat, implicit or explicit, of losing her job and livelihood.[326] Harassers may threaten or merely hint at a tangible employment action but not follow through on the threat. The impact of such intimidation on a subordinate is certainly aided by the supervisor's agency powers.[327] A similar threat of a co-employee would carry far less weight if any at all. The harassing supervisor may use his influence to sabotage the victim's reputation within the company, to undermine her credibility if she reports or threatens to report, and to avoid personal accountability.[328] All such actions are aided by the supervisor's agency powers. The force of

323. *See, e.g.*, Desert Palace, Inc. v. Costa, 539 U.S. 90, 95–96 (2003) (involving discharge); Price Waterhouse v. Hopkins, 490 U.S. 228, 231–32, 235 (1989) (involving the denial of an application for partnership); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 796 (1973) (involving the refusal to hire).

324. *Ellerth*, 524 U.S. at 762–65 (establishing strict liability for employers when their supervisors use their agency powers to engage in sexual harassment); *see supra* note 316 and accompanying text (discussing strict liability of employers who discriminate against members of a protected class).

325. *Ellerth*, 524 U.S. at 764–65.

326. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 801 (1998) (acknowledging Faragher's argument that a supervisor may dissuade a victim from resistance or complaint by implicitly threatening to abuse his authority).

327. *See id.* at 801–02

328. *See id.*

these arguments did not escape the Supreme Court.[329] In *Faragher*, the Court conceded that "there are good reasons for vicarious liability for misuse of supervisory authority."[330]

3. The Specious Discrete-Occurrence Rationale

One might argue that there is a practical argument for applying the *Ellerth* affirmative defense only in cases where the supervisor does not take a tangible employment action: such actions are discreet occurrences, which an employer cannot prevent after the fact.[331] By contrast, a hostile work environment often involves ongoing abuse, which the affirmative defense seeks to short circuit.[332] This justification fails because the *Ellerth* affirmative defense would be as effective in typical employment discrimination cases as it is in hostile work environment cases. In *Price Waterhouse v. Hopkins*,[333] for example, an anti-discrimination policy coupled with Hopkins's early reporting of gender-stereotyping might have prevented the denial of her bid for partnership. Alternatively, after the firm denied her promotion, if she had followed an anti-discrimination policy and promptly reported the biased decision-making process, the firm might have reconsidered her partnership application. However, one should not lose sight of the broader point. Regardless of whether the complaint concerns harassment or a typical form of discrimination, because of fear of retaliation and skepticism of enforcement, one may reasonably question the effectiveness of anti-harassment policies. Strict liability would seem a better deterrent.

329. *Id.* at 804. The *Faragher* Court cited numerous cases, analogous to cases of sexual harassment, where courts held that employers could be strictly liable for a supervisor's intentional wrongdoing that did not advance the employer's interests. *Id.* at 794–96; *see, e.g.*, Primeaux v. United States, 102 F.3d 1458, 1462–63 (8th Cir. 1996) (reversing judgment in favor of defendant where a limited-duty federal officer raped a motorist); Lyon v. Carey, 533 F.2d 649, 655 (D.C. Cir. 1976) (affirming jury verdict finding an employer liable for its deliveryman's rape of customer); Doe v. Samaritan Counseling Ctr., 791 P.2d 344, 349–50 (Alaska 1990) (reversing order of summary judgment in favor of a counseling center where one of its therapists had sexual relations with a patient).

330. *Faragher*, 524 U.S. at 804. The Court went on to note that *Meritor* constrained it from imposing strict liability on employers for all harassments committed by supervisors. *Id.* This rationale justifies a flawed decision based on the dictum of another flawed decision.

331. *See, e.g.*, Elizabeth M. Brama, Note, *The Changing Burden of Employer Liability for Workplace Discrimination*, 83 MINN. L. REV. 1481, 1494, 1505–06 (1999) (arguing that the *Ellerth* affirmative defense is inappropriate for cases where the employee suffers a tangible employment action, because, for example, adverse actions such as a discharge or demotion are discrete and are therefore not amenable to remediation).

332. *Id.* at 1498–99.

333. 490 U.S. 228, 231–32 (1989).

4. Unjust Outcomes

The *Ellerth* affirmative defense is also troublesome in its application. It sometimes lets employers escape accountability, despite the serious harassment of their supervisors.[334] In *Lutkewitte v. Gonzales*,[335] the D.C. Circuit affirmed a jury verdict in favor of the government, although the court was appalled by the "repugnant and reprehensible conduct" of the harasser, the plaintiff's supervisor, David Ehemann.[336] Ehemann demanded sex from Lutkewitte, and fearing retaliation, she succumbed to Ehemann's coercion.[337] At trial, plaintiff requested a jury instruction that Ehemann had taken tangible employment actions against her by: (1) compelling her attendance in New York for an inspection, (2) engaging in a pattern of sexual misconduct that implied he would take other tangible employment actions against her unless she submitted to his sexual demands, and (3) providing her with benefits because she acquiesced.[338] The trial court refused to give that instruction.[339]

On appeal the D.C. Circuit noted that requiring Lutkewitte to attend an inspection in New York did not amount to a tangible employment action.[340] Furthermore, the court found no support in the record for Lutkewitte's contention that Ehemann implicitly threatened her with tangible employment actions[341] or provided her with benefits because of

334. *See, e.g.*, Helm v. Kansas, 656 F.3d 1277, 1280, 1291–92 (10th Cir. 2011) (sustaining the affirmative defense because the plaintiff delayed several years in reporting the harassment, which involved multiple physical violations including manual vaginal penetration); Jackson v. Cty. of Racine, 474 F.3d 493, 496, 502 (7th Cir. 2007) (finding that plaintiff Jackson's supervisor simulated masturbation in front of her, kissed her on the lips, blew in her ear, constantly sent her obscene jokes, and constantly made inappropriate remarks, telling her, for example, that she had "'a great set of boobs," but affirmed the district court's order of summary judgment for defendant because Jackson delayed four months in reporting the harassment); Finnerty v. William H. Sadlier, Inc., 176 F. App'x 158, 162–63 (2d Cir. 2006) (affirming district court's order of summary judgment for defendants because they proved both prongs of the affirmative defense).

335. 436 F.3d 248 (D.C. Cir. 2006) (per curiam).

336. *Id.* at 250.

337. *Id.* at 252.

338. *Id.* at 250.

339. *Id.*

340. *Id.* at 252.

341. *Id.* Judge Brown argued that when a supervisor uses threats to extort sex from a subordinate, the supervisor has not taken a tangible employment action within the meaning of *Ellerth*. *Id.* at 270 (Brown, J., concurring). Judge Brown reasoned that the threat of discharge absent the actual event of discharge is not a tangible employment action. *Id.* He therefore would have rejected Lutkewitte's contention that her submission to Ehemann's implicit threats constituted grounds to instruct the jury that if it found she submitted to his implicit threats, the government would be strictly liable for the harassment. *Id.* at 271. *Contra* Jin v. Metro. Life Ins. Co, 310 F.3d 84, 94–95 (2d Cir. 2002) (holding an employer strictly liable for a supervisor's harassment when the supervisor

their sexual relationship.[342] Absent such proof, the D.C. Circuit felt compelled to affirm the trial court's decision to refuse the plaintiff's requested jury charge, which would have excluded the *Ellerth* affirmative defense.[343] Because the jury found that the plaintiff unreasonably failed to take advantage of the corrective measures in place, the government used the *Ellerth* affirmative defense to evade liability.[344]

5. Misplaced Tolerance

Why the affirmative defense applies to discrimination based on hostile work environments is puzzling. Perhaps the answer lies with those who frustrate the advancement of justice and harbor a lingering attitude, conscious or subconscious, that sexual harassment based on a hostile work environment, though corrosive, is not quite as objectionable as other forms of sex discrimination. The delinquent child must be punished but not too harshly. The victim does not suffer economic harm but merely endures a passing affront that will fade in due course. These are the enduring biases that continue to minimize the harm inflicted when a woman is subjected to a hostile work environment.

C. Vance v. Ball State University*: The Restrictive Definition of "Supervisor"*

By creating the *Ellerth* affirmative defense, the Supreme Court diverged from the 1991 Civil Rights Act. In *Vance v. Ball State University*,[345] the Court compounded this error by adopting a narrow definition of supervisor.[346]

1. The *Vance* Majority

Maetta Vance, an African-American woman, worked as a fulltime catering assistant for Ball State's dining services.[347] She complained that Saundra Davis, a catering specialist, racially harassed her by glaring at

threatened to discharge a subordinate unless she had sex with him and the subordinate submitted); *see also* Heather S. Murr, *The Continuing Expansive Pressure to Hold Employers Strictly Liable for Supervisory Sexual Extortion: An Alternative Approach Based on Reasonableness*, 39 U.C. DAVIS L. REV. 529, 538 (2000) (arguing that employers should be strictly liable when supervisors use threats of discharge to extort sex from subordinates).

342. *Lutkewitte*, 436 F.3d at 252–53.

343. *Id.* at 254.

344. *Id.* at 250; *see id.* at 256 (Brown, J., concurring) (noting that the plaintiff reported the harassment ten months after the initial sexual encounter).

345. 570 U.S. 421 (2013).

346. *Id.* at 424.

347. *Id.*

her, slamming pots and pans in her presence, and blocking her on an elevator.[348] The issue in the case was whether Davis and Vance were co-workers or whether Davis was Vance's supervisor within the meaning of *Ellerth*.[349] If Davis was merely Vance's co-worker, the *Ellerth* regime would not apply and Ball State would be liable for Davis's harassment only if negligent in dealing with the harassment.[350] The negligence standard is more difficult for plaintiffs to meet than the *Ellerth* affirmative defense because an employer is liable only if it knew or should have known about the harassment and failed to take reasonable preventive and corrective measures.[351] Under the *Ellerth* regime, once an employee reports the wrongdoing, the affirmative defense is lost to the employer.[352]

The Supreme Court considered two alternative definitions of "supervisor."[353] The broader of the two alternatives defined a supervisor as an employee authorized to exercise significant control over another employee's daily work. Endorsed by the EEOC, this standard favored employees because it expanded the reach of the *Ellerth* affirmative defense.[354] The narrower of the two alternatives defined a supervisor as an employee with authority to take tangible employment actions against subordinates.[355] By narrowing the number of employees who would qualify as supervisors, this definition contracted the breadth of the *Ellerth* affirmative defense and required a greater number of plaintiffs to prove employer negligence.

In a 5-4 decision, the Court adopted the narrower standard.[356] To support its decision, the Court quoted *Ellerth*'s discussion of the powers of a supervisor. The *Ellerth* Court had stated, "Tangible employment actions fall within the special province of the supervisor. The supervisor has been empowered by the company *as a distinct class* of agent to make economic decisions affecting other employees under his or her control."[357]

348. *Id.* at 425.
349. *Id.* at 424.
350. *Id.*
351. *See id.*
352. *Id.*
353. *Id.* at 430–31.
354. *Id.* at 431.
355. *Id.* at 430–31.
356. *Id.* at 431. The Court held that "an employer may be vicariously liable for an employee's unlawful harassment only when the employer empowered that employee to take tangible employment actions against the victim., *i.e.,* to effect 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 benefit.'" *Id.* (quoting Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998)).
357. *Id.* at 440 (emphasis in original) (quoting *Ellerth,* 524 U.S. at 762).

According to the *Vance* majority, this passage from *Ellerth* implied that, by definition, a supervisor has the authority to take tangible employment actions.[358]

The *Vance* Court also contrasted the clarity of its definition of "supervisor" with what it characterized as the murky definition proposed by the dissent.[359] To illustrate the imprecision of the dissent's definition, the majority noted that in *Vance* itself the dissent's definition would not resolve whether Davis wielded sufficient authority to qualify as Vance's supervisor.[360] Davis's job description gave her "leadership" responsibilities over other employees, and at times she directed Vance and other employees in the kitchen.[361] The majority noted that when the plaintiff applied the dissent's definition, she argued that the facts established Davis's status as a supervisor.[362] Applying the same definition, the Department of Justice, as *amicus curiae,* reached the opposite conclusion.[363] Thus, the dissent's muddled definition would lead to uncertainty in the status of offenders, frustrate settlement efforts, prolong litigation,[364] and overcomplicate the task of jurors.[365] The majority stressed that its clear definition of "supervisor" would facilitate settlement and the disposition of cases at the summary judgment level.[366]

To deflect criticism that a narrow definition of supervisor would unreasonably limit employer liability,[367] the majority emphasized that its rule would impose liability on employers that failed negligently to prevent harassment.[368] The majority specified factors that would evidence negligence: (1) failing to monitor the workplace, (2) failing to

358. *Id.*
359. *Id.* at 441.
360. *See id.*
361. *Id.*
362. *Id.*
363. *See id.* at 441–42.
364. *See id.* at 444.
365. *Id.* The *Vance* majority referred to the case's oral argument to highlight its view that the dissent's definition of "supervisor" was unworkably vague. *Id.* at 442–43. The attorney for the United States was asked to apply the EEOC definition to the facts in Faragher v. City of Boca Raton, 524 U.S. 775 (1998). In *Faragher*, an alleged harasser threatened to assign the victim to clean the toilets in the lifeguard station for one year if she did not date him. *Vance*, 570 U.S. at 442–43. When the attorney from the Justice Department was asked if these facts established that the alleged harasser was a supervisor, the government's attorney first responded yes, but then hedged by saying that one would first need to know what percentage of a lifeguard's daily work was encompassed by cleaning toilets. *Id.*
366. *Vance*, 570 U.S. at 441.
367. *Id.* at 448–49.
368. *Id.* Noting that the First, Seventh, and Eighth Circuits had all adopted the narrow definition of supervisor, the Court remarked that its rule had not produced any dire consequences. *Id.* at 449.

respond to complaints, (3) failing to provide a mechanism to report complaints, and (4) discouraging the reporting of complaints.[369]

2. The *Vance* Dissent

Authored by Justice Ginsburg, the dissenting opinion advocated the broader definition of "supervisor."[370] This view followed the EEOC Guidance, which covers employees who control the day-to-day working activities of other employees.[371] Justice Ginsburg suggested that, because of the EEOC's "informed judgment" and "body of experience," the agency's position deserved deference.[372]

The dissent also relied on *Faragher v. City of Boca Raton*.[373] In that case, Silverman, one of the alleged harassers, had authority to make daily work assignments for the lifeguard staff and supervise their work, but he had no authority to take tangible employment actions.[374] Justice Ginsburg pointed out that Silverman would have met the dissent's broad definition of supervisor but not the majority's narrow definition.[375] She observed that the *Faragher* Court characterized Silverman as Faragher's supervisor, and not a single Justice, including Justice Thomas who dissented in that case, disagreed with that characterization.[376] Citing *Pennsylvania State Police v. Suders*,[377] Justice Ginsburg noted that the Court had again applied the broader definition of supervisor.[378] While conceding that *Suders* did not decide or address how to define "supervisor," Justice Ginsburg argued that the Court's common sense application of the broader definition showed the superiority of that

369. *Id.*

370. *Id.* at 451 (Ginsburg, J., dissenting). Most of the commentary on *Vance* has sided with the dissent. *See* Ladelle Davenport, Comment, Vance v. Ball State University *and the Ill-Fitted Supervisor/Co-Worker Dichotomy of Employer Liability*, 52 HOUS. L. REV. 1431, 1457 (2015) (advocating a broad approach to vicarious liability by relying on the rule imputing employer liability for the acts of "superiors" who control a subordinate's day-to-day work activities); Andrew Freeman, Comment, *A Bright Line, But Where Exactly? A Closer Look at* Vance v. Ball State University *and Supervisor Status Under Title VII*, 19 LEWIS & CLARK L. REV. 1153, 1171 (2015) (arguing that many businesses have abandoned clear hierarchies of authority, rendering the formalistic approach of the *Vance* majority unduly rigid).

371. *Vance*, 570 U.S. at 451 (Ginsburg, J., dissenting).

372. *Id.* at 462–63.

373. 524 U.S. 775 (1998).

374. *Vance*, 570 U.S. at 457 (Ginsburg, J., dissenting).

375. *Id.* at 457–58.

376. *Id.* at 457.

377. 542 U.S. 129, 134 (2004) (holding that for a plaintiff alleging a hostile work environment to establish that a constructive discharge was a tangible employment action, the plaintiff must prove that the working conditions were intolerable).

378. *Vance*, 570 U.S. at 457–58 (Ginsburg, J., dissenting).

approach.[379] She asserted that an employee who controls the work activities of other employees is aided by his agency powers as much as an employee who has the authority to hire, fire, promote, or reassign.[380]

Justice Ginsburg refuted the majority's argument that its definition of supervisor enjoyed the virtue of clarity.[381] She wondered when the authority to reassign would constitute a tangible employment action and speculated that the answer might depend on whether and to what degree the reassignment had economic consequences.[382] Disciplinary action might also carry economic consequences that might or might not count as a tangible employment action.[383]

3. The Legacy of *Vance*

Ellerth created an affirmative defense at odds with § 2000e-5(g)(2)(B) of the 1991 Civil Rights Act. *Vance* compounded *Ellerth*'s misstep by tightening the definition of supervisor until it has suffocated the rights of victims of workplace harassment.[384] In *McCafferty v. Preiss Enterprises, Inc.*,[385] Megan McCafferty, a fifteen-year-old, was an employee of McDonald's.[386] On the pretext of driving her to work to accommodate a schedule change, Jacob Peterson, her swing manager,

379. *Id.* at 457–58.

380. *Id.* at 457–58. Justice Ginsburg discussed four cases where she contended employers would have escaped liability for highly offensive behavior because the harassers, who had the power to direct the work activities of other employees, did not have the authority to take tangible employment actions. *Id.* at 458–61.

381. *Id.* at 464.

382. *Id.*

383. *Id.* Justice Ginsburg cited examples of employees whose level of authority defies easy categorization as supervisory or not. *Id.* at 465. She asked whether a pitching coach supervises his pitchers, an artistic director supervises her opera star, or a law firm associate supervises paralegals. *Id.* Such situations, Justice Ginsburg, argued, require a case-by-case analysis and are not amendable to resolution by a mechanical rule. *Id.*

384. *See, e.g.*, Cooper v. Smithfield Packaging, Inc., 724 F. App'x 197, 199, 203 (4th Cir. 2018) (finding a four-year pattern of harassment that included inappropriate touching and threats of retaliation was not actionable because the harasser, who had input into evaluating the victim's work performance and scheduling her work days, was not her supervisor within the meaning of *Vance*); EEOC v. Autozone, Inc., 692 F. App'x 280, 281–84 (6th Cir. 2017) (per curiam) (affirming district court's order of summary judgment for defendants where a store manager frequently made lewd remarks to the store's employee and grabbed her in the genital area because the harasser was not a supervisor within the meaning of *Vance*, although he could initiate the disciplinary process and recommend hiring and firing decisions); Matherne v. Ruba Mgmt., 624 F. App'x 835, 837, 837, 840 (5th Cir. 2015) (per curiam) (rejecting the victim's allegations that her weekend manager harassed her with sexual comments, because the manager lacked authority to take tangible employment actions).

385. 534 F. App'x 726 (10th Cir. 2013).

386. *Id.* at 727.

abducted, drugged, and raped her.[387] Peterson had the authority to assign McCafferty work duties, change her work hours, and discipline her.[388] Although he had substantial input into hiring and firing decisions, he could not make such decisions unilaterally.[389] The Tenth Circuit affirmed the district court's grant of McDonald's motion for summary judgment because Peterson did not have the authority to take tangible employment actions.[390] Title VII, as interpreted by the Supreme Court, did not hold McDonald's or anyone accountable in this case of sexual outrage.

The current regime threatens even more injustice. Employees, who are guilty of harassment, are not individually liable under Title VII because as "agents" they are statutorily included in the definition of "employers."[391] The only defendant under federal discrimination law is the employer itself.[392] The wisdom of *Ellerth* and *Vance* is hard to comprehend. Under *Meritor*, a victim must show that the harassment was so severe or pervasive that it rendered the workplace environment abusive.[393] Yet, after proving sexual exploitation, the victim will have no recourse unless the employer was negligent or facilitated the misconduct.[394] This double-barrel barrier cannot be what Congress intended when it passed a law to stamp out sex discrimination in the workplace.

387. *Id.* at 728.

388. *Id.*

389. *Id.*

390. *Id.* at 731.

391. Civil Rights Act of 1964, 42 U.S.C. § 2000e(b) (2018) ("The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a person . . . ."); *see also* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 763 (1998) (recognizing that Congress included in the definition of an employer its agents); Gary v. Long, 59 F.3d 1391, 1399 (D.C. Cir. 1995) (holding that, although supervisory employees may be joined in Title VII actions, they may not be liable individually); Tomka v. Seiler, 66 F.3d 1295, 1317 (2d Cir. 1995) (concluding that Congress intended to limit liability under Title VII to "employer-entities"); Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587–88 (9th Cir. 1993) (finding that Title VII's statutory scheme shows Congress's intent to impose liability only on employers); Dorothy S. Lund, *Sexual Harassment and Corporate Law*, 118 COLUM. L. REV. 1583, 1606–07 (2018) (noting that the consensus view of the circuit courts exempts supervisors from Title VII liability, but observing that employers may contractually shift Title VII liability to supervisors).

392. *See supra* note 391 and accompanying text (discussing the predominant holding of federal courts limiting Title VII liability to employers, including agents).

393. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986).

394. *See* Vance v. Ball State Univ., 570 U.S. 421, 439–40 (2013) (discussing the negligence standard that applies when non-supervisors commit sexual harassment and the affirmative defense that applies when supervisors are aided by their agency powers).

CONCLUSION

Federal law's insensitivity to hostile work environment plaintiffs is perplexing. When presented with flagrant abuses that range from relentless taunting to physical assault, some judges seem to think that the misconduct was not all that bad. They seem unsympathetic to a victim because the harasser grabbed her only one or twice. Often discounting the harm that words can inflict, they are dismissive of complaints based on recurrent, vicious remarks, and innuendo. They seem unimpressed when a victim, fearing retaliation, hesitated to report the most harrowing offense. They seem to overlook the likelihood that the egregiousness of the misconduct might have spawned the victim's fear to register a complaint. Perhaps news stories of politicians and celebrities who have abused subordinates will awaken the judiciary to the plight of victims of harassment.[395] Perhaps the #MeToo movement will speed the transition.[396]

The instrument is in place to move the law of sexual harassment toward fairness. Title VII as amended by the 1991 Civil Rights Act expresses the national policy of intolerance toward invidious discrimination. That statute provides the basis for a vigorous approach that will help to expel sexual harassment from the workplace. Rather than requiring severe or pervasive misconduct that renders the working environment abusive, Title VII, when properly interpreted, prohibits sexual or gender-related words or conduct that, when viewed as a whole, would have been highly offensive to a reasonable person and were highly offensive to the victim. Congress fashioned a sword to fight sexual harassment. It is up to the courts to use that sword.

395. *See 263 Celebrities, Politicians, CEOs, and Others Who Have Been Accused of Sexual Misconduct Since April 2017*, VOX, https://www.vox.com/a/sexual-harassment-assault-allegations-list (last updated Jan. 9, 2019) (enumerating prominent names accused of sexual harassment).

396. *See* Erin M. Morrissey, Comment, *#MeToo Spells Trouble for Them Too: Sexual Harassment Scandals and the Corporate Board*, 93 TUL. L. REV. 177, 177–78 (2018) (commenting that the #MeToo movement has sparked public awareness of the magnitude of the problem that sexual harassment poses and has emboldened victims to speak out and name harassers).