State Regulation of Sexual Harassment

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I. INTRODUCTION

In October 2017, more than one dozen women made public decades of alleged sexual harassment by Harvey Weinstein, a major Hollywood producer.[1] Within two weeks, Weinstein was fired from his studio and resigned from the board.[2] Partly as a reaction to these events, women and others across the United States began using the hashtag "#MeToo" to share their own experiences with sexual harassment and abuse.[3] The #MeToo Movement garnered enough attention that at least 200 powerful and famous men like Matt Lauer, Charlie Rose, Russell Simmons, Al Franken, Louis C.K., and Kevin Spacey, have been fired or forced to resign after at least 920 people alleged that "one of these men subjected them to sexual misconduct."[4]

While these allegations are receiving unprecedented attention, they are not new. Sexual harassment in the workplace often comes in the form of sexual assault, sexualized attention, demeaning comments, and authentic or mock sexual advances from coworkers or supervisors.[5] And though women continue to file the vast majority of sexual harassment complaints with the Equal Employment Opportunity Commission (EEOC),[6] women are not the only individuals who experience sexual harassment.[7]

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1. *See* Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, NEW YORKER (Oct. 10, 2017, 10:47 AM), https://perma.cc/Z88D-QD6G.

2. *Harvey Weinstein 'steps down from company board'*, BBC NEWS (Oct. 18, 2017), https://perma.cc/K8SY-9AY3.

3. *More Than 12M "Me Too" Facebook Posts, Comments, Reactions in 24 Hours*, CBS NEWS (Oct. 17, 2017, 6:26 PM), https://perma.cc/A8RV-3X7S. The phrase "Me Too" was first popularized in 2007 by Tarana Burke, an activist hoping to spread empathy and connect with survivors of sexual violence. Alanna Vaglanos, *The 'Me Too' Campaign Was Created By a Black Woman 10 Years Ago*, HUFFPOST (Oct. 17, 2017, 1:44 PM), https://perma.cc/S6TV-3JB8.

4. Audrey Carlsen, Maya Salam, Claire Cain Miller, Denise Lu, Ash Ngu, Jugal K. Patel, & Zach Wichter, *#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women.*, N.Y. TIMES (Oct. 29, 2018), https://perma.cc/4L7C-AX8H.

5. Reva B. Siegel, *Introduction: A Short History of Sexual Harassment, in* Directions in Sexual Harassment Law 3 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004). This introduction expands on the history of oppression of women and inequality at work, from slavery to the modern Information Age. The authors argue that women have experienced unequal power dynamics at work for centuries, which has led to modern harassment ranging from sexual assault to derogatory comments about the female anatomy.

6. *Charges Alleging Sex-Based Harassment (Charges filed with EEOC) FY 2010 - FY 2021*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://perma.cc/ZA7D-WMBX (last visited Jan. 7, 2019). In 2018, 15.9% of 7,609 charges alleging sexual harassment were filed by males. The EEOC website defines sexual harassment as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical harassment of a sexual nature." *Sexual Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://perma.cc/395Q-759S (last visited Mar. 1, 2023).

7. *See infra* Part VII; Robin Bailey, *Many Men are Sexually Harassed in the Workplace—So Why Aren't They Speaking Out?*, THE CONVERSATION (Mar. 13, 2018, 7:17AM), https://perma.cc/H7WN-SWC8 (summarizing research into commonalities between men who experience sexual harassment).

To combat harassment at work, Congress enacted Title VII of the Civil Rights Act of 1964, which implemented the first legal recognition of, and protection from, sexual harassment outside of tort law.[8] Section 703(a) of Title VII states that:

> It shall be an unlawful employment practice for an employer–(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[9]

Thus, Title VII created both a legal cause of action for sexual harassment in the workplace,[10] as well as an anti-harassment policy meant "to encourage informal conciliation and to foster voluntary compliance."[11] Congress' policy objective was affirmed in *Bostock v. Clayton County*, where the Supreme Court held that sexual discrimination under Title VII exists where an individual is fired on the basis of their sexual orientation or gender identity.[12] Congress continues to work to ensure that workplaces are free from discrimination by updating employment discrimination law.[13] For example, the BE HEARD in the Workplace Act of 2021 would prohibit employers from entering into contracts or agreements with workers that contain non-disparagement or nondisclosure clauses, prohibit and post-dispute arbitration agreements, and requires the EEOC to provide specified training and resource materials with regard to prohibited discrimination and harassment in employment.[14] Congress is also considering the EMPOWER Act, Part 2 of which would disallow tax deductions for expenses and judgments incurred in sex harassment litigation,[15] and Part 1 of which would prohibit nondisclosure clauses regarding sex harassment, establish a confidential tip line for workplace harassment, require disclosure of claims to the SEC, and establish federally-recommended materials for use in workplace anti-harassment trainings.[16]

8. *See* 42 U.S.C.A. § 2000e-2 (West, Westlaw through Pub. L. No. 117-268).
9. *Id.* § 2000e-2(a).
10. *See id.*
11. Stache v. Int'l Union of Bricklayers & Allied Craftsmen, 852 F.2d 1231, 1234 (9th Cir. 1988).
12. See Bostock v. Clayton Cnty, 140 S. Ct. 1731 (2020) (holding that an employer violates Title VII if he fires an individual on the basis of their sexual orientation or gender identity).
13. *See Pending Legislation That May Impact EEOC*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://perma.cc/BV2J-X952 (last visited Oct. 28, 2018); BE HEARD in the Workplace Act, S.3219, 117th Cong. (2021), https://perma.cc/26BN-XL8R.
14. S.3219, 117th Cong. § 4 (2021–2022).
15. S.574, 116th Cong. § 2 (2019–2020).
16. S.575, 116th Cong. §§ 4–7 (2019–2020).

The Supreme Court has also attempted to legally define sexual harassment, generally holding that sexual harassment can include tangible employment changes in exchange for sexual favors or conduct that is so pervasive or severe that it creates an abusive working environment for the victim.[17] Such conduct cannot be mere utterances or offhand comments;[18] typically, both a reasonable person as well as the actual victim must find the conduct hostile or abusive given the circumstances.[19] This Article will explore how other courts apply and expand upon this legal definition.[20] To supplement federal law, forty-eight states and the District of Columbia (D.C.) have implemented anti-discrimination statutes that either expressly[21] or impliedly prohibit sexual harassment in the private workplace.[22]

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17. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (holding that sexual harassment actions cover pervasive or severe conduct, which does not have to include economic or tangible discrimination, that creates an objectively hostile or abusive work environment); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64, 67 (1986) (holding that actionable sexual harassment claims can be, but are not limited to, tangible economic actions against victims and can also include severe or pervasive conduct that creates an abusive or hostile workplace); *see also* Louise Feld, *Along the Spectrum of Women's Rights Advocacy: A Cross-Cultural Comparison of Sexual Harassment Law in the United States and India*, 25 FORDHAM INT'L L.J. 1205, 1241–42 (2001).

18. *See* Faragher v. Boca Raton, 524 U.S. 775, 788 (1998); *Meritor*, 477 U.S. at 67.

19. *See Faragher*, 524 U.S. at 787 (citing *Harris*, 501 U.S. at 21–22).

20. *See infra* Parts II–V.

21. *See* CAL. GOV'T CODE §§ 12920–12921 (West, Westlaw through Ch. 997 of 2022 Reg. Sess., as amended by S.B. 523, Ch. 630 Cal. Legis. Serv. (Cal. 2022)); COLO. REV. STAT. ANN. § 24-34-402(1)(a) (West, Westlaw through 2022 2nd Reg. Sess. of the 73rd Gen. Assemb.); CONN. GEN. STAT. ANN. § 46a-60(b)(8) (West, Westlaw through 2022 Oct. Reg. Sess. of Conn. Gen. Assemb.); 775 ILL. COMP. STAT. ANN. 5/2-102(D) (West, Westlaw through P.A. 102-1102 of the 2022 Reg. Sess.); MD. CODE ANN., STATE GOV'T § 20-606(a)(5) (West, Westlaw through 2022 Reg. Sess. of the Gen. Assemb.); MASS. GEN. LAWS ANN. ch. 151B, § 4 (West, Westlaw through Ch. 125, 134, 136, 144–147, 149, 158, & 174 of the 2022 2nd Ann. Sess.); W. VA. CODE R. § 77-4-2 (West, Westlaw through Sept. 16, 2022).

22. *See* ALASKA STAT. ANN. § 18.80.220 (West, Westlaw through 2022 2nd Reg. Sess. of the 32nd Legis.); ARIZ. REV. STAT. ANN. § 41-1463(B) (West, West, Westlaw through 2022 2nd Reg. Sess. of the 55th Legis.); ARK. CODE ANN. § 16-123-107 (West, Westlaw through 2023 3rd Extra. Sess. of the 94th Ark. Gen. Assemb. & include changes made by the Ark. Code Revision Comm'n received through Oct. 25, 2022); DEL. CODE ANN. tit. 19, § 711 (West, Westlaw through 2023 Ch. 5 of the 152th Gen. Assemb.); D.C. CODE ANN. §§ 2-1401.02(31), 2-1402.11(a) (West, Westlaw through Dec. 28, 2022); FLA. STAT. ANN. § 760.10 (West, Westlaw through 2022 2nd Reg. Sess.); GA. CODE ANN. § 45-19-29 (West, Westlaw through 2022 Reg. Sess. of the Ga. Gen. Assemb. subject to changes by the Ga. Code Comm'n); HAW. REV. STAT. ANN. § 378-2 (West, Westlaw through 2022 Reg. Sess. pending text revision by revisor of statutes); IDAHO CODE ANN. § 67-5909 (West, Westlaw through 2022 2nd Reg. Sess. & 1st Extra. Sess. of the 66th Idaho Leg.); IND. CODE ANN. § 22-9-1-2 (West, Westlaw through 2023 1st Reg. Sess., 2nd Reg. Tech. Sess. & 2nd Reg. Spec. Sess. of the 122nd Gen. Assemb.); IOWA CODE ANN. § 216.6 (West, Westlaw through 2023 Reg. Sess. Subject to changes made by Iowa Code Editor for Code 2024); KAN. STAT. ANN. § 44-1009(a)(1) (West, Westlaw through 2022 Reg. Sess. of the Kan. Leg.); KY. REV. STAT. ANN. § 344.040 (West, Westlaw through 2023 Reg. & Extra. Sess.); LA. STAT. ANN. § 23:332 (A) (West, Westlaw through 2022 1st Extra. & Reg. Sess.); ME. REV. STAT. ANN. tit. 5, § 4572 (West, Westlaw through 2023 2nd Reg. Sess. of the 131st Legis.) (This statute has been preempted by federal law. Carmichael v. Verso Paper, 679 F. Supp. 2d 109 (2010)); MICH. COMP. LAWS ANN. § 37.2202 (West, Westlaw through P.A. 2023, No. 3 of the 2022 Reg. Sess., 102nd Leg.); MINN. STAT. ANN. § 363A.08 (West, Westlaw through 2023 Reg. Sess. subject to change by Minn. Revisor of Stat.) (This statute has been limited on preemption grounds by Boldt v. N. States Power Co., 195 F. Supp. 3d 1057 (D. Minn. 2016)); MO. ANN. STAT. § 213.055 (West, Westlaw through WID 37 of the 2022 2nd Reg. Sess. of the 101st Gen. Assemb.); MONT. CODE ANN. § 49-2-303 (West, Westlaw through 2021 Sess. of the Mont. Leg.); NEB. REV. STAT. ANN. § 48-1104 (West, Westlaw

Others rely on common law torts.[23] States also define sexual harassment in regulations governing public employees.[24]

This Article analyzes the varying approaches of states and circuits in implementing, expanding, and interpreting elements of their own sexual harassment laws.[25] Part II presents the basic elements of most sexual harassment claims. Part III explains the basics of Title VII, the EEOC, state and local agencies called Fair Employment Practices Agencies (FEPAs), as well as policy updates since the election of President Trump. Part IV examines state implementation of sexual harassment laws, including alternative common law remedies. This section also explores the ways many states have expanded their protection of employees and implemented administrative requirements as part of a broader regulatory scheme to protect workers. Part V examines different key elements of sexual harassment claims and how states have interpreted them. Part VI explores the extent to which employers may be held liable for sexual harassment claims and the different defenses available to an employer in defending against a sexual harassment claim. Part VII examines the standards courts have more recently developed for applying Title VII protections to same-sex sexual harassment and sexual harassment of transgender employees. Finally, Part VIII provides a brief overview of recent

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through end of the 2022 2nd Reg. Sess. of the 107th Leg.); NEV. REV. STAT. ANN. § 613.330 (West, Westlaw through end of Ch. 2 of the 2022 33rd Spec. Sess. subject to change from reviser of the Leg. Counsel Bureau); N.H. REV. STAT. ANN. § 354-A:7 (West, Westlaw through Ch. 1 of the 2023 Reg. Sess.); N.J. STAT. ANN. § 10:5-12 (West, Westlaw through L. 2023, c. 9 & J.R. No. 1); N.M. STAT. ANN. § 28-1-7 (West, Westlaw through 2022 2nd Reg. Sess. & 3rd Spec. Sess. of the 55th Leg.); N.Y. EXEC. LAW § 296 (McKinney, Westlaw through L. 2022, Chs. 1 to 841); N.C. GEN. STAT. ANN. § 95-151 (West, Westlaw through S.L. 2022-75 of the 2022 Reg. Sess. of the Gen. Assemb. made pursuant to direction of the Revisor of Statutes.); N.D. CENT. CODE ANN. § 14-02.4-01 (West, Westlaw through legislation effective through Feb. 23, 2023 from the 2023 Reg. Sess.); OHIO REV. CODE ANN. § 4112.02 (West, Westlaw through 2022 Reg. Sess. of the Ohio 134th Gen. Assemb.); OKLA. STAT. ANN. tit. 25, § 1302 (West, Westlaw through the 2022 2nd Reg. Sess. & 1st & 2nd Extra. Sess. of the 58th Leg.); OR. REV. STAT. ANN. § 659A.030 (West, Westlaw through 2022 Reg. Sess. of the 81st Leg. Assemb., pending classification of undesignated material and text revision by the Or. Reviser); PA. STAT. ANN. § 955 (West, Westlaw through 2022 Reg. Sess. Act 98) (limited on constitutional grounds in Renner v. Court of Common Pleas of Lehigh County, 234 A.3d 411 (2020)); R.I. GEN. LAWS ANN. § 28-5-7 (West, Westlaw through Ch. 442 of the 2022 Reg. Sess. of the R.I. Leg.); S.C. CODE ANN. § 1-13-80 (Westlaw through 2022 Act No. 268, subject to final approval by the Leg. Council, technical revisions by the Code Comm'n, and publication in the Official Code of Laws); S.D. Codified Laws § 20-13-10 (Westlaw through 2023 Reg. & Spec. Sess. Laws & Sup. Ct. Rule 23-01); TENN. CODE ANN. § 4-21-401 (West, Westlaw through 2020 2nd Reg. Sess. of the 112th Tenn. Gen. Assemb.); TEX. LAB. CODE ANN. § 21.051 (West, Westlaw through 2021 Reg. & 1st Called Sess. of the 87th Leg.); UTAH CODE ANN. § 34A-5-106 (West, Westlaw through 2022 3rd Spec. Sess.); VT. STAT. ANN. tit. 21, § 495 (West, Westlaw through Adjourned & 1st Spec. Sess. of the 2021–2022 Vt. Gen. Assemb.); VA. CODE ANN. § 2.2-3900 (West, Westlaw through 2022 Reg. Sess. & Spec. Sess. 1, cc. 1 to 22); WASH. REV. CODE ANN. § 49.60.180 (West, Westlaw through 2022 Reg. Sess. of the Wash. Leg.); WIS. STAT. ANN. § 111.321 (West, Westlaw through 2021 Act 267, published Apr. 16, 2022); WYO. STAT. ANN. § 27-9-105 (West, Westlaw through the 2023 Gen. Sess. of the Wyo. Leg.).

23. *See, e.g.*, Machen v. Childersburg Bancorporation, Inc., 761 So. 2d 981, 983 (Ala. 1999).

24. *See, e.g.*, FLA. ADMIN. CODE R. 60L-40.001 (1) (2002).

25. *See infra* Parts II–V.

cases of sexual harassment in the media that received national coverage, concluding with a summary of the response to #MeToo within the legal community.

II. BASIC ELEMENTS OF SEXUAL HARASSMENT LAWS

Under Title VII, federal courts recognize two forms of sexual harassment: *quid pro quo* and hostile work environment.[26] While these terms do not appear in the text of Title VII, the Supreme Court has interpreted Section 703(a) to protect employees from both tangible (*quid pro quo*) and intangible (hostile work environment) sexual harassment.[27] Many state courts look to federal guidelines as persuasive authority to shape their own statutory interpretation.[28] The following section will briefly cover the general legal elements of *quid pro quo* and hostile work environment, as these elements are the foundation of workplace sexual harassment claims.

A. *QUID PRO QUO*

Quid pro quo harassment occurs when the "submission to or rejection of" requests for sexual favors "is used as the basis for employment decisions affecting" an individual.[29] Thus, *quid pro quo* harassment falls within Title VII's "because of . . . sex" requirement because a sexual favor would not have been solicited but for the sex of the person harassed.[30] To prove *quid pro quo* sexual harassment under most state laws, a plaintiff must show that: (1) the plaintiff belongs to a protected class under anti-discrimination law; (2) the harassment allegedly experienced was based on sex; (3) the harassment was unwelcome; (4) the plaintiff was subjected to unwelcome sexual harassment in the form of sexual advances or requests for sexual favors; and (5) the plaintiff's submission to the unwelcome advances was an express or implied condition for receiving job benefits, or the plaintiff's refusal to submit resulted in a tangible job detriment such as reduction in pay, failure to obtain a raise or to receive benefits, or termination of

26. *See, e.g.*, Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 751–52 (1998) (explaining that the terms "*quid pro quo*" and "hostile work environment" can be used to demarcate different types of sexual harassment claims); Karibian v. Columbia Univ., 14 F.3d 773, 777, 781 (2d Cir. 1994) (holding that plaintiffs may proceed under either a *quid pro quo* or hostile work environment theory); Soto v. John Morrell, 285 F. Supp. 2d 1146, 1169 (N.D. Iowa 2003) (explaining that Title VII recognizes both *quid pro quo* and hostile work environment claims).

27. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) ("[T]he language of Title VII is not limited to 'economic' or 'tangible' discrimination. [Congress intended] to strike at the entire spectrum of disparate treatment of men and women in employment.") (citations omitted). Title VII extends to hostile work environment cases where the harassment does not always lead to economic damages for the victim. *Id.* at 66.

28. *See, e.g.*, Labra v. Mid-Plains Const., Inc., 90 P.3d 954, 957 (Kan. Ct. App. 2004) ("Although federal cases construing Title VII . . . are not controlling, they are persuasive authority in the interpretation and application of the KAAD.").

29. *See* 29 C.F.R. § 1604.11 (1972); *Sex-Based Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://perma.cc/C83Y-VGP5 (last visited Mar. 4, 2023).

30. *See* Barnes v. Costle, 561 F.2d 983, 990 (D.C. Cir. 1977).

employment.[31] The Ninth Circuit has held that an employer can be vicariously liable for a *quid pro quo* action when a supervisor recommends, with the authority to recommend, a "tangible employment action" against a plaintiff. [32]

B. HOSTILE WORK ENVIRONMENT

A hostile work environment claim usually involves "severe or pervasive" harassment and hostility that interferes with an individual's work performance.[33] While a plaintiff must show that gender is a substantial factor in the discrimination—and that "but for" the sex of the plaintiff, the plaintiff would not have been treated in that manner—no showing of economic harm or actual psychological injury is necessary.[34] To make a prima facie showing of a hostile work environment, the victim must show that: (1) they belong to a protected class under the anti-discrimination law; (2) the harassment allegedly experienced was based on sex; (3) the harassment was unwelcome; and (4) the harasser's conduct was so severe and/or pervasive that it altered the victim-employee's work environment by detracting from the employee's job performance.[35]

Recent decisions have extended hostile work environment claims to employees who are not the intended recipients of unwelcome sexual advances.[36] For example, in *Miller v. Department of Corrections*, a male prison warden had affairs with numerous female employees and then provided these employees with promotions and privileges.[37] When other female employees complained about the practice of favoritism, the warden retaliated against them.[38] These women brought a hostile work environment claim.[39] The California Supreme Court held

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31. *See, e.g.*, Kauffman v. Allied Signal, Inc., Autolite Div., 970 F.2d 178, 186 (6th Cir. 1992); Island v. Buena Vista Resort, 103 S.W.3d 671, 676–77 (Ark. 2003); Schmitz v. Bob Evans Farms, Inc., 697 N. E.2d 1037, 1040 (Ohio Ct. App. 1997); Ewald v. Wornick Fam. Foods Corp., 878 S.W.2d 653, 658–59 (Tex. App. 1994); Westmoreland Coal Co. v. W. Va. Hum. Rts. Comm'n, 382 S.E.2d 562, 566–67 (W. Va. 1989).

32. *See* Holly D. v. Cal. Inst. of Tech., 339 F.3d 1158, 1169 n.14 (9th Cir. 2003).

33. *See Meritor*, 477 U.S. at 67. As discussed in Section V-A, *infra*, states differ as to whether the harassing conduct must be "of a sexual nature."

34. *See* Yanowitz v. L'Oreal USA, Inc., 116 P.3d 1123, 1137 (Cal. 2005); Lively v. Flexible Packaging Ass'n, 830 A.2d 874, 888–89 (D.C. 2003); Byrd v. Richardson-Greenshields Sec., Inc., 552 So. 2d 1099, 1102–03 (Fla. 1989); Nelson v. Univ. of Haw., 38 P.3d 95, 111 (Haw. 2001); McElroy v. State, 637 N.W.2d 488, 499 (Iowa 2001); Manikhi v. Mass Transit Admin., 758 A.2d 95, 103 (Md. 2000); Ocana v. Am. Furniture Co., 91 P.3d 58, 69 (N.M. 2004); Hampel v. Food Ingredients Specialties, Inc., 729 N.E.2d 726, 732 (Ohio 2000).

35. *See* Veco, Inc. v. Rosebrock, 970 P.2d 906, 910 (Alaska 1999); Elezovic v. Ford Motor Co., 697 N.W.2d 851, 868–69 (Mich. 2005); Goins v. W. Grp., 635 N.W.2d 717, 725 (Minn. 2001); Nava v. City of Santa Fe, 103 P.3d 571, 574 (N.M. 2004); *Lively*, 830 A.2d at 888; Cincinnati Bar Ass'n v. Young, 731 N.E.2d 631, 639–40 (Ohio 2000).

36. *See, e.g.*, Alison Doyle, *Examples of Sexual and Non-Sexual Harassment*, LIVEABOUTDOTCOM (Sept. 21, 2021), https://perma.cc/96TL-QK5P; EEOC v. PVNF, LLC, 487 F.3d 790, 798 (10th Cir. 2007) (explaining that the fact that the victim was not the intended recipient of a derogatory email does not negatively impact her claim); Miller v. Dep't of Corr., 115 P.3d 77, 87 (Cal. 2005).

37. *Miller*, 115 P.3d at 81–83.

38. *Id.* at 83–84.

39. *Id.* at 85.

that these women could bring a hostile work environment action against their employer under the state equivalent of Title VII.[40] According to the court, management's view of the female employees as "sexual playthings" was demeaning to all female employees and implied that the only way to advance professionally was to engage in sexual conduct with superiors.[41] The court noted the deleterious effect that such widespread sexual favoritism could have on the work environment.[42] This approach is mirrored by EEOC enforcement guidance stating that if sexual favoritism is sufficiently widespread, male or female colleagues not subject to that favoritism can establish a hostile work environment claim.[43]

III. EEOC & OTHER FEDERAL LAWS

A. TITLE VII

The Civil Rights Act of 1964[44] forbids discrimination on the basis of race, color, religion, sex, or national origin within voter registration requirements, public schools and accommodations, and employment contexts,[45] and Title VII of the Act specifically forbids discrimination on the basis of sex and race in employment practices including hiring, promotion, and firing.[46] This section of the Act applies to most employers with at least fifteen employees, labor unions, and employment agencies.[47] Perhaps most importantly, Title VII created the EEOC, discussed in Section B below.[48]

Title VII is a consistent source of both great debate and expansion of substantive rights for victims of discrimination.[49] The EEOC is principally responsible for implementing Title VII's protections. Additionally, executive orders and congressional legislation often use Title VII as a basis for new actions, referencing definitions and Title VII's legislative history when further expanding anti-discrimination guidelines. Over the last five decades, Title VII has been broadly interpreted as an instrument by which the EEOC, the legislature, and the judiciary

40. *Id*. at 80.

41. *Id*.

42. *See id*. at 91–92; *see also* Broderick v. Ruder, 685 F. Supp 1269, 1278 (D.D.C. 1988) (discussing how defendant's sexual favoritism created a hostile work environment for a female staff attorney); Badrinauth v. Metlife Corp., No. Civ. A. 04-2552, 2006 WL 288098, at *4–5, 2006 U.S. Dist. LEXIS 4790, at *1 (D.N.J. Feb. 6, 2006) (holding that sexual favoritism can give rise to a hostile work environment claim).

43. *See* U.S. Equal Emp. Opportunity Comm'n, N-915.048, Policy Guidance on Employer Liability Under Title VII For Sexual Favoritism (1990), https://perma.cc/BNG2-KN49.

44. *See The Civil Rights Act of 1964: A Long Struggle for Freedom*, LIBRARY OF CONGRESS, https://perma.cc/8DMC-SPT7 (last visited Mar. 4, 2023).

45. *See Legal Highlight: The Civil Rights Act of 1964*, DEP'T OF LABOR, https://perma.cc/8U5X-WV48 (last visited Mar. 4, 2023).

46. *See The Civil Rights Act of 1964 and the Equal Employment Opportunity Commission*, NAT'L ARCHIVES & RECS. ADMIN., https://perma.cc/TC74-LYFP (last visited Mar. 4, 2023).

47. *See What You Should Know: ABCs of the EEOC*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://perma.cc/45TS-C25W (last visited Feb. 25, 2023).

48. *See* Civil Rights Act of 1964, 42 U.S.C. § 2000e-4 (1964).

49. *See* NAT'L ARCHIVES & RECS. ADMIN., *supra* note 46.

may ensure discrimination-free workplaces and employment opportunities. The EEOC constitutes the most progressive and far-reaching vehicle for Title VII's assurances.

B. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Title VII of the Civil Rights Act of 1964 created the EEOC, a five-member bipartisan commission with the power to receive, investigate, and conciliate complaints of discrimination based on Title VII factors.[50] Since its creation, the EEOC's purview of potential discriminatory practices has expanded to include race, color, religion, sex (including pregnancy, gender identity, and sexual orientation), national origin, age (forty or older), disability, or genetic information.[51]

Political conservatives are often in opposition to many EEOC guidelines, arguing they saturate the legal system with government regulations and federal policies, while political liberals often support EEOC policies expanding the rights of women and minorities.[52] In recent years, thanks in part to the #MeToo movement and a dramatic shift in workplace culture, training, and structure, the EEOC has seen a significant increase in sexual harassment charges.[53] The changing workplace structure may partially account for a marked increase in individuals alleging sex-based harassment from 2010 to 2018: up from 12,695 to 13,055, the highest in that timeframe, although the number of charges notably decreased in 2020 and 2021, with the lowest number of charges at 10,035.[54] It is difficult, however, to extrapolate generally from recorded charging statistics what, if any, effect an evolving workforce has on overall trends in types of charges filed with the EEOC.[55] The EEOC's charging statistics show a percentage of cases that include any of ten types of discrimination—for example, one individual may allege both sex and national origin discrimination.[56] Thus, although the EEOC saw a 13.6% increase in charges that include allegations of sexual harassment, it does not provide statistics on whether there has been a change in cases that allege only discrimination on the basis of sex generally in a lawsuit.[57] Many charges alleging sexual harassment are filed concurrently with retaliation charges.[58]

50. *See What You Should Know: ABCs of the EEOC*, *supra* note 47.

51. *See Timeline of Important EEOC Events*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://perma.cc/TEX5-SUDD (last visited Mar. 4, 2023).

52. *See id.*

53. *See Holistic Approach Needed to Change Workplace Culture To Prevent Harassment, Experts Tell EEOC*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (2018), https://perma.cc/YGQ7-REW8.

54. *See Charges Alleging Sex-Based Harassment (Charges filed with EEOC) FY 2010–FY 2021*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://perma.cc/VF4Y-24L2 (last visited Mar. 4, 2023).

55. *See id.*

56. *Id.*

57. *Id.*

58. *Id.*

Between 2018 and 2021, of the 27,291 sexual harassment charges filed, 43.5% were concurrently filed with a retaliation charge.[59]

C. FAIR EMPLOYMENT PRACTICE AGENCIES

FEPAs are responsible for enforcing geographic-specific anti-discrimination laws.[60] Filing practices vary greatly, as FEPAs can enforce local law that goes beyond those promulgated by the EEOC. Because of the great variation between various states, cities, and towns, some FEPAs may enforce laws that provide far greater protection to employees based on local marriage or custody laws, for example.[61] Complaints may be filed either with a FEPA or directly with the EEOC, though if the complaint is originally lodged with a FEPA and the matter is one covered by the EEOC, the FEPA will file a copy with the EEOC, with the reverse also being true.[62]

As part of the Performance and Accountability Report for Fiscal Year 2018, Acting Chair Victoria A. Lipnic, a Trump Administration appointee, noted a goal to combat employment discrimination through strategic law enforcement by increasing FEPA-reported resolutions.[63] The result was an increase in the proportion of FEPA resolutions reported by local or state FEPA offices from 14% in 2014 to a range of 15–17% as of September 30, 2017.[64] The EEOC achieved this objective by integrating EEOC responsibilities into private and state and local government sectors so as to track the progress of state and local partners in adhering to agency-wide efforts to attack instances of systemic discrimination.[65]

D. RELATED FEDERAL LAWS

As outlined above, the EEOC is tasked with enforcing Title VII of the Civil Rights Act of 1964, including the Pregnancy Discrimination Act, the Equal Pay Act of 1963, the Age Discrimination in Employment Act of 1967, Title I of the Americans with Disabilities Act of 1990, Sections 102 and 103 of the Civil Rights Act of 1991, Sections 501 and 505 of the Rehabilitation Act of 1973, and the Genetic Information Nondiscrimination Act of 2008.[66] These Acts comprise the vast majority of federal legislation and regulation addressing sexual harassment in the workplace or public spaces. However, there are a number of other federal acts and orders worth noting.

Title IX, a 1972 amendment to the Civil Rights Act of 1964, specifically prohibits discrimination on the basis of sex under any educational program or activity

59. *Id.*

60. *See Fair Employment Practices Agencies (FEPAs) and Dual Filing*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://perma.cc/GU7J-EJJ3 (last visited Mar. 4, 2023).

61. *See id.*

62. *Id.*

63. *Performance and Accountability Report Fiscal Year 2018*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://perma.cc/6EX9-SAUP (last visited Mar. 4, 2023).

64. *See id.*

65. *Id.*

66. *See Laws Enforced by EEOC*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://perma.cc/W294-CD7X (last visited Mar. 4, 2023).

receiving federal financial assistance.[67] This prohibition applies to "admissions to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education."[68] Title IX also governs procedures in any instance of alleged sexual assault or harassment on a college campus, as sexual violence or harassment is a form of discrimination on the basis of sex.[69] The Department of Labor enforces the requirements of Title IX and the Education Amendments of 1972.

Presidents may choose to address issues of sexual discrimination and harassment in the workplace through the implementation of executive orders. On May 28, 1998, President Clinton signed Executive Order 13087 in furtherance of Executive Order 11478, Equal Employment Opportunity in the Federal Government.[70] While the EEOC operates under the holding that discrimination against an individual because of that person's sexual orientation is discrimination because of sex and is therefore prohibited under Title VII, this Executive Order made clear that the federal government is held to a uniform policy prohibiting discrimination based on sexual orientation.[71]

President Barack Obama amended Executive Order 11246 (now titled Executive Order 11326), originally signed by President Johnson in 1965, on July 21, 2014, substantially expanding its reach.[72] Now, Executive Order 11326 prohibits federal contractors and federally-assisted construction contractors and subcontractors who complete more than $10,000 in government business in one year from discrimination in employment decisions based on race, color, religion, sex, sexual orientation, gender identity, or national origin.[73]

E. CURRENT POLICIES

While the Biden Administration has demonstrated a commitment to combating discrimination, it must grapple with sweeping changes to previous federal government stances on discrimination made by the Trump Administration.[74] On March 27, 2017, President Trump signed an executive order revoking President Obama's 2014 Fair Pay and Safe Workplaces Executive Order.[75] Although the Biden Administration has not reinstated the Act, President Biden signed an executive order that required the head of each federal agency to review all existing orders, regulations, guidance documents, and other agency actions and to consider whether the

67. *See* Education Amendment Act of 1972, 20 U.S.C. §1681(a) (1972).

68. *See id*. at (a)(1).

69. *See* Exec. Order. No. 14021, 86 Fed. Reg. 13803 (Mar. 8, 2021).

70. *See* Exec. Order. No. 13087, 63 Fed. Reg. 30097 (May 28, 1998).

71. *See Facts about Discrimination in Federal Government Employment Based on Marital Status, Political Affiliation, Status as a Parent, Sexual Orientation, and Gender Identity*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://perma.cc/E72W-EZPD (last visited Mar. 4, 2023); *see* Executive Order 13087, *supra* note 70.

72. *See* Exec. Order No. 13672, 79 Fed. Reg. 42971 (July 21, 2014).

73. *See id.*

74. Exec. Order No. 13988, 86 Fed. Reg. 7023 (Jan. 20, 2021).

75. *See* Exec. Order No. 13782, 82 Fed. Reg. 15607 (Mar. 27, 2017).

action is contrary to the prohibition of discrimination on the basis of gender identity or sexual orientation.[76] President Trump's revocation of the Fair Pay Order directly impacts individuals seeking to sue employers for harassment in the workplace, as allegations of harassment may now be kept from the public and thus lead to few lasting impacts on large contractors while affording victims little by way of remedy.

In July 2017, the Trump Administration took the highly unusual step of filing a friend-of-the-court brief in a federal case in the Second Circuit Court of Appeals, *Zarda v. Altitude Expressions*.[77] In its brief, the Department of Justice (DOJ) argued that federal civil rights law, namely Title VII, does not protect employees from discrimination based on sexual orientation.[78] The DOJ argued that Title VII amendments are the purview of Congress, not the courts, and "sex" has always been separate from "sexual orientation."[79] Directly opposing the EEOC and a Seventh Circuit opinion holding the opposite, DOJ stated that "an employer who discriminates against an employee in a same-sex relationship is not engaged in sex-based treatment of women as inferior to similarly situated men . . . , but rather is engaged in sex-neutral treatment of homosexual men and women alike" and is thus not in violation of Title VII.[80] This brief laid bare the sharp divide between the DOJ and the EEOC—both enforce the requirements of Title VII, but neither is entitled to *Chevron* deference when interpreting the Act.[81] Ultimately, a divided Supreme Court held that an employer violates Title VII of the Civil Rights Act when it intentionally fires an individual employee based in part on sex, noting that "homosexuality and transgender status are inextricably bound up with sex."[82]

IV. STATE IMPLEMENTATION AND EXPANSION OF SEXUAL HARASSMENT LAWS

While most state statutes at least partially mirror Title VII, many go further to effectively expand Title VII anti-discrimination protections to cover LGBT workers and workers in settings with fewer than fifteen employees.[83] These expanded protections recognize the fact that those classes are equally as vulnerable to discrimination as are the named Title VII classes. In some states, legislatures passed these statutes after a federal circuit court held that sexual orientation and gender identity are not protected classes under Title VII.[84] Many states also impose

76. *See* Exec. Order No. 13988, *supra* note 74.

77. Alan Feur, *Justice Department Says Rights Law Doesn't Protect Gays*, N.Y. TIMES (July 27, 2017), https://perma.cc/A33K-USKK.

78. *See* Brief for the United States as Amici Curiae Supporting Respondents at 6, Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2017) (No. 15-3775).

79. *See id.* at 22.

80. *See id.*

81. *See* Alison Frankel, *EEOC Backs Gay Employee in Latest Appellate Battle Over Workplace Rights,* REUTERS (Mar. 16, 2018), https://perma.cc/T8UD-YAGC.

82. *See Bostock*, 140 S. Ct. at 1742.

83. *See infra* Section IV-A.

84. *See e.g.*, Etsitty v. Utah Transit Authority, 502 F.3d 1215, 1221 (10th Cir. 2007) (holding that "transsexuals" are not a protected class for purposes of Title VII's "because of sex" discrimination). The following year, Colorado incorporated protections for sexual identity and transgender status. COLO. REV. STAT. ANN. § 24-34-402, § 24-34-301. *See also, e.g.*, Pagan v. Gonzalez, 430 Fed. Appx. 170, 172

additional regulatory requirements on employers and have established their own FEPAs to oversee compliance.[85] In FEPA states,[86] employees can either bring a cause of action for sexual harassment through the EEOC under Title VII or through the state FEPA.[87] Despite this apparent overlap in protection, dual protection is necessary as FEPAs often enforce statutes that offer greater protections than Title VII; they also often have different deadlines, standards, and relief available to the employee.[88] Section A discusses the ways that protected classes have been expanded beyond the formal Title VII class members. First, it explores state statutes that protect employees who work in settings of fewer than fifteen workers. It then discusses protections that some states have implemented for marginalized groups not named in Title VII. Section B explains the administrative requirements that Title VII imposes on employers to educate its workers and to facilitate prevention of workplace harassment. Section C explains proactive employer "best practices" and states at the forefront of transparency in harassment cases. Section D outlines the overlaps with common law torts in states that do not have protective statutes separate and apart from federal legislation.

A. EXPANDED CLASS PROTECTIONS

Title VII only provides sexual harassment protection to those employees working in an environment with a minimum of fifteen employees.[89] As a result, many individuals working for small businesses do not fall under the federal umbrella of protection.[90] Many state sexual harassment statutes cover employers with fewer than fifteen employees,[91] and seventeen of these states and D.C. cover all

(3rd Cir. 2011) (reasoning that sexual orientation is not a cognizable claim under Title VII). Two years later, Delaware amended its state statute to include sexual orientation; the following year it was amended to include gender identity. DEL. CODE ANN. tit. 19, § 711.

85. *See Fair Employment Practices Agencies (FEPAs) and Dual Filing*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://perma.cc/JCC4-F8PL (last visited Mar. 4, 2023) [hereinafter *EEOC Dual Filing Procedures*]; *see also* State and Local Contracts/Worksharing Agreements, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://perma.cc/7ZQ7-QG37 (last visited Mar. 4, 2023).

86. *See EEOC Dual Filing Procedures*, *supra* note 85 ("To determine if there is a FEPA in your area, please see the information for your nearest EEOC field office, which lists the FEPAs in its jurisdictional area.").

87. *See id.*

88. *Id.*

89. *See* 42 U.S.C.A. § 2000e(b) (West, Westlaw through Pub. L. No. 117-262) ("The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year.").

90. *See* Kalley R. Aman, *No Remedy for Hostile Environment Sexual Harassments?: Balancing a Plaintiff's Right to Relief Against Protection of Small Business Employers*, 4 J. SMALL & EMERGING BUS. L. 319, 331 (2000) (arguing that the government's desire to help small business owners avoid vicarious liability for supervisory sexual harassment may leave some small business employees without a legal remedy). *See also* Robyn Pennachia, *Why Suing Over Employee Discrimination is a Hell of a Lot Harder Than it Should Be*, MIC.COM (Mar. 20, 2018), https://perma.cc/MN23-DZ4V.

91. *Compare* 42 U.S.C.A. § 2000e(b) (West, Westlaw through Pub. L. No. 117-262 (establishing that the statute applies to those employees with fifteen or more employees), *with* ARK. CODE ANN. § 16-123-102 (West, Westlaw through 2023 Reg. Sess. of the 94th Ark. Gen. Assemb.) (establishing that employers with

employers with one or more employees.[92] Many small businesses that were once

nine or more employees can be held liable); *see* CAL. GOV'T CODE § 12926 (West, Westlaw through 2022 Reg. Sess. of the Cal. Gen. Assemb.) (establishing that employers with five or more employees may be held liable); DEL. CODE ANN. tit. 19, §§ 710, 711 (West, Westlaw through 2022 Reg. Sess. of the 152nd Del. Gen. Assemb.) (establishing that employers with four or more employees may be held liable); IDAHO CODE ANN. §§ 67-5902, 67-5909 (West, Westlaw through 2023 Reg. Sess. of the 67th Idaho Gen. Assemb.) (establishing that employers with five or more employees may be held liable); IND. CODE ANN. § 22-9-1-3 (West, Westlaw through 2022 Reg. Sess. of the 122nd Ind. Gen. Assemb.) (establishing that employers with six or more employees may be liable); IOWA CODE ANN. §§ 216.2, 216.6 (West, Westlaw through 2022 Reg. Sess. of the 122nd Ind. Gen. Assemb.) (establishing that anyone employing employees in the state may be held liable); KAN. STAT. ANN. §§ 44-1002, 44-1009 (West, Westlaw through 2023 Reg. Sess. Iowa Gen. Assemb.) (establishing that employers with four or more employees may be held liable); KY. REV. STAT. ANN. §§ 344.030, 344.040 (West, Westlaw through 2023 Reg. Sess. Ky. Gen. Assemb.) (establishing that an employer with eight or more employees may be held liable); MASS. GEN. LAWS ANN. Ch. 151B, §§ 1, 4 (West, Westlaw through 2022 Reg. Sess. of the 2nd Mass. Gen. Assemb.) (establishing that employers with six or more employees may be held liable); MO. ANN. STAT. §§ 213.010, 213.055 (West, Westlaw through 2022 2nd Reg. & 1st Extra. Sess. of the Mo. 101st Gen. Assemb.) (establishing that employers with six or more employees may be held liable); N.H. REV. STAT. ANN. §§ 354-A:2, 354-A:7 (West 2018) (establishing that employers with six or more employees may be liable and protecting sexual orientation); N.M. STAT. ANN. §§ 28-1-2, 28-1-7 (West, Westlaw through 2022 Reg. Sess. of the N.M. 55th Gen. Assemb.) (establishing that employers with four or more employees may be held liable); OHIO REV. CODE ANN. § 4112.01 (West, Westlaw through 2022 Reg. Sess. of the Ohio 134th Gen. Assemb.) (establishing that employers with four or more employees may be held liable); 43 PA. STAT. ANN. § 954 (West, Westlaw through 2022 Reg. Sess. of the Pa. 166th Gen. Assemb.) (establishing that an employer with four or more employees may be liable); R.I. GEN. LAWS §§ 28-5-6, 28-5-7 (West, Westlaw through 2022 Reg. Sess. of the R.I. Gen. Assemb.) (establishing that employers with four or more employees may be liable); TENN. CODE ANN. § 4-21-102 (West, Westlaw through 2022 Reg. Sess. of the 122nd Tenn. Gen. Assemb.) (establishing that employers with eight or more employees may be liable); WASH. REV. CODE ANN. § 49.60.040 (West, Westlaw through 2022 Reg. Sess. of the 122nd Wash. Gen. Assemb.) (establishing that employers with eight or more employees may be liable); W. VA. CODE § 5-11-3 (West, Westlaw through 2023 Reg. Sess. of the W. Va. Gen. Assemb.) (establishing that employers with twelve or more employees may be liable); WYO. STAT. ANN. § 27-9-102 (West, Westlaw through 2023 Reg. Sess. of the Wyo. Gen. Assemb.) (establishing that employers with two or more employees may be liable).

92. *See* ALASKA STAT. ANN. §§ 18.80.300(5), 18.80.220 (West, Westlaw through 2022 2nd Reg. Sess. of the Alaska 32nd Gen. Assemb.); ARIZ. REV. STAT. ANN. § 41-1461 (West, Westlaw through the 2nd Reg. Sess. of the 55th Leg. (2022)); COLO. REV. STAT. ANN. §§ 24-34-401, 24-34-402 (West, Westlaw through 2nd Reg. Sess., 73rd Gen. Assemb. (2022)); D.C. CODE ANN. §§ 2-1401.02, 2-1402.11 (West, Westlaw through Dec. 28, 2022) (stating that there is no minimum number of employees an employer must have in order to be held liable); HAW. REV. STAT. ANN. §§ 378-1, 378-2 (West, Westlaw through the end of the 2022 Reg. Sess.) (stating that employers with one or more employee may be held liable); 775 ILL. COMP. STAT. ANN. 5/2-101 (West, Westlaw through P.A. 102-1142 of the 2022 Reg. Sess.) (stating that there is no employee minimum when a complainant asserts a civil rights violation due to discrimination based on sex); ME. REV. STAT. ANN. tit. 5, §§ 4553, 4572 (West, Westlaw through emergency legislation through Ch. 2 of the 2023 1st Reg. Sess. of the 131st Leg.) (stating that there is no minimum number of employees an employer must have in order to be held liable); MICH. COMP. LAWS ANN. § 37.2201 (West, Westlaw through P.A. 2023, No. 3, of the 2023 Reg. Sess., 102nd Leg.) (explaining that an employer with one or more employees may be held liable); MINN. STAT. ANN. §§ 363A.03, 363A.08 (West, Westlaw through legislation effective through Feb. 8, 2023 from the 2023 Reg. Sess.) (establishing that employers with one or more employee can be held liable); MONT. CODE ANN. §§ 49-2-101, 49-2-303 (West, Westlaw through the 2021 Sess. of the Mont. Leg.) (establishing that employers with one or more employees may be held liable); N.D. CENT. CODE ANN. §§ 14-02.4-01, 14-02.4-02 (West, Westlaw through legislation effective through Feb. 23, 2023 from the 2023 Reg. Sess.) (explaining that employers with one or more employees may be held liable); N.J. STAT. ANN. §§ 10:5-5, 10:5-12 (West, Westlaw through L. 2023, c. 9 and J.R. No. 1) (stating there is no minimum number of employees an employer must have in order to be held liable); N.Y. EXEC. LAW § 292(5)

exempt from sexual harassment laws under Title VII are now required to comply with analogous state laws.[93] The EEOC provides a "Small Business Resource Center," offering assistance and training in order to help newly covered companies implement changes to ensure compliance.[94] Individual state FEPAs and equivalent government agencies also provide resources designed to assist small local companies to comply with expanded state laws.[95]

Title VII offers protection from discrimination because of one's sex.[96] There had been significant disagreement among the EEOC, states, and federal courts as to their respective interpretations of whether and how discrimination "because of sex" applies to sexual orientation and gender identity discrimination. While the Title VII wording does not formally recognize different classes of sexual minorities,[97] many state statutes specify that protections extend to various additional classes of sexual minorities.[98] This includes either actual or perceived

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(McKinney, Westlaw through L. 2022, Chs. 1 to 841) (establishing that employers of any size may be liable); OKLA. STAT. ANN. tit. 25, §§ 1301, 1302 (West, Westlaw through legislation of the 2nd Reg. Sess. & 1st & 2nd Extra. Sess. of the 58th Leg. (2022)) (establishing that there is no minimum number of employees an employer must have in order to be held liable); OR. REV. STAT. ANN. §§ 659A.001, 659A.030 (West, Westlaw through laws enacted in the 2022 Reg. Sess. of the 81st Leg. Assemb.) (stating that employers with at least one employee may be held liable); S.D. CODIFIED LAWS §§ 20-13-1, 20-13-10 (West, Westlaw through laws of the 2023 Reg. Sess. effective Feb. 9, 2023 and Supreme Court Rule 23-15) (defining an employer as anyone who hires an employee); VT. STAT. ANN. tit. 21, §§ 494, 495 (West, Westlaw through Chs. 186 (End) and M-19 (End) of the Adjourned Sess. of the 2021-2022 Vt. Gen. Assemb. (2022)) (explaining that employers with one or more employees may be liable); WIS. STAT. ANN. §§ 111.32, 111.321 (West, Westlaw through 2021 Act 267, published Apr. 16, 2022) (explaining that there is no minimum number of employees an employer must have in order to be held liable).

93. *See supra* notes 91–92.

94. *See Small Business Resource Center*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://perma.cc/8LK2-ZM7N (last visited Mar. 4, 2023).

95. *See, e.g.*, *What Kinds of Technical Assistance Does the IHRC Offer?*, IDAHO HUM. RTS. COMM'N, https://perma.cc/MP7D-2ENE (last visited Mar. 4, 2023) (directing small businesses to the EEOC resources page).

96. *See* 42 U.S.C.A. § 2000e-2 (West, Westlaw through Pub. L. No. 114-327).

97. *Id.*

98. *See, e.g.*, CAL. GOV'T CODE §§ 12920 to 12996 (West, Westlaw current with urgency leg. through Ch. 997 of 2022 Reg. Sess. & all propositions on 2016 ballot) (including sexual orientation and gender identity); COLO. REV. STAT. ANN. § 24-34-402 (West, Westlaw through 2022 2nd Reg. Sess. of the 73rd Gen. Assemb.) (including sexual orientation); DEL. CODE ANN. tit. 19, § 711 (West, Westlaw through Ch. 5 of the 152nd Gen. Assemb. (2023-2024)) (including sexual orientation); D.C. CODE § 2-1402.11 (West, Westlaw through Dec. 28, 2022) (including sexual orientation and gender identity or expression); HAW. REV. STAT. § 378-2 (West, Westlaw through Act 220 of the 2022 Reg. Sess.) (including sexual orientation); IOWA CODE ANN. § 216.6 (West, Westlaw through 2023 Reg. Sess.) (including sexual orientation and gender identity); ME. REV. STAT. ANN. tit. 5, § 4572 (West, Westlaw through Ch. 2 of the 2023 2nd Reg. Sess. of the 131st Leg.) (including sexual orientation); MINN. STAT. § 363A.08 (West, Westlaw through 2023 Reg. Sess.) (including sexual orientation); MONT. CODE ANN. § 49-2-303 (West, Westlaw through 2021 Sess.) (including sex distinction); NEV. REV. STAT. ANN. § 613.330 (West, Westlaw through Ch. 2 (End) of the 33rd Spec. Sess. (2021)) (including sexual orientation); N.H. REV. STAT. ANN. § 354-A:7 (West, Westlaw through Ch. 1 of the 2023 Reg. Sess., not including changes & corrections made by the State of N.H., Office of Leg. Servs.) (including sexual orientation); N.M. STAT. ANN. § 28-1-7 (West, Westlaw through 2022 Reg. Sess. of the 55th Leg.) (including sexual orientation and gender identity); N.Y. EXEC. LAW § 296 (McKinney, Westlaw through L. 2022, Chs. 1-841) (including sexual orientation); OR. REV. STAT. ANN. § 659A.030 (West,

sexual orientation, gender identity or expression, bisexuality, homosexuality, heterosexuality, and transgender status.[99] The EEOC interprets Title VII to encompass discrimination based on gender identity and sexual orientation, and asserts that it will enforce this interpretation of the law regardless of conflicting state law; that is, a state law that does not prohibit discrimination on these bases is not a defense under Title VII.[100] The Supreme Court in *Bostock v. Clayton County* resolved the circuit split on the issue by holding that an employer that fires an employee because of their sexual orientation or gender identity violates Title VII because "[s]ex plays a necessary and undisguisable role in the [employment] decision, exactly what Title VII forbids."[101]

To supplement Title VII's protection of particular sex-related conditions, some state statutes explicitly include protections for gender- or stereotype-related classifications such as: pregnancy; childbirth (and related medical conditions such as childbearing capacity, sterilization, and fertility); marital status (including a change thereof and domestic partnership); relationship with a person of another race; breastfeeding; parenthood; personal appearance; family status; and family

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Westlaw through 2022 Reg. Sess.) (including sexual orientation); R.I. GEN. LAWS § 28-5-7 (West, Westlaw through Ch. 442 of the 2022 Sess.) (including sex, sexual orientation, gender identity or expression); VT. STAT. ANN. tit. 21, § 495 (West, Westlaw through laws of the Adjourned & Spec. Sess. of the 2021–2022 Vt. Gen. Assemb.) (including sex, sexual orientation, and gender identity); WASH. REV. CODE ANN. § 49.60.180 (West, Westlaw current with all effective legislation from the 2022 Reg. Sess. of the Wash. Leg.) (including sexual orientation).

99. *See, e.g.*, CAL. GOV'T CODE §§ 12920 to 12996 (West, Westlaw current with urgency Leg. through Ch. 997 of 2022 Reg. Sess. & all propositions on 2016 ballot) (including sexual orientation and gender identity); COLO. REV. STAT. ANN. § 24-34-402 (West, Westlaw through 2022 2nd Reg. Sess. of the 73rd Gen. Assemb.) (including sexual orientation); DEL. CODE ANN. tit. 19, § 711 (West, Westlaw through 81 Laws 2018, Chs. 200-450) (including sexual orientation); D.C. CODE § 2-1402.11 (West, Westlaw through Dec. 28, 2022) (including sexual orientation and gender identity or expression); HAW. REV. STAT. § 378-2 (West, Westlaw through Act 220 of the 2022 Reg. Sess.) (including sexual orientation); IOWA CODE ANN. § 216.6 (West, Westlaw through 2023 Reg. Sess.) (including sexual orientation and gender identity); ME. REV. STAT. ANN. tit. 5, § 4572 (West, Westlaw through Ch. 2 of the 2023 2nd Reg. Sess. of the 131st Leg.) (including sexual orientation); MINN. STAT. § 363A.08 (West, Westlaw through 2023 Reg. Sess.) (including sexual orientation); MONT. CODE ANN. § 49-2-303 (West, Westlaw through 2021 Sess.) (including sex distinction); NEV. REV. STAT. ANN. § 613.330 (West, Westlaw through 2017 79th Reg. Sess.) (including sexual orientation); N.H. REV. STAT. ANN. § 354-A:7 (West, Westlaw through Ch. 1 of the 2023 Reg. Sess., not including changes & corrections made by the State of N.H., Office of Leg. Servs.) (including sexual orientation); N.M. STAT. ANN. § 28-1-7 (West, Westlaw through 2022 Reg. Sess. of the 55th Leg.) (including sexual orientation and gender identity); N.Y. EXEC. LAW § 296 (McKinney, Westlaw through L. 2022, Chs. 1-841) (including sexual orientation); OR. REV. STAT. ANN. § 659A.030 (West, Westlaw through 2022 Reg. Sess.) (including sexual orientation); R.I. GEN. LAWS § 28-5-7 (West, Westlaw through Ch. 442 of the Jan. 2022 Sess.) (including sex, sexual orientation, gender identity or expression); VT. STAT. ANN. tit. 21, § 495 (West, Westlaw through laws of the Adjourned & Spec. Sess. of the 2021–2022 Vt. Gen. Assemb.) (including sex, sexual orientation, and gender identity); WASH. REV. CODE ANN. § 49.60.180 (West, Westlaw current with all effective legislation from the 2022 Reg. Sess. of the Wash. Leg.) (including sexual orientation).

100. *See What You Should Know About EEOC and the Enforcement Protections for LGBT Workers*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://perma.cc/8RKA-W5KU (last visited Mar. 4, 2023).

101. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1734, 1737 (2020).

responsibilities (actual or perceived).[102] Codifying these classes of sexual minorities not only ensures that they have a legal cause of action, but also proactively communicates a strong message to employers that the state will protect all classes of citizens, regardless of their sexual minority status.

B. ADDITIONAL ADMINISTRATIVE REQUIREMENTS

In addition to the expanded class of protected employees, many states now require employers to take affirmative action to prevent sexual harassment in the

102. *See, e.g.*, ALASKA STAT. ANN. § 18.80.220 (West, Westlaw through amendments received through the 2022 2nd Reg. Sess. of the 32nd Leg.) (including, marital status, and changes thereto, pregnancy and parenthood); CAL. GOV'T CODE §§ 12920 to 12996 (West, Westlaw through Ch. 997 of 2022 Reg. Sess.) (including marital status, sexual orientation, gender identity, pregnancy, childbirth, or related medical conditions); COLO. REV. STAT. ANN. § 24-34-402 (West, Westlaw through 2nd Reg. Sess., 73rd Gen. Assemb. (2022)) (including sexual orientation); CONN. GEN. STAT. ANN. § 46a-60 (West, Westlaw through Gen. Stat. of Conn., Revision of 1958, Revised to Jan. 1, 2023) (including marital status); DEL. CODE ANN. tit. 19, § 711 (West, Westlaw through Ch. 5 of the 152nd Gen. Assemb. (2023-2024)) (including marital status and sexual orientation); D.C. CODE § 2-1402.11 (West, Westlaw through Dec. 28, 2022) (including marital status, personal appearance, sexual orientation, gender identity or expression, and family responsibilities); FLA. STAT. ANN. §§ 760.01–760.11 (West, Westlaw through 2022 2nd Reg. Sess. & Spec. A, C, & D Sess. of the 27th Leg.) (including marital status); GA. CODE. ANN. §§ 45-19-20-45-19-45 (West, Westlaw through legislation passed at the 2022 Reg. Sess. of the Ga. Gen. Assemb.); HAW. REV. STAT. § 378-2 (West, Westlaw through the end of the 2022 Reg. Sess.) (including sexual orientation); IOWA CODE ANN. § 216.6 (West, Westlaw through legislation effective Feb. 6, 2023 from the 2023 Reg. Sess.) (including sexual orientation and gender identity); MASS. GEN. LAWS ANN. Ch. 151B, § 4 (West, Westlaw through 2022 2nd Annual Sess.); MICH. COMP. LAWS ANN. § 37.2202 (P.A. 2023, No. 3 of the 2023 Reg. Sess., 102nd Leg.) (including marital status); MINN. STAT. ANN. § 363A.08 (West, Westlaw through legislation effective through Feb. 8, 2023 from the 2023 Reg. Sess.) (including marital status and sexual orientation); MONT. CODE ANN. § 49-2-303 (West, Westlaw through the 2021 Sess. of the Mont. Legis.) (including marital status, and sex distinction); NEB. REV. STAT. ANN. § 48-1104 (West, Westlaw through the 2nd Reg. Sess. of the 107th Leg. (2022)) (including marital status); NEV. REV. STAT. ANN. § 613.330 (West, Westlaw through Ch. 2 (End) of the 33rd Spec. Sess. (2021)) (including sexual orientation); N.H. REV. STAT. ANN. § 354-A:7 (West, Westlaw through Ch. 1 of the 2023 Reg. Sess.) (including marital status and sexual orientation); N.J. STAT. ANN. § 10:5-12 (West, Westlaw through L. 2023, c. 9 and J.R. No. 1); N.M. STAT. ANN. § 28-1-7 (West, Westlaw through 2022 2nd Reg. Sess. & 3rd Spec. Sess. of the 55th Leg. (2022)) (including sexual orientation and gender identity); N.Y. EXEC. LAW § 296 (McKinney, Westlaw through L. 2022, Chs. 1 to 841) (including marital status and sexual orientation); N.D. CENT. CODE §§ 14-02.4-01, 14-02.4-02 (West, Westlaw through legislation effective through Feb. 23, 2023 from the 2023 Reg. Sess.) (including status with regard to marriage); OR. REV. STAT. ANN. § 659A.030 (West, Westlaw through laws enacted in the 2022 Reg. Sess. of the 81st Leg. Assemb.) (including sexual orientation and marital status); R.I. GEN. LAWS § 28-5-7 (West, Westlaw through effective legislation through Ch. 442 of the 2022 Reg. Sess. of the R.I. Leg.) (including sex, sexual orientation, and gender identity or expression); UTAH CODE ANN. § 34A-5-106 (West, Westlaw through laws through the 2022 3rd Spec. Sess.) (including sex, pregnancy, childbirth, and pregnancy-related conditions); VT. STAT. ANN. tit. 21, § 495 (West, Westlaw through Chs. 186 (End) and M-19 (End) of the Adjourned Sess. of the 2021–2022 Vt. Gen. Assemb. (2022)) (including sex, sexual orientation, and gender identity); VA. CODE ANN. § 2.2-3900 (West, Westlaw through the 2022 Reg. Sess. & Spec. Sess. I) (including pregnancy, childbirth or related medical conditions, and marital status); WASH. REV. CODE ANN. § 49.60.180 (West, Westlaw through all legislation from the 2022 Reg. Sess. of the Wash. Leg.) (including marital status and sexual orientation); W. VA. CODE § 5-11-9 (West, Westlaw through legislation of the 2023 Reg. Sess. approved through Feb. 15, 2023) (including pregnancy); WIS. STAT. ANN. § 111.321 (West, Westlaw through 2021 Act 267, published Apr. 16, 2022) (including marital status); WYO. STAT. ANN. § 27-9-105 (West, Westlaw through amendments received through Feb. 21, 2023 of the 2023 Gen. Sess. of the Wyo. Legis.) (including pregnancy).

workplace.[103] These regulations may involve (1) formal training; (2) distribution of a formal written sexual harassment policy; (3) posting of signs declaring employees' rights; and (4) taking all reasonable measures to prevent sexual harassment from occurring within the organization.[104] Subsection 1 discusses the formal training standard and the ways in which some states have gone beyond the Court's interpretation of minimum requirements, whether to enhance their protocols and work towards prevention, or in anticipation of litigation defenses. Subsection 2 discusses posting and policy requirements, and the emerging research on how to address systemic problems that underlie Title VII claims.

1. Training

Title VII does not require employers to conduct training on sexual harassment prevention.[105] Nonetheless, many states have taken a variety of measures to implement such training.[106] Since the Supreme Court's decisions in *Ellerth* and *Faragher*, employers can demonstrate an affirmative defense to a Title VII claim by showing that (1) the employer had communicated and established an effective procedure for employees to seek redress from sexual harassment, and (2) the harassed employee failed to take advantage of this procedure.[107] Some states' mandatory programs are so comprehensive that they seem designed to raise awareness and prevent sexual harassment, despite the minimal *Ellerth*/*Faragher* standard.[108] Other states do not legally require, but rather "encourage" employers to provide various training and prevention programs.[109] The "encouragement"

103. *See, e.g.*, CAL. GOV'T CODE § 12940(k) (West, Westlaw through Ch. 997 of 2022 Reg. Sess.) ("It is an unlawful employment practice . . . for an employer, labor organization, employment agency, apprenticeship training program, or any training program leading to employment, to fail to take all reasonable steps necessary to prevent discrimination and harassment from occurring.").

104. *See infra* Parts II–IV.

105. Susan Bisom-Rapp, *Sex Harassment Training Must Change: The Case for Legal Incentives for Transformative Education and Prevention*, 71 STAN. L. REV. 1 (June 2018), https://perma.cc/U3A8-N32H.

106. Agnes Herba, *State-specific sexual harassment training requirements (United States)*, OPENSESAME (Jan. 5, 2018), https://perma.cc/5RF7-D663.

107. *See Ellerth*, 118 S.Ct. at 2265; *Faragher*, 118 S.Ct. at 2277.

108. *See Ellerth*, 118 S.Ct. at 2265; *Faragher*, 118 S.Ct. at 2277.

109. *See, e.g.*, MASS. GEN. LAWS ANN. Ch. 151B, § 3A(e) (West, Westlaw through 2022 Reg. Sess. of the 2nd Mass. Gen. Assemb.) ("Employers are encouraged to conduct additional training for new supervisory and managerial employees."); VT. STAT. ANN. tit. 21, § 495H(f)(3) (West, Westlaw through 2021–2022 Reg. Sess. of the Vt. Gen. Assemb.) ("Employers are encouraged to conduct additional training for new supervisory and managerial employees and members within one year after commencement of employment or membership, which should include at a minimum the information outlined in this section, the specific responsibilities of supervisory and managerial employees, and the actions that these employees must take to ensure immediate and appropriate corrective action in addressing sexual harassment complaints."). *See, e.g.*, Terry v. Laurel Oaks Behav. Health Ctr., Inc., 1 F. Supp. 3d 1250, 1271–72 (M.D. Ala. 2014); Aguas v. State, 107 A.3d 1250, 1253 (N.J. 2015); Johnson v. N. Idaho Coll., 278 P.3d 928, 934–37 (Idaho 2012).

terminology comes directly from the EEOC, which cites commonly accepted practices designed to educate workers about discrimination/harassment and work towards preventing it, without delineating specific measures that employers must take.[110]

A handful of state regulations provide useful models for comprehensive prevention measures. California, Connecticut, Delaware, D.C., Illinois, Maine, and New York are at the forefront of requiring businesses to implement a comprehensive training program designed to raise awareness and prevent workplace sexual harassment.[111] Connecticut requires all employers with at least three employees to provide sexual harassment training to all new employees within six months of the date of their hire, and California requires new employee training for companies with at least five workers.[112] Maine requires sexual harassment training for all employers with more than fifteen employees and mandates special training for supervisors and managers.[113] All three states have specific requirements regarding the content of sexual harassment training, record keeping, refreshment courses, and question and answer sessions.[114]

In 2018, New York and Delaware adopted similarly strong provisions.[115] New York, for example, requires employers of all sizes to conduct training beyond "parking employees in front of a video" and includes soliciting feedback from workers regarding the training.[116] Notably, though, the New York law does not include mandatory state monitoring for compliance, but does allow the state to audit or investigate when a company fails to comply.[117] Rather than impose significant consequences, the state instead relies on the expectation that in a more visible system, employees will be more likely to report.

In addition to the specific California statute, the California Department of Fair Employment and Housing insists that all employers take reasonable steps to

110. *See Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://perma.cc/CS3K-YBE9 (last visited Mar. 4, 2023).

111. *See Sexual Harassment Training Laws*, HR DIVE (June 9, 2022), https://perma.cc/BR84-QLNF; *see, e.g.*, *Sexual Harassment Prevention Training*, C.R. DEP'T STATE OF CA., https://perma.cc/ZFB5-273F (last visited Mar. 4, 2023); *Sexual Harassment Prevention Resources*, CT. COMM'N ON HUM. RTS. & OPPORTUNITIES, https://perma.cc/GY2J-MAA8 (last visited Mar. 4, 2023); *Sexual Harassment Education and Training*, ME. DEP'T OF LABOR, https://perma.cc/4GRK-BE6U (last visited Mar. 4, 2023).

112. *See* CONN. GEN. STAT. ANN. § 46a-54(15)(C) (West, Westlaw through 2023 Reg. Sess.); CAL. CODE REGS. tit. 2, § 11024 (West, Westlaw through Feb. 17, 2023 Register 2023, No. 7).

113. ME. REV. STAT. ANN. tit. 26, § 807(3) (West, Westlaw through 2023 Reg. Sess. of the 131st Leg.).

114. *See* CONN. GEN. STAT. ANN. § 46a-54(15)(B) (West, Westlaw through 2023 Reg. Sess. Gen. Assemb.); ME. REV. STAT. ANN. tit. 26, § 807(3) (West, Westlaw through 2023 Reg. Sess. of the 131st Leg.); CAL. CODE REGS. tit. 2, § 11024 (West, Westlaw through Feb. 17, 2023 Register 2023, No. 7).

115. N.Y. LAB. LAW § 201-g (McKinney, Westlaw through L. 2022, Chs. 1 to 841); DEL. CODE ANN. tit. 19, § 711A (West, Westlaw through 81 Laws 2018, Chs. 200-453).

116. N.Y. LAB. LAW § 201-g (McKinney, Westlaw through L. 2022, Chs. 1 to 841); Yuki Noguchi & Shane McKeon, *Amid #MeToo, New York Employers Face Strict New Sexual Harassment Laws*, NPR (Oct. 9, 2018), https://perma.cc/M447-9DKA.

117. *See* Noguchi & McKeon, *supra* note 116.

prevent harassment, which includes providing training to their respective employees.[118] Such statutory provisions become especially important when determining liability or mitigating damages.[119]

Hawaii, on the other hand, is representative of states whose legislation encourages companies to take a proactive approach to sexual harassment prevention but does not mandate training protocols by law. The Hawaii Administrative Rules provide that:

> Prevention is the best tool for the elimination of sexual harassment. Hawaii mandates that employers affirmatively raise the subject of workplace harassment, express strong disapproval, develop appropriate sanctions, inform employees of their right to raise and how to raise the issue of sexual harassment, and take any other steps necessary to prevent sexual harassment from occurring.[120]

Other states use similar wording in order to stress the importance of "prevention," and recommend approaches that may achieve that goal without legally requiring the employer to take affirmative steps to eliminate sexual harassment.[121] Regardless of the state, courts will always consider proactive steps taken by employers to prevent sexual harassment as one of the factors to determine employer liability.[122] As one scholar puts it, "Courts have been strict with employers who do not meet this basic requirement of having a policy specifically dealing with sexual harassment, but have been flexible in approving different

118. *See Employees and job applicants are protected from bias,* CAL. DEP'T OF FAIR EMP. & HOUS., https://perma.cc/LFC7-FWSA (last visited Mar. 4, 2023).

119. *See generally* State Dep't of Health Servs. v. Superior Ct., 79 P.3d 556, 563 (Cal. 2003).

120. HAW. CODE R. § 12-46-109(g) (2018).

121. *See* 29 C.F.R. § 1604.11(f) (2018), WL 29 C.F.R. § 1604.11 ("Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under title VII, and the Pennsylvania Human Relations Act, and developing methods to sensitize all concerned."); COLO. CODE REGS. § 708-1:20.6 (2018), WL 3 CCR 708-1:20.6 ("Covered entities are encouraged to take all steps necessary to prevent discrimination, including harassment, from occurring, such as: affirmatively raising the subject, expressing strong disapproval, promulgating and distributing an anti-discrimination policy, training, developing appropriate sanctions, informing affected individuals of their right to raise and how to raise the issue of discrimination, and developing methods to sensitize all concerned."); OHIO ADMIN. CODE 4112-5-05(J)(6), OH ADC § 4112-5-05 (2018) (West, Westlaw through Baldwin's Ohio Admin. Code, Dec. 16, 2022) ("Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment.").

122. *See* discussion *infra* Part IV.

types of policies."[123] The New Jersey Supreme Court, for example, held that an employer can be vicariously liable for a supervisor's misconduct in the absence of sufficient sexual harassment training.[124]

In light of the varying approaches and motivations of state practices, there is little conclusive evidence that standalone training is an effective prevention tool. In 2016, the EEOC released a study evaluating sexual harassment training, but reported that it was unable to determine whether or not standalone training "is or is not an effective tool in preventing harassment."[125] The EEOC, National Women's Law Center (NWLC), and other scholars have called for strategies beyond standalone training because systemic organizational cultures are typically at the root of Title VII claims and violations.[126] On the heels of the study, the EEOC published a webpage devoted to "Promising Practices" that reflect more comprehensive tactics that seek to address the root of discriminatory and harassing behavior.[127]

2. Posting

The *Faragher* Court "noted that the central goal of Title VII is prophylactic —'to avoid harm'—and that employers must 'inform[ ] employees of their right to raise and how to raise the issue of harassment.'"[128] The EEOC affirms that "[e]mployers are required to post notices describing the [f]ederal laws prohibiting job discrimination based on . . . sex."[129] Many states enforce this requirement by either (1) posting a sign in a prominent and accessible location to ensure notice to all employees or (2) distributing a brochure with a formal written sexual harassment policy to all employees.[130] These statutes often require specific content to

123. Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law*, 26 HARV. WOMEN'S L.J. 3, 11 (2003).

124. *See generally* Gaines v. Bellino, 801 A.2d 322 (N.J. 2002).

125. U.S. Equal Emp. Opportunity Comm'n, Report of the Co-Chairs of the Select Task Force on the Study of Harassment in the Workplace, at 50 (2016), https://perma.cc/ELK5-MT2G.

126. *See id.*; *see also* Maya Raghu & Joanna Suriani, *#MeTooWhatNext: Strengthening Workplace Sexual Harassment Protections and Accountability*, NAT'L WOMEN'S L. CTR. (Dec. 2017), https://perma.cc/XQD6-HCDZ; *see also* Bisom-Rapp, *supra* note 105.

127. *Promising Practices*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://perma.cc/7KD2-NXWJ (last visited Mar. 4, 2023).

128. *Faragher*, 524 U.S. at 806.

129. *Employers*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://perma.cc/R325-R6DJ (last visited Mar. 4, 2023).

130. *See* MASS. GEN. LAWS ANN. Ch. 151B, § 7 (West, Westlaw through 2022 2nd Ann. Sess.) (mandating that employers post, in a conspicuous place, notices of its sexual harassment policies; failure to do so shall result in a fine of not less than ten dollars nor more than one hundred dollars); ME. REV. STAT. ANN. tit. 26, § 807(1), (6) (West, Westlaw through 2023 Reg. Sess. of the 131st Leg.) ("(1) An employer shall post in a prominent and accessible location in the workplace a poster providing, at a minimum, the following information: the illegality of sexual harassment; a description of sexual harassment, utilizing examples; the complaint process available through the commission; and directions on how to contact the commission . . . (6) An employer who violates this section may be assessed a fine" ranging from $25–$2,500, depending on the violation.).

be included, such as definitions, rights, and the state employment commission's contact information. Failure to comply is generally punishable by minor fines.[131]

As with standalone training, there is little conclusive data that reflects the effectiveness of posting procedures. In fact, there has been a lack of scientific research into the effectiveness of employers' varying posting and policy approaches to sexual harassment prevention.[132] As the NWLC asserts, "a policy is only the first step in prevention."[133] The NWLC echoes several of the EEOC recommendations which include: anonymous climate surveys to identify problematic behavior and address it early, training that includes testimonials from victims, clear instructions for reporting, and strong and appropriately enforced policies against retaliation.[134] As discussed in the preceding section, California has implemented a comprehensive training program that includes noteworthy accountability measures.[135] Supervisors are required to acknowledge that they received the written policy and completed requisite training, and upon doing so, if they then receive a complaint about harassment and fail to act, they cannot plead ignorance and may be held liable if illegal conduct is found.[136] Such accountability measures, while moderate, are an important first step towards systematizing accountability, and thus harassment prevention.

C. EMPLOYER BEST PRACTICES AND PROACTIVE PREVENTION

Despite the minimal data reflecting the ineffectiveness of standalone training policies, two recent studies have taken a more nuanced approach to evaluating organizational attitudes that may contribute to the perpetuation or prevention of Title VII complaints.[137] These studies' focus was on the extent to which employees viewed their employer and work setting as ethical and their management as open to organizational reform and taking harassment prevention seriously.[138] The studies found that when individuals viewed management with skepticism regarding their asserted interest in preventing workplace harassment, "training

131. *See* MASS. GEN. LAWS ANN. Ch. 151B, § 7 (West, Westlaw through Ch. 322 of 2018 2nd Ann. Sess.) (mandating that employers post, in a conspicuous place, notices of its sexual harassment policies; failure to do so shall result in a fine of not less than ten dollars nor more than one hundred dollars); ME. REV. STAT. ANN. tit. 26, § 807(1), (6) (West, Westlaw through 2017 2nd Reg. Sess. & 2nd Spec. Sess. of the 128th Leg.) ("(1) An employer shall post in a prominent and accessible location in the workplace a poster providing, at a minimum, the following information: the illegality of sexual harassment; a description of sexual harassment, utilizing examples; the complaint process available through the commission; and directions on how to contact the commission . . . . (6) An employer who violates this section may be assessed a fine" ranging from $25–$2,500, depending on the violation.).

132. *See* Vicki J. Magley & Joanna L. Grossman, *Do Sexual Harassment Prevention Trainings Really Work?*, SCIENTIFIC AMERICAN: BLOG (Nov. 10, 2017), https://perma.cc/TW9Y-6HTJ.

133. *See* Raghu & Suriani, *supra* note 126.

134. *Id.*

135. *See* CAL. CODE REGS. tit. 2, § 11024 (West, Westlaw through Feb. 17, 23 Register 2023, No. 7).

136. *See id.*

137. Magley & Grossman, *supra* note 132.

138. *See id.*

outcomes particularly suffer."[139] In short, when employees trust their supervisors' ethical standards and believe that they genuinely view harassment as a problem to be remedied, workers are more likely to benefit and learn from training procedures.

One example of a proactive state approach is Maryland's Disclosing Sexual Harassment in the Workplace Act of 2018. The first part of the two-part Act, which went into effect on October 1, 2018, declares null and void against public policy any employment contract provision that waives an employee's rights or remedies to a sexual harassment claim or retaliation for reporting one.[140] This part of the Act applies to all employers of any size, notwithstanding conflicting federal arbitration laws.[141] In 2018, major companies such as Google and Facebook took a similar approach in light of internal employee protests against employers' confidential settlements.[142] New York similarly expanded the state's anti-sexual harassment protections in 2018 through the addition of a provision that prohibited mandatory arbitration clauses for sexual harassment claims from being written into contracts and made those already written null and void.[143] In 2022, the Senate cleared a House-passed bill which guaranteed that victims of sexual harassment could pursue lawsuits in court by prohibiting the enforcement of contract provisions that mandated third-party arbitration of workplace sexual harassment claims.[144]

The second part of the Act only applies to employers with fifty or more workers, a minimum significantly higher than the Title VII employer coverage. It enacts regimented training requirements as well as transparency by requiring employers to: provide two hours of in-person or virtual training (with specified components) to every employee within six months of beginning employment and subsequently at least every two years, designate an employee as a training representative, and provide annual reports regarding sexual harassment settlements to the state's Civil Rights Commission.[145] If an employer fails to comply, the EEOC has authority to conduct an audit of the office or organization.[146]

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139. Ho Kwan Cheung, Caren B. Goldberg, Eden B. King, & Vicki J. Magley, *Are They True to the Cause? Beliefs About Organizational and Unit Commitment to Sexual Harassment Awareness Training*, 43 GRP. & ORG. MGMT. 531 (Sept. 2017).

140. MD. CODE ANN., LAB. & EMPL. § 3-715 (West, Westlaw through 2022 Reg. Sess. of Gen. Assemb.).

141. Patricia Ambrose, *Maryland's New Sexual Harassment Law*, HOGAN LOVELLS (June 13, 2018), https://perma.cc/728X-UDRZ.

142. *See* Jena McGregor, *Google and Facebook Ended Forced Arbitration for Sexual Harassment Claims. Why More Companies Could Follow*, WASH. POST (Nov. 12, 2018), https://perma.cc/4K63-55S7.

143. *New Anti-Sexual Harassment Measures in New York State and New York City*, PAUL WEISS (May 10, 2018), https://perma.cc/B4JS-X32R.

144. Paige Smith, *Senate Passes Landmark #MeToo Bill to Ease Workplace Suits*, BLOOMBERG LAW (Feb. 10, 2022), https://perma.cc/4YMB-CEUN.

145. MD. CODE ANN., STATE PERS. & PENS. § 2-203.1 (West, Westlaw through 2022 Reg. Sess. of Gen. Assemb.).

146. *Id*. at (f)(2).

The varying state approaches to proactive prevention reflect the necessity of further extensive research into the intersection between workplace environments, organizational culture, and transparency.

D. COMMON LAW TORT PROTECTION

Some states, like Alabama and Mississippi, do not have statutory provisions to protect public and private workers from sexual harassment, relying instead on established common law tort actions to offer protection.[147] Alabama sexual harassment claims can be based on the torts of outrage, assault and battery, negligence, or invasion of privacy.[148] Mississippi has a statute that specifically protects state employees from sexual harassment, but makes no mention of the remedies available to private sector employees.[149] One exception to the lack of protection for private sector employees is a statutory provision that prohibits any employer from discriminating against women who use their break time to breastfeed.[150] Mississippi tort theories include recovery for breach of contract, emotional distress, and reputational harm caused by sexual harassment.[151]

Many states do not recognize sexual harassment as a separate tort and instead allow plaintiffs to seek remedy under other tort claims in addition to formal statutory protections.[152] This common law alternative is especially relevant when the plaintiff seeks to avoid federal and state statutory restrictions, such as the statute

147. *See, e.g.*, Stabler v. Mobile, 844 So. 2d 555, 558 (Ala. 2002).

148. *See, e.g., Ex parte* Birmingham News, Inc., 778 So. 2d 814, 818 (Ala. 2000) (stating that the invasion of privacy tort consists of four distinct wrongs: "(1) intruding into the plaintiff's physical solitude or seclusion; (2) giving publicity to private information about the plaintiff that violates ordinary decency; (3) putting the plaintiff in a false, but not necessarily defamatory, position in the public eye; or (4) appropriating some element of the plaintiff's personality for a commercial use" (internal citation omitted) (quoting Johnson v. Fuller, 706 So. 2d 700, 701 (Ala. 1997))).

149. MISS. CODE ANN. § 25-9-149 (West, Westlaw through 2022 Reg. & 1st Extra. Sess.).

150. MISS. CODE ANN. § 71-1-55 (West, Westlaw through 2022 Reg. & 1st Extra. Sess.).

151. *See, e.g.*, Univ. of S. Miss. v. Williams, 891 So. 2d 160, 172–73 (Miss. 2004) (explaining that a contract contains implied covenant of good faith and fair dealing in performance and enforcement; thus, plaintiff could recover for mental anguish and emotional distress, but only for the breach of contract after plaintiff was denied the opportunity to receive her doctoral degree due to sexual harassment by a professor). Additionally, the court held that plaintiffs may recover damages for mental anguish and emotional distress in breach of contracts actions without proof of physical manifestation. *See id.*

152. *See, e.g.*, Smith v. Am. Online, Inc., 499 F. Supp. 2d 1251, 1267 (M.D. Fla. 2007) (finding Florida law does not recognize a common law claim of sexual assault as an independent tort, but nevertheless allowing the plaintiff to advance her claim for battery resulting from the alleged sexual assault); Sutphin v. United Am. Ins. Co., 154 F. Supp. 2d 906, 908 (W.D. Va. 2000) (finding that sexual harassment, in and of itself, is not a separate cause of action under Virginia tort law); Machen v. Childersburg Bancorporation, Inc., 761 So. 2d 981, 987–88 (Ala. 1999) (finding that while Alabama does not recognize sexual harassment as an individual cause of action, claims of sexual harassment are maintained under common law tort claims such as assault and battery, invasion of privacy, negligent training and supervision, and outrage); Myers v. Trendwest Resorts, Inc., 56 Cal. Rptr. 3d 501, 518 (Cal. Ct. App. 2007) ("There is no common law cause of action for sexual harassment, but conduct constituting sexual harassment may be alleged in common law claims such as battery and intentional infliction of emotional distress.").

of limitations or the EEOC and state FEPAs' filing requirements.[153] Common tort claims used include assault and battery,[154] invasion of privacy,[155] negligent training or supervision,[156] breach of contract,[157] and negligent or intentional infliction of emotional distress.[158] Common law tort claims have certain benefits such as sometimes providing larger recoveries than claims filed through the EEOC or state FEPA processes.[159]

V. VARYING STATE AND FEDERAL INTERPRETATIONS OF THE ELEMENTS OF A SEXUAL HARASSMENT CLAIM

Although the elements of a sexual harassment claim purport to be objective standards, there are inherent subjective questions regarding whether a person may perceive conduct as discriminatory or harassing. Federal and state courts' interpretations of the elements thus demonstrate some notable discrepancies. Section A explores the varying interpretations of "conduct of a sexual nature," particularly the nuanced understanding of a "reasonable person" standard in determining whether a hostile work environment exists. Section B discusses the relevance of gender stereotyping in determining whether conduct is "based on sex," including claims against a harasser of the same sex. Section C examines how to quantify the requisite severity and pervasiveness under federal and state statutes.

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153. *See Fair Employment Practices Agency and Dual Filing*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://perma.cc/MTQ2-D5LJ (last visited Mar. 4, 2023).

154. *See, e.g.*, Minckler v. United Parcel Serv., Inc., 132 A.D.3d 1186, 1190 (N.Y. App. Div. 2015) (finding that there was a material issue of fact as to the plaintiff's assault and battery claim).

155. *See, e.g.*, Garces v. R & K Spero Co., No. CV095025895S, 2009 WL 1814510, at *8 (Conn. Super. Ct. May 29, 2009) (finding a material issue of fact as to whether requiring the plaintiff to "beg" to use the bathroom and given subsequent reasons as to why constituted a breach of privacy). Additionally, the court expressed that the law of privacy encompasses four distinct kinds of invasion: (1) unreasonable intrusion upon the seclusion of another; (2) appropriation of the other's name or likeness; (3) unreasonable publicity given to the other's private life; or (4) publicity that unreasonably places the other in a false light before the public. *Id.*

156. *See, e.g.*, Waffle House, Inc. v. Williams, No. 02-05-00373-CV, 2011 WL 3795224, at *12 (Tex. Ct. App. Aug. 25, 2011) (finding that the employer "did not take reasonable precautions to prevent interaction" between the plaintiff and defendant, and was therefore vicariously liable).

157. *See, e.g.*, Moret v. Gale, No. 47768-8-II, 2016 WL 6216257, at *7 (Wash. Ct. App. Oct. 25, 2016) (finding that the plaintiff would be able to recover if he could prove that the employer's handbook outlined specific treatment regarding sexual harassment allegations or termination, thereby contractually modifying his at-will status and creating the right to sue if the employer failed to adhere to those promises).

158. *See, e.g.*, Fisher v. San Pedro Peninsula Hosp., 262 Cal. Rptr. 842, 858 (Cal. Ct. App. 1989) (stating that plaintiff is able to bring a claim for intentional infliction of emotional distress against her employer, explaining that "[t]he four elements of a claim for intentional infliction of emotional distress are: (1) outrageous conduct by the defendant, (2) intention to cause or reckless disregard of the probability of causing emotional distress, (3) severe emotional distress, and (4) actual and proximate causation of the emotional distress") (quoting Molko v. Holy Spirit Ass'n, 762 P.2d 46, 61 (Cal. 1986), *superseded by statute as recognized in* Aguilar v. Atlantic Richfield Co., 24 P.3d 493 (Cal. 2001)); *see also* Restatement (Third) of Torts: Phys. & Emot. Harm § 46(n) (Am. Law Inst. 2012, Oct. 2018 Update).

159. *See Pre 1965: Events Leading to the Creation of the EEOC*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://perma.cc/HBC2-MB9Q (last visited Mar. 4, 2023).

A. CONDUCT OF A SEXUAL NATURE

The EEOC asserts "[h]arassment does not have to be of a sexual nature . . . and can include offensive remarks about a person's sex," meaning it can be "illegal to harass a woman by making offensive comments about women in general."[160] Some states follow the EEOC's direction in their assessment of a claim.[161] However, others take a contrasting position, requiring unwelcome conduct of a "sexual nature" in determining whether a hostile work environment exists.[162] Because most gender discrimination statutes are not fault-based, the offender's intent is sometimes not relevant.[163]

Many courts use a "reasonable person" standard to establish whether the conduct of a sexual nature created a hostile work environment for a victim, per EEOC guidelines.[164] This standard is applied by considering whether a person in the plaintiff's position and circumstances (an analysis which often includes the plaintiff's gender) would feel that a hostile work environment was created by the conduct.[165]

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160. *Sexual Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://perma.cc/Z35U-NE88 (last visited Mar. 4, 2023).

161. *See, e.g.*, Payne v. Children's Home Soc'y, 892 P.2d 1102, 1106 (Wash. Ct. App. 1995) (holding that gender-based discrimination need not be of a sexual nature to be actionable). Some of these states require causation-in-fact; the plaintiff-employee must allege that the harassment would not have occurred but for his or her sex. *See, e.g.*, Birschtein v. New United Motor Mfg., Inc., 112 Cal. Rptr. 2d 347, 353 (Cal. Ct. App. 2001); Hampel v. Food Ingredients Specialties, Inc., 729 N.E.2d 726, 734–35 (Ohio 2000); Miner v. Mid-Am. Door Co., 68 P.3d 212, 217 (Okla. Civ. App. 2002); Huck v. McCain Foods, 479 N.W.2d 167, 170 (S.D. 1991); Campbell v. Fla. Steel Corp., 919 S.W.2d 26, 28 (Tenn. 1996). Other states allow mixed-motive claims, where sex need only be a contributing factor. *See, e.g.*, Meyers v. Chapman Printing Co., 840 S.W.2d 814, 823 (Ky. 1992); Nava v. City of Santa Fe, 103 P.3d 571, 574–75 (N.M. 2004).

162. *See, e.g.*, Arquero v. Hilton Haw. Vill., LLC, 91 P.3d 505, 510 (Haw. 2004) (requiring that in order to establish a claim for hostile work environment due to sexual harassment, a plaintiff must first show that "he or she was subjected to sexual advances, requests for sexual favors, or other verbal or physical conduct or visual forms of harassment of a sexual nature"); Haynie v. State, 664 N.W.2d 129, 135 (Mich. 2003) (finding that only conduct or communication of a sexual nature, such as unwelcome sexual advances or requests for sexual favors, may constitute a sexual harassment claim).

163. *See, e.g.*, Ellison v. Brady, 924 F.2d 872, 880 (9th Cir. 1991) (explaining that Title VII is not fault-based, and thus courts should not look at the motivations of employers); Lehmann v. Toys R Us, Inc., 626 A.2d 445, 454 (N.J. 1993) (explaining that the state statute does not require the plaintiff to demonstrate intentional discrimination).

164. U.S. Equal Emp. Opportunity Comm'n, Notice No. 915.002, Enforcement Guidance on Harris v. Forklift Sys., Inc. (Mar. 8, 1994), https://perma.cc/7V7L-UKM3; *see, e.g.*, Arquero, 91 P.3d at 510; Fowler v. Kootenai Cnty., 918 P.2d 1185, 1189 (Idaho 1996); Radtke v. Everett, 501 N.W.2d 155, 158 (Mich. 1993); Bougie v. Sibley Manor, Inc., 504 N.W.2d 493, 499 (Minn. Ct. App. 1993) (finding that the jury instruction of a "reasonable woman" standard—a reasonable person standard that recognizes gender—was not "clearly erroneous"); Tarr v. Ciasulli, 853 A.2d 921, 924–26 (N.J. 2004); McIntyre v. Manhattan Ford, Lincoln-Mercury, Inc., 669 N.Y.S.2d 122, 128 (N.Y. Sup. Ct. 1997); Wood v. Emerson Elec. Co., No. 86-159, 1994 WL 716270, at *16 (Tenn. Ct. App. Aug. 12, 1994) (explaining that the reasonable person standard should recognize the sex of the victim, making the standard, in this case, a "reasonable woman" standard).

165. *See, e.g.*, Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 871–72 (9th Cir. 2001); *Wood*, 1994 WL 716270, at *16.

Despite the inherent subjectivity of the "reasonable person" standard, the EEOC guidelines set some benchmarks. The court must "consider the victim's perspective and not stereotyped notions of acceptable behavior," and take into account the context of the situation in order to "adopt the perspective of a reasonable person's reactions in a similar environment under similar . . . circumstances."[166] On the other end of the spectrum, a claim that serves as a "vehicle for vindicating the petty slights suffered by the hypersensitive" is not a cognizable claim.[167] In recent years, certain courts and scholars have wrestled with the reality that a "reasonable person" standard "fails to account for the wide divergence between most women's views of appropriate sexual conduct and those of men."[168] Some courts have also been keen to point out that evaluating such conduct by an objective reasonableness standard could in fact reinforce prevailing social norms that perpetuate gender discrimination.[169] As the Ninth Circuit posited in *Ellison v. Brady*, in environments where sexual harassment is commonplace, asking whether a "reasonable person" would find particular conduct offensive would simply look at existing practices rather than aspiring to an ideal in which discrimination is not tolerated.[170]

The Court attempted to delineate some contours of the reasonable person standard further in *Harris v. Forklift Systems, Inc*., explaining that Title VII "comes into play before the harassing conduct leads to a nervous breakdown . . . [it] takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause tangible psychological injury."[171] But the Court's explanation that psychological harm is "relevant . . . but no single factor is required," may have resulted in more confusion than cohesion among state courts on the question of how to factor psychological injury into the totality of the circumstances.

While federal circuits and the EEOC follow the *Harris* Court's standard that psychological harm is but one factor in the totality calculus, state courts vary in their understanding of this element in interpreting state Title VII analogs. As a result, some states require victims to be personally exposed to harassment that affects their "psychological well-being,"[172] while others do not.[173]

166. U.S. Equal Emp. Opportunity Comm'n, Notice No. N-915-050, policy guidance on current issues of sexual harassment (Mar. 19, 1990) https://perma.cc/Z3JJ-CHCK (citations omitted).

167. *Id.*

168. Rabidue v. Osceola Refining Co., 805 F.2d 611, 626 (6th Cir. 1986) (Keith, J., dissenting).

169. *See* Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991).

170. *See id.*

171. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993).

172. *See, e.g.*, E.E.O.C. v. Fairbrook Med. Clinic, 609 F.3d 320, 330 (4th Cir. 2010); U.S. Equal Emp. Opportunity Comm'n, Notice No. N-915-050, policy guidance on current issues of sexual harassment, at n.20 (Mar. 19, 1990), https://perma.cc/Z3JJ-CHCK.

173. *See, e.g.*, Herman v. W. Fin. Corp., 869 P.2d 696, 875–76 (Kan. 1994) (finding that there is no psychological well-being requirement for a discrimination claim).

B. CONDUCT BASED ON SEX

To show that conduct is based on sex, plaintiffs often must show that a defendant's conduct or damaging evaluation of the plaintiff was motivated by gender stereotypes.[174] A 2017 case in the Second Circuit, *Christiansen v. Omnicom Group, Inc*., reflects a claim on these grounds. The plaintiff, an openly-gay creative director at an advertising agency, alleged that over the course of four years his supervisor repeatedly harassed him by highlighting his effeminacy via crude and graphic drawings, taunting social media posts, and mocking him by depicting "him in tights and a low-cut shirt prancing around" the office.[175] The lower court dismissed the case for failure to state a claim, but the Second Circuit reversed, finding there was a cause of action under Title VII because Christiansen was discriminated against based on gender non-conforming behavior or gender stereotyping.[176]

Indeed, the "conduct based on sex" test often allows courts to negate the alternative requirement that the harassment was sexual in nature.[177] For example, in *Chadwick v. WellPoint, Inc*., the female plaintiff, a mother of six-year-old triplets, brought a claim of discrimination under Title VII.[178] She alleged that she was denied a promotion because of gender stereotypes that, as a working mother, she would not be able to devote adequate effort to the company. In notifying Chadwick that she did not get the promotion, her boss said, "It was nothing you did or didn't do. It was just that you're going to school, you have the kids and you just have a lot on your plate right now."[179] The First Circuit held that despite the lack of sexual innuendo, the discrimination was based on the gender stereotype "that mothers, particularly those with young children, neglect their work duties in favor of their presumed childcare obligations."[180]

C. CONDUCT OF A SEVERE AND PERVASIVE NATURE

Since the Court's decision in *Meritor*, harassing conduct must be "severe or pervasive" so as to constitute a hostile work environment under Title VII. In assessing the severity and pervasiveness of conduct, courts consider: (1) the frequency of the harassment; (2) the severity of the harassment; (3) whether the

174. *Price Waterhouse*, 490 U.S. at 251 (holding that in a Title VII claim, a plaintiff may use evidence of gender stereotypes to show that the employer relied on gender in decision-making), *rev'd on other grounds*, Burrage v. United States, 571 U.S. 204, 213 n.4 (2014). The conduct based on "gender stereotypes" standard used in *Price Waterhouse* is still cited as a prevailing authority. *See, e.g*., Evans v. Georgia Reg'l Hosp., 850 F.3d 1248, 1254 (11th Cir. 2017).

175. Christiansen v. Omnicom Grp., Inc., 852 F.3d 195, 198 (2d Cir. 2017).

176. *Id*. at 198–200.

177. *See, e.g*., Alphonse v. Omni Hotels Mgmt. Corp., 643 So. 2d 836, 839 (4th Cir. 1994) (holding that sexual harassment does not need to be in the form of sexual advances or conduct with sexual overtones); LaMont v. Indep. Sch. Dist. No. 728, 814 N.W.2d 14, 16 (Minn. 2012) (holding that sexual harassment claims do not require conduct to be sexual).

178. Chadwick v. WellPoint, Inc., 561 F.3d 38, 40–41 (1st Cir. 2009).

179. *Id*. at 42.

180. *Id*.

harassment is physically threatening or humiliating; and (4) whether the harassment unreasonably interferes with an employee's work performance.[181] Because of the inherently subjective nature of these terms, the EEOC guidelines recommend a context-based totality of the circumstances assessment to determine whether there was severity and/or pervasiveness based on the facts of each case.[182] The standard of review is normally both objective and subjective, meaning that courts must consider how the harasser's behavior would be viewed by a reasonable person, as well as how the harasser's behavior was subjectively viewed by the plaintiff.[183]

Circuits continue to split in terms of how to delineate clear lines and standards for hostile work environments under this element. The Tenth Circuit held in *Morris v. City of Colorado Springs*, that a surgeon's inappropriate comments towards the plaintiff female nurse were insufficiently severe or pervasive enough to constitute a Title VII hostile work environment.[184] Although she subjectively felt uncomfortable, the court reasoned that in light of the totality of the facts at hand, the workplace was not an objectively hostile environment.[185] On the other hand, the Second Circuit held in *Howley v. Town of Stratford* that a single instance of a supervisor's particularly offensive and extended remarks was sufficient to create a hostile work environment when considered in the specific professional context at hand.[186] For further contrast to each of those cases, the Ninth Circuit has held that in light of particular circumstances, even a one-time breast fondling did not meet its "extremely severe" standard for one-time physical incidents.[187]

VI. EMPLOYER LIABILITY

Employees who have faced workplace harassment and seek relief must overcome the additional burden in proving that their employer is liable for the harm. Whether the victim is reacting to negative employment action like hiring, firing, shift assignments, promotions, pay raises, or is simply taking proactive action against a hostile work environment, they are required to navigate the legal liabilities at play. This section outlines the primary issues analyzed in the evaluation of employer liability. One must consider whether the employer is imputable, if the employer can raise affirmative defenses, and the role the harasser plays in relation to the victim in the employment scheme.

181. *See, e.g.*, *Miller*, 115 P.3d at 87–88; *Constantine*, 792 N.Y.S.2d at 311.
182. 29 C.F.R. 1604.11(b).
183. *See, e.g.*, *Miller*, 115 P.3d at 88, 97; San Juan v. Leach, 717 N.Y.S.2d 334, 336 (N.Y. App. Div. 2000).
184. Morris v. Colorado Springs, 666 F.3d 654 (10th Cir. 2012).
185. *See id.* at 665–68.
186. *See* Howley v. Stratford, 217 F.3d 141, 153 (2d Cir. 2000).
187. *See* Brooks v. San Mateo, 214 F.3d 917, 926 (9th Cir. 2000).

A. IMPUTABILITY OF THE EMPLOYER

Because most state anti-discrimination laws are modeled after Title VII, courts hold employers liable not only for the direct actions taken by the employer, but also for the acts of supervisors and other employees.[188] However, the standard to determine an employer's liability changes depending on whether the harasser was a co-worker or the employer themself.[189] If the harasser is a co-worker, then employers are held to a negligence standard.[190] The employer is liable in this instance if the employer reasonably knew or should have known that a co-worker harassed the plaintiff and the employer failed to prevent or stop the harassment.[191]

If the harasser is the employer or a supervisor with authority over the employee, then an employer may be liable if harassment culminates in a tangible action[192] against the employee.[193] If no tangible action occurred, an employer may be subject to vicarious liability for a hostile work environment created by a supervisor.[194] In this case, the employer may raise the affirmative defense that they took "reasonable care to prevent and correct" discriminatory behavior.[195]

In some instances, common law principles of agency may be applied to impute liability to the employer after a supervisor harasses the plaintiff.[196] For example,

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188. *See Ellerth*, 524 U.S. at 744–45; *Faragher*, 522 U.S. at 807–08.

189. *See* Vance v. Ball State Univ., 567 U.S. 421, 422 (2013).

190. *See id.* at 439 (holding that an employer is liable if they were negligent in controlling the harassment); *see also* Dunlap v. Spec Pro, Inc., 939 F. Supp. 2d 1075, 1085 (D. Colo. 2013) (holding that an employer is negligent if they knew or should have known about a "non-supervisory" employee's harassment and did not stop it).

191. *See Vance*, 567 U.S. at 466; Burhans v. Lopez, 24 F. Supp. 3d 375, 382 (S.D.N.Y. 2014) (holding that a failure to act and respond to complaints of sexual harassment may make an employer or supervisor liable).

192. *See Ellerth*, 524 U.S. at 744 (stating tangible action is defined as an action that is "a significant change in employment status, such as discharge, demotion, or undesirable reassignment").

193. *See* Helm v. Kansas, 656 F.3d 1277, 1287 (10th Cir. 2011) (holding that an employer may be strictly liable if a supervisor's harassment culminates in a tangible adverse employment action, and the plaintiff can demonstrate a connection between the harassment and the adverse action); State Dep't of Health Servs. v. Super. Ct., 79 P.3d 556, 562–63 (Cal. 2003) (explaining that employers are held strictly liable for a supervisor's harassment and may be liable for non-supervisory harassment if they knew or should have known of the harassment and did not take steps to correct it).

194. *See Ellerth*, 524 U.S. at 765; *see also* Debord v. Mercy Health Sys. of Kansas, Inc., 737 F.3d 642, 650 (10th Cir. 2013) (finding that employers can be directly or vicariously liable for a hostile work environment).

195. *Helm*, 656 F.3d at 1285 (finding that in the absence of an adverse action, an employer is only liable if they cannot assert the *Faragher*/*Ellerth* two-step affirmative defense: that the employer took reasonable care to correct or prevent harassment, and that the plaintiff failed to utilize the preventive or corrective opportunities); *Debord*, 737 F.3d at 653 (finding that an employer can defeat a harassment claim when no tangible action was taken by showing that the employer took reasonable steps to avoid a hostile workplace (or, the "*Faragher* defense")).

196. *See* Entrot v. BASF Corp., 819 A.2d 447, 453 (N.J. Super. Ct. App. Div. 2003) (holding that to establish employer liability, a plaintiff must prove that the harassing employer was a "supervisor" and that "the employer contributed to the harm through its negligence, intent, or apparent authorization of the harassing conduct, or [that] the supervisor was aided in the commission of the harassment by the agency relationship").

New Jersey has developed a four-prong test to determine whether an agency relationship existed between the employer and the harassing supervisor.[197] The fact finder must determine whether: (1) the employer gave the supervisor the authority to control the situation leading to the plaintiff's complaint; (2) the supervisor exercised that authority; (3) the supervisor discriminated against the plaintiff in violation of a statute; and (4) the authority delegated by the employer aided the supervisor in causing the injury of which the plaintiff complains.[198]

B. EMPLOYER DEFENSES

Courts have carved out a defense for employers when they are vicariously liable for a supervisor's actions. Most states allow defendants to defend against state law sexual harassment claims with the affirmative defense introduced by the Supreme Court in *Burlington Industries v. Ellerth*.[199] The *Ellerth* defense explains that an employer can defend against vicarious liability of a supervisor's harassment if the employer can show that they (1) exercised "reasonable care to prevent and correct" harassment, and (2) the plaintiff failed to take advantage of these preventive or corrective measures.[200] Moreover, the employer may escape

197. Lehman v. Toys R Us, Inc., 626 A.2d 455, 462 (N.J. 1993).

198. *Id*. at 462–63; *cf*. Vasquez v. Empress Ambulance Serv., Inc., 835 F.3d 267, 273 (2d Cir. 2016) (using the law of agency to find an employer liable for sexual harassment); Staub v. Proctor Hosp., 562 U.S. 411, 418 (2011) (using the law of agency to see if the employer can be held liable for discrimination based on military status).

199. *Ellerth*, 524 U.S. at 742–45; *see, e.g*., Natson v. Eckerd Corp., Inc., 885 So. 2d 945, 947–48 (Fla. Dist. Ct. App. 2004); Zeller Elevator Co. v. Slygh, 796 N.E.2d 1198, 1212 n.3 (Ind. Ct. App. 2003); Farmland Foods, Inc. v. Dubuque Hum. Rts. Comm'n, 672 N.W.2d 733, 744 (Iowa 2003) ("When a supervisor perpetrates the harassment, but no tangible employment action occurred, the employer may assert the *Faragher*/*Ellerth* affirmative defense to avoid liability."); Am. Gen. Life & Accident Ins. Co. v. Hall, 74 S.W.3d 688, 692 (Ky. 2002) (explaining that the Kentucky Civil Rights Act recognizes the *Faragher*/*Ellerth* affirmative defense); *Entrot*, 819 A.2d at 463 (finding that there is no barrier to applying Title VII affirmative defenses to New Jersey's Law Against Discrimination claims); *cf*. Garcez v. Freightliner Corp., 72 P.3d 78, 87 (Or. Ct. App. 2003) (finding that, although the *Faragher*/*Ellerth* defense cannot be used in claims of co-worker harassment, its principles are embedded in the requirement that the plaintiff establish that the employer knew or should have known of the harassing conduct (construing Swinton v. Potomac Corp., 270 F.3d 794, 803 (9th Cir. 2001)). *But see* Barra v. Rose Tree Media Sch. Dist., 858 A.2d 206, 216–17 (Pa. Commw. Ct. 2004) (holding that an employer cannot raise the *Ellerth-Faragher* affirmative defense if the employee raises a genuine issue of material fact regarding whether the supervisor's act amounted to constructive discharge (citing Pennsylvania State Police v. Suders, 542 U.S. 129, 139 (2004)).

200. *Ellerth*, 524 U.S. at 765; *see also* Vance v. Ball State Univ., 567 U.S. 421, 424 (2013) (adopting the two-part test from *Ellerth*); *see also* Dudley v. Metro-Dade Cnty., 989 F. Supp. 1192, 1200 (D. Fla. 1997) (applying federal and Florida law to find that "an employer is insulated from liability for hostile working environment sexual harassment if (1) the employer has an explicit policy against sexual harassment and (2) it has effective grievance procedures calculated to encourage victims of harassment to come forward") (citations omitted); State Dep't of Health Servs. v. Superior Ct., 79 P.3d 556, 565 (Cal. 2003) (finding employer can affirmatively defend against a sexual harassment suit under the Fair Employment and Housing Act under the avoidable consequences doctrine by proving that: (1) the employer took reasonable steps to prevent and correct the harassment; (2) the employee unreasonably failed to use the available preventative and corrective measures that the employer provided; and (3) reasonable use of the employer's procedures would have prevented at least some of the harm that the employee suffered); Lee v. Delta Air Lines, Inc., 778 So. 2d 1169, 1173 (La. Ct. App. 2001) (placing the

liability if they took adequate affirmative steps to investigate and remedy the harassment complaint.[201] Courts will examine the reasonableness of the employer's response to the plaintiff's grievance, including the promptness of the response, when determining whether the employer's affirmative defense articulates a reasonable response to the complaint.[202] For example, in *Madeja v. MBP Corp.*, the court held that the reasonableness inquiry turned on the remedy's ability to stop the individual harasser from continuing to engage in the harassment and to discourage other potential harassers from engaging in similar conduct.[203]

In California, however, employers are strictly liable for harassment at the hands of their supervisors.[204] Under the California Fair Employment and Housing Act (FEHA), the *Ellerth* defense is not available to employers.[205] In *State Department of Health Services v. Superior Court*, the court explains that the *Ellerth* defense was derived from the law of agency.[206] In contrast, the language of FEHA suggests that employer liability cannot be constrained by these principles.[207] Rather, training could provide employers with an opportunity to mitigate and reduce the level of damages that they ultimately pay.[208] Likewise in Illinois, employers are strictly liable for the sexual harassment of employees by supervisory personnel, regardless of whether the employer was aware of the conduct.[209]

The employer may also be relieved of liability if the harassing conduct did not occur in a work-related context; factors such as the time, location, and motivation

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burden on plaintiff to prove that employer knew or should have known of the sexual harassment and failed to take proper remedial action). *But see* Velez v. City of Jersey City, 817 A.2d 409, 415 (N.J. Super. Ct. App. Div. 2003) (finding plaintiff bears the burden of proving that the employer knew of the harassing conduct and failed to take any reasonable steps to remedy it).

201. *See* N.H. Dep't of Corr. v. Butland, 797 A.2d 860, 863–64 (N.H. 2002) (holding employer not liable for sexual harassment against plaintiff where it investigated plaintiff's harassment complaint on same day plaintiff filed complaint, completed investigation two days later, and suspended co-worker as a result of investigation). *But see* Norcon, Inc. v. Kotowski, 971 P.2d 158, 172 (Alaska 1999) (finding employer failed to instruct employees of how to respond to sexual harassment complaints and consequently, when plaintiff complained of sexual harassment, employer took no action).

202. *See* Madeja v. MPB Corp., 821 A.2d 1034, 1042–43 (N.H. 2003) (explaining that defendant's remedial action must be "reasonable and adequate"); *see also* Payton v. N.J. Turnpike Auth., 691 A.2d 321, 327 (N.J. 1997) (finding that when the remedial process is unduly prolonged or unnecessarily and unreasonably leaves the employee exposed to continued hostility in the workplace, it is considered ineffective and does not prevent the employer from being held vicariously liable); *Velez*, 817 A.2d at 415 (explaining that the entire remedial process must be judged to determine its effectiveness or its calculated ability to end the alleged harassment, and that the fact finder must consider the speed, diligence, and good faith with which a sexual harassment investigation is performed).

203. *See Madeja*, 821 A.2d at 1042–43.

204. *State Dep't of Health Servs.*, 79 P.3d at 558.

205. *Id.* at 563.

206. *Id.*

207. *See id.* at 562.

208. *See id.* at 565.

209. Bd. of Dir., Green Hills Cnty. Club v. Hum. Rts. Comm'n, 162 Ill. App. 3d 216, 220 (5th Dist. 1987).

of the actions may be considered when making this determination.[210] However, employers may be held liable for *retaliatory* actions even if not related to the terms or conditions of employment.[211] On the other hand, if the employer would have made the same employment decision absent a discriminatory or retaliatory motive, the employer may also escape liability.[212]

Lastly, the employer may avoid liability if the employer did not have actual or constructive notice of a non-supervisor's harassment.[213]An employee must provide enough evidence for a reasonable jury to find that the employer knew or should have known about the harassment, and despite that knowledge, failed to stop it.[214] To prove actual knowledge, the employee must demonstrate that they took steps to inform management of the harassment.[215] In the case that actual knowledge does not exist, the Tenth Circuit in *Tademy v. Union Pacific Corp.* reasoned that we must test for constructive knowledge by applying "what amounts to a negligence standard: highly pervasive harassment should, in the exercise of reasonable care, be discovered by management-level employees."[216] In this case, the employer has constructive knowledge of the harassment.[217]

C. DEFINITION OF "SUPERVISOR"

The *Ellerth* defense may turn on the meaning of "supervisor" because the Supreme Court discussed this affirmative defense as applicable when the harasser is a supervisor.[218] Until recently, courts were split on the meaning of "supervisor"

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210. *See* Doe v. Oberweis Dairy, 456 F.3d 704, 715–16 (7th Cir. 2006) (finding that although sexual intercourse between the supervisor and employee took place outside of work, it still affected conditions of employment); Doe v. Capital Cities, 58 Cal. Rptr. 2d 122, 128 (Cal. Ct. App. 1996) (holding employer can be liable for sexual harassment outside of the workplace under the California Fair Employment and Housing Act, if harassment occurs within a work-related context); Lee v. Delta Air Lines, Inc., 778 So. 2d 1169, 1174 (La. Ct. App. 2001) (finding employee's conduct is within the scope of his employment if the conduct is: (1) of the kind that he is employed to perform; (2) occurs substantially within the authorized limits of time and space; and (3) is performed in part to serve the employer); Tanner v. Reynolds Metals Co., 739 So. 2d 893, 897 (La. Ct. App. 1999) (stating that an employer is vicariously liable if the tortious conduct of its employee is "so closely connected in time, place, and causation to his employment duties as to be regarded a risk of harm fairly attributed to the employer's business"); Phelps v. Vassey, 437 S.E.2d 692, 694 (N.C. Ct. App. 1993) (explaining that employer is liable for harassing actions by its employees if the harassment was expressly authorized, within the scope of the employee's employment, and in furtherance of the employer's business, or if the harassment was ratified by the employer).

211. *See* Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 63–64 (2006).

212. Johnson v. Curtis Dworken Chevrolet, 242 B.R. 773, 780 (D.D.C. 1999) ("[I]f the plaintiff successfully shows that a discriminatory or retaliatory motive played a motivating part in an adverse employment action, the employer can nevertheless avoid liability by demonstrating by a preponderance of the evidence that it would have taken the same action absent discriminatory or retaliatory motive.").

213. *Debord*, 737 F.3d at 650–52.

214. *Ellerth*, 524 U.S. at 759.

215. *See Debord*, 737 F.3d at 651.

216. Tademy v. Union Pac. Corp., 614 F.3d 1135, 1147 (10th Cir. 2008).

217. *See id.*

218. *See Ellerth*, 524 U.S. at 763.

for purposes of the *Ellerth* defense.[219] The Seventh Circuit held that supervisors are those with the authority to affect a victim's employment, and thus have the power to hire, fire, promote, demote, discipline, or transfer the employee.[220] The First, Fourth, and Eighth Circuits similarly held that supervisors were employees who could take tangible employment actions including hiring, firing, changing benefits, and promoting and demoting the victim.[221] However, Minnesota's statutes and Supreme Court, as well as other states' courts, have accepted a broader definition of supervisor: a supervisor could be someone who either has the authority to affect tangible employment decisions or, more simply, "has authority to direct the employee's daily work activities."[222]

However, the Supreme Court arguably ended this debate in *Vance v. Ball State*.[223] In this case, the Supreme Court affirmed the Seventh Circuit's approach and held that an employee is a supervisor under Title VII "if he or she is empowered by the employer to take tangible employment actions against the victim."[224] Thus, it appears that the narrower definition of supervisor prevails when applied to an employer's affirmative defenses.[225]

Given the increased attention and notoriety of workplace discrimination and the many distinct groups it affects, it is likely that the law will evolve to encompass an expanded definition of sexual harassment.[226] Indeed, the legal evolution of sexual harassment law has led to the recognition that sexual harassment may include harassment between people of the same-sex and modern protections for members of the LGBT community.[227]

VII. MODERN DEVELOPMENTS

Some states are beginning to encompass same-sex sexual harassment under their anti-discrimination statutes.[228] The Supreme Court's decision in *Oncale v.*

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219. *See generally* Merritt v. Albemarle Corp., 496 F.3d 880 (8th Cir. 2007); Noviello v. City of Boston, 398 F.3d 76 (1st Cir. 2005); Mikels v. Durham, 183 F.3d 323 (4th Cir. 1999); Parkins v. Civ. Constructors of Ill., Inc., 163 F.3d 1027 (7th Cir. 1998).

220. *Parkins*, 163 F.3d at 1035.

221. *See Merritt*, 496 F.3d at 883 (holding that a supervisor must have more responsibility than assigning tasks to employees and should have the authority to make tangible employment actions including hiring, firing, or promoting); *Noviello*, 398 F.3d at 96 (explaining that to prove an employee is a supervisor, a plaintiff must prove that the employee had the power to affect the terms of the plaintiff's employment, such as terminating or disciplining the plaintiff); *Mikels*, 183 F.3d at 333 (finding that a supervisor's position lies in his authority to take tangible employment actions against a victim, such as hiring, firing, failing to promote, or changing benefits or responsibilities).

222. MINN. STAT. ANN. § 363A.08 (West, Westlaw through Ch. 6 of the 2017 Reg. Sess.); Frieler v. Carlson Mktg. Grp., Inc., 751 N.W.2d 558, 572 (Minn. 2008); *see also, e.g.*, Entrot, 819 A.2d at 459 (explaining that while a supervisor could be an employee with the power to fire, demote, and direct job functions, this list is not exhaustive and could also include an employee with more indirect influence).

223. *Vance*, 567 U.S. at 421.

224. *Id.* at 424.

225. *See id.*

226. *See infra* Part IV.

227. *See supra* Part VII.

228. *See* Storey v. Chase Bankcard Servs., 970 F. Supp. 722, 731 (D. Ariz. 1997) (denying motion to dismiss when female employee claimed sexual harassment by female supervisor after supervisor made

Sundowner Offshore Services, Inc. introduced protections against same-sex sexual harassment.[229] Similarly to opposite-sex sexual harassment claims, same-sex sexual harassment claims often turn on perceived sexual interest or advances.[230] Additionally, same-sex sexual harassment claims can be based on the *quid pro quo* theory or the hostile environment theory like opposite-sex claims.[231] While different courts use a variety of tests, many continue to rely on three basic standards in evaluating same-sex sexual harassment claims: (1) the "because of" gender test; (2) the conduct-based test; and (3) the hostility towards one sex test.[232] Courts may also use the stereotype test.[233]

A. THE "BECAUSE OF" GENDER TEST

The standard to prove same-sex sexual harassment may be higher than opposite-sex sexual harassment as plaintiffs must prove that the conduct constituted discrimination "because of" sex.[234] This means that an employer will only be liable if the harassment would not have occurred had the victim been a member of the opposite sex.[235] Therefore, if a male would not have been harassed if he were female, then the treatment of him would constitute sexual harassment because of his gender. In the previously mentioned *Zarda* case, a gay employee sued his former employer alleging he was fired because he failed to conform to

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sexual advances toward her). In *Storey*, the court's ruling centered on the fact that the harasser had treated members of one sex differently from members of the other sex. *Id.*; *see also* Mogilefsky v. Superior Ct., 26 Cal. Rptr. 2d 116, 119 (Cal. Ct. App. 1993) (recognizing plaintiff's claim of sexual harassment by supervisor of the same sex); Melnychenko v. 84 Lumber Co., 676 N.E.2d 45, 48 (Mass. 1997) (holding that the supervisor's sexual orientation was irrelevant where he repeatedly touched plaintiffs in a sexual way and made sexual comments). In *Mogilefsky*, the court explained that the proper inquiry is "whether the victim has been subjected to sexual harassment, not what motivated the harasser." *Mogilefsky*, 26 Cal. Rptr. 2d at 121; *see also* Green v. Ford, No. 01-220, 2003 WL 22100835, at *2–3 (Me. Sup. Ct. Aug. 25, 2003) (recognizing same-sex sexual harassment using the elements described in Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998), but finding that the supervisor's sexual comments about plaintiff's wife were not based on the plaintiff's sex; thus, no sexual harassment could be found).

229. *Oncale*, 523 U.S. at 79–80.

230. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986); Coe v. N. Pipe Prod., Inc., 589 F. Supp. 2d 1055, 1066 (N.D. Iowa 2008); *Mogilefsky*, 26 Cal. Rptr. 2d at 116.

231. *Mogilefsky*, 26 Cal. Rptr. 2d at 121 (holding that same gender sexual harassment may be the basis of a sexual harassment claim and may be based on *quid pro quo* or hostile work environment or both).

232. *Oncale*, 523 U.S. 75 (introducing the "because of" gender test); Sheffield v. Los Angeles Cnty. Dep't of Soc. Servs., 134 Cal. Rptr. 2d 492, 498 (Cal. Ct. App. 2003) (introducing the conduct-based test); Salinas v. Kroger Texas, L.P., 163 F. Supp. 3d 419 (S.D. Tex. 2016) (introducing hostility towards one sex test).

233. *See supra* Section VII-D.

234. *Oncale*, 523 U.S. at 79–80.

235. *See* Quick v. Donaldson Co., 90 F.3d 1372, 1379 (8th Cir. 1996) (finding that harassing behavior directed only at the area of male sexual organs may have constituted prohibited sexual harassment); Caldwell v. KFC Corp., 958 F. Supp. 962, 967 (D.N.J. 1997) (holding that when a supervisor harasses a subordinate because of the subordinate's sex, the supervisor is discriminating on the basis of sex regardless of the parties' respective genders).

stereotypical male behavior by referring to his sexual orientation.[236] The court held that since sexual orientation is a function of sex, sexual orientation discrimination is a subset of sex discrimination.[237] Therefore, it concluded, the plaintiff was entitled to protection because "but for" his gender, he would not have been harassed for being sexually attracted to men.

B. THE CONDUCT-BASED TEST

The conduct-based test examines if the harassing conduct of a same-sex employee is of a sexual nature and whether it is repeated, pervasive, or interferes with the other employee's ability to work.[238] This test overlaps with the hostile work environment test, since such repeated conduct creates a hostile environment.[239] For a work environment to be considered hostile, it must be objectively offensive based on the reasonable person standard as well as subjectively offensive to the plaintiff.[240] Courts look to the totality of the circumstances to make this determination, including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[241]

The conduct-based test does not always require that the conduct be overtly sexual.[242] Additionally, typically the test does not inquire into the sexual orientation of either party.[243] In *Smith v. Rock-Tenn Services, Inc.*, the court considered the frequency of the behavior the defendant categorized as "horseplay," the threatening nature of the acts, and the plaintiff's response to the offenses to determine whether the conduct interfered with the plaintiff's ability to work.[244]

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236. Zarda v. Altitude Express Inc., 883 F.3d 100, 108–09 (2d Cir. 2017).

237. *See id.* at 116.

238. *See Oncale*, 523 U.S. at 81 (holding that Title VII covers conduct that is severe and pervasive); Smith v. Rock-Tenn Servs., Inc., 813 F.3d 298, 309 (6th Cir. 2016) (finding that same-sex pervasive and severe harassment creates a Title VII claim); Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1064 (9th Cir. 2002) (holding that severe and pervasive unwelcome physical conduct constitutes a cause of action); *Sheffield*, 134 Cal. Rptr. 2d at 499–500 (finding that repeated telephone calls to plaintiff requesting a date and threatening behavior after rejection created hostile work environment).

239. Psychiatric Inst. of Wash. v. D.C. Comm'n on Hum. Rts., 871 A.2d 1146, 1151 (D.C. 2005) (finding that repeated phone calls and numerous degrading comments about sexuality and mental health was conduct that also created hostile work environment).

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

241. *Id.* at 23.

242. *See* Bailey v. Henderson, 94 F. Supp. 2d 68, 75 (D.D.C. 2000) (holding that conduct does not need to be sexual or romantic).

243. *See Rene*, 305 F.3d at 1063 (finding sexual orientation irrelevant for Title VII claims). *But see* Wrightson v. Pizza Hut of Am., 99 F.3d 138, 143 (4th Cir. 1996) (explaining that plaintiff's employer and co-workers were homosexuals, and that Title VII permits claims from homosexual employees against homosexual employers and co-workers).

244. Smith v. Rock-Tenn Servs., Inc., 813 F.3d 298, 309–10 (6th Cir. 2016).

C. HOSTILITY TOWARDS A SINGLE SEX

Regardless of what gender the employer and employee are, harassment may still be found under the test of hostility towards a single sex.[245] A court may look to see if an employer is generally hostile to a certain sex.[246] Such general hostility towards the plaintiff's sex can be the basis for a sexual harassment claim.[247] For example, the EEOC filed a lawsuit in 2018 in Wisconsin using this reasoning against Walmart Inc. by arguing that the employer was hostile towards women, particularly pregnant women, at one of their warehouses.[248] The case was settled for $14 million in 2020.[249]

D. HARASSMENT BASED ON STEREOTYPES

Same-sex harassment may also arise when an employer discriminates against an employee for failing to conform to stereotypical gender roles.[250] For example, the Third Circuit held that conduct motivated by beliefs that the plaintiff did not conform to his or her gender stereotypes could be held to be discriminatory.[251] Other courts have similarly held that harassment from one sex to the same sex based on stereotypes creates a Title VII claim.[252] Often with same-sex discrimination, claims fall into both the realms of harassment based on stereotypes as well as "because of" gender.[253] The court in *Christensen v. Omnicorp, Inc.* concluded that plaintiffs could prove that they were discriminated against based on gender stereotypes such as "the stereotype that men should be exclusively attracted to women and women should be exclusively attracted to men."[254]

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245. *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998); Davis v. Coastal Int'l Sec., Inc., 275 F.3d 1119, 1123 (D.C. 2002); Salinas v. Kroger Tex., L.P., 163 F. Supp. 3d 419, 424 (S.D. Tex. 2016).

246. *See Oncale*, 523 U.S. at 80 (surmising that a trier of fact can determine that a female employee experiences harassment from a female employer who is hostile to all women); *Davis*, 275 F.3d at 1125 (holding that a plaintiff can demonstrate harassment with evidence that the harasser treated men as a group differently than women); *Salinas*, 163 F. Supp. 3d at 424 (explaining that general hostility to a particular sex can constitute "because of sex" discrimination).

247. *See Salinas*, 163 F. Supp. 3d at 424.

248. Vanessa Romo, *Federal Commission Sues Walmart for Alleged Discrimination Against Pregnant Employees*, NPR (Sept. 21, 2018), https://perma.cc/DZQ6-ZPB7.

249. Samantha Schmidt, *Judge approves $14 million settlement in Walmart pregnancy discrimination case*, WASH. POST (Apr. 29, 2020, 6:52 PM), https://perma.cc/ZSK9-SMP3.

250. Janet Halley, *Sexuality Harassment, in* Left Legalism/Left Critique 91 (Wendy Brown & Janet Halley eds., 2002) (introducing that same-sex sexual harassment may arise from deviating from gender expectations).

251. *See* Bibby v. Philadelphia Coca Cola Bottling Co., 260 F.3d 257, 262–63 (3d Cir. 2001) (explaining that evidence demonstrating that a harasser harassed an employee because that employee did not conform to gender stereotypes is one way a plaintiff can prove same-sex harassment because of sex).

252. *See* Zalewski v. Overlook Hosp., 692 A.2d 131, 135–36 (N.J. Super. Ct. Law Div. 1996) (finding that when plaintiff was harassed for being a virgin and effeminate, jury could find that plaintiff was discriminated against because he was a man and did not fit into gender stereotypes).

253. *See* Christiansen v. Omnicorp Grp., Inc., 852 F.3d 195, 200–06 (8th Cir. 2017).

254. *Id.* at 206.

E. SEXUAL HARASSMENT OF TRANSGENDER PERSONS

Multiple courts have held that Title VII protects transgender persons against sexual harassment.[255] To bring a successful Title VII claim, a transgender person must show that they were discriminated against because they failed to conform to gender stereotypes.[256] In fact, the Supreme Court has held that all persons cannot be discriminated against for gender non-conformity.[257] Lower courts have simply enumerated that Title VII protection applies to transgender persons as well.[258]

Federal courts have held that transgender individuals are not protected as a class under Title VII, and thus discrimination based on being transgender is not itself a violation of Title VII.[259] However, in an administrative decision, the EEOC held that discrimination based on being transgender is itself a cognizable claim.[260] For example, the EEOC ruled that keeping a transgender woman from using the women's restroom at work because of her gender identity violated Title VII.[261] Here, the EEOC broke from the federal courts' standard in recognizing harassment against transgender persons.[262]

During the Trump administration it was proposed to redefine gender as binary, immutable, and solely based on genitalia at birth.[263] In pursuit of this revision, the Department of Health and Human Services is attempting to establish a legal definition of sex under Title IX.[264] Even if this reformation takes place, transgender

255. *See* Glenn v. Brumby, 663 F.3d 1312, 1317 (11th Cir. 2011) (holding that transgender persons, like all people, are protected from sex discrimination under Title VII); Schroer v. Billington, 577 F. Supp. 2d 293, 305 (D.D.C. 2008) (holding that turning down a transgender person for employment violated Title VII); Smith v. City of Salem, 378 F.3d 566, 567–75 (6th Cir. 2004) (holding that terminating an employee because they were diagnosed with "Gender Identity Disorder"—a now antiquated diagnostic term—violates Title VII).

256. *See Glenn*, 663 F.3d at 1320–21 (holding that firing a transgender woman after coming to work in woman's clothes constituted discriminatory sex stereotyping); *Schroer*, 577 F. Supp. 2d at 305 (holding that firing a transgender woman for not appearing as a man constitutes sex-stereotyping, which is a violation of Title VII); *Smith*, 378 F.3d at 575 (holding that sex stereotyping for not conforming to a gender, including transitioning, is impermissible).

257. *Price Waterhouse*, 490 U.S. at 250 (holding that an employer violated Title VII through sex stereotyping by making an adverse decision against a female employee because of her unfeminine and aggressive behavior); *see also* Fabian v. Hosp. of Cent. Conn., 172 F. Supp. 3d 509, 527 (D. Conn. 2016) (holding that discrimination on the basis of sex stereotypes is discrimination "because of sex").

258. *See, e.g.*, Chavez v. Credit Nation Auto Sales, 49 F. Supp. 3d 1163, 1173 (N.D. Ga. 2014), *aff'd in part, rev'd in part sub nom.* Chavez v. Credit Nation Auto Sales, LLC, 641 F. App'x 883 (11th Cir. 2016) (finding triable issues of fact exist as to (1) Chavez's employer's discriminatory intent and (2) whether gender bias was "a motivating factor" in the employer terminating her); *Glenn*, 663 F.3d at 1312; *Schroer*, 577 F. Supp. 2d at 293; *Smith*, 378 F.3d at 575.

259. *See* Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1221 (10th Cir. 2007); *Schroer*, 577 F. Supp. 2d at 305.

260. Macy v. Holder, EEOC Decision No. 120120821, 2012 WL 1435995, at *1 (Apr. 20, 2012).

261. Lusardi v. Mchugh, EEOC Decision No. 0120133395, 2015 WL 1607756, at *10 (Apr. 1, 2015).

262. *Id.*

263. Erica L. Green, *'Transgender' Could Be Defined Out of Existence Under Trump Administration*, N.Y. TIMES (Oct. 21, 2018), https://perma.cc/S5KD-AC24.

264. *See id.*

persons will likely still have the same avenue available for relief in proving that they have been discriminated against because they failed to conform to gender stereotypes.[265] Nevertheless, these modifications would certainly hinder attempts to define transgender persons as a protected class.[266]

VIII. SEXUAL HARASSMENT IN THE MEDIA

While much of this review outlines the legal principles set by statutes and courts surrounding sexual harassment in the workplace, the continued outbreak of high-profile sexual harassment cases demonstrates that sexual harassment continues to be an issue in the workplace.[267]

In March 2016, Enrichetta Ravina, an assistant professor of finance at Columbia University, filed suit against the school after alleging she had been subjected to sexual harassment by Geert Bekaert, a tenured professor at Columbia Business School.[268] In her complaint filed in July 2016, Ravina states that she was mocked when she approached senior leaders at Columbia about Bekaert's conduct.[269] Specifically, Ravina alleged that Dean Hubbard compared her situation to a "soap opera" and accused her of flirting with Bekaert.[270] In the aftermath of her repeated allegations of sexual harassment against Bekaert, Columbia revoked Ravina's paid leave and informed Ravina that her tenure process would run during the 2015–2016 academic year "on an accelerated basis."[271] Ultimately, Ravina's request for tenure was denied, and in May 2016, she received a letter from Columbia notifying her that her employment would be terminated in 2017.[272] A jury found Bekaert had "retaliated against" Ravina for accusing him of sexual harassment and Columbia was strictly liable for Bekaert's conduct under New York law.[273]

Furthermore, in March 2016, University of California, Berkeley, School of Law Dean, Sujit Choudhry, resigned after a sexual harassment lawsuit was filed against him and the law school.[274] Tyann Sorrell, Choudhry's former executive assistant, alleged that Choudhry had sexually harassed her by giving her "bear hugs," kissing her on her cheeks, and repeatedly rubbing her shoulders and arms.[275] When Sorrell complained to her superiors, she alleged that they made no

265. *See Price Waterhouse*, 490 U.S. at 250 (1989).

266. *See* Etsitty v. Utah Transit Auth., 502 F.3d 1215, 1221 (10th Cir. 2007).

267. *See supra* Part VI.

268. Amended Complaint, Ravina v. Columbia Univ. No. 1:16-cv-02137 (S.D.N.Y. July 7, 2016), https://perma.cc/H5H4-PCZ4.

269. Amended Complaint at 4, Ravina v. Columbia Univ. No. 1:16-cv-02137 (S.D.N.Y. July 7, 2016), https://perma.cc/H5H4-PCZ4.

270. *Id.*

271. Rick Rojas, *Columbia Professor Files Sexual Harassment Suit Against University*, N.Y. TIMES (Mar. 23, 2016), https://perma.cc/UL8X-43PS.

272. *Id.*

273. Ravina v. Columbia Univ., No. 16-CV-2137 (RA) (S.D.N.Y. Mar. 6, 2020).

274. Susan Svriuga, *Berkeley Law School Dean Resigns After Sexual Harassment Complaint*, WASH. POST (Mar. 10, 2016), perma.cc/U3L6-WAW6.

275. *Id.*

attempt to reprimand Choudhry.[276] After a four-month investigation conducted by UC Berkeley in 2015, they found that Choudhry had "[b]y a preponderance of the evidence . . . violated the sexual harassment provisions of the UC Policy on Sexual Harassment and Sexual Violence."[277]

While the aforementioned cases are merely a sampling of sexual harassment litigations, they demonstrate that, despite Title VII and state statutes, sexual harassment remains prevalent in the workplace.[278] Nevertheless, this high-profile media attention has given a voice to those previously unable to pursue criminal charges or civil action.

On September 25, 2018, Judge Steven T. O'Neill sentenced Bill Cosby to three to ten years in prison for the sexual assault of Andrea Constand.[279] Constand and Cosby first met in November 2002.[280] When Constand initially reported the sexual assault to the authorities, the district attorney for Montgomery decided not to pursue charges, citing "insufficient credible and admissible evidence."[281] During discovery, Cosby admitted to obtaining Quaaludes to give to women for sex.[282] Constand and Cosby settled in civil court for an amount that would later be revealed as $3.38 million; both signed a nondisclosure agreement.[283] After numerous accusations spanning decades against the actor came to light in the media and a judge released Cosby's deposition to the public, the investigation was reopened and Cosby was subsequently arrested on charges of aggravated indecent assault.[284] While his initial trial resulted in a deadlock, upon retrial a jury found Cosby guilty on three counts of assault.[285]

Likewise, in October 2017, the New York Times released an expose documenting movie mogul Harvey Weinstein's long history of paying off sexual harassment accusers.[286] Like Cosby, the investigation revealed that Weinstein had long been accused of sexual harassment and assault, reaching at least eight settlements with women.[287] Weinstein was found guilty of sexual assault in February

276. *Id.*

277. Office for the Prevention of Harassment And Discrimination, Report of Investigation and Findings (July 7, 2015), https://perma.cc/H78Q-L4L6.

278. *See supra* Part VII; *see also Charges Alleging Sexual Harassment FY 2010–FY 2015*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://perma.cc/D4ME-WQUF (last visited Mar. 4, 2023). The EEOC alone continues to receive thousands of complaints each year. *See id.*

279. Eric Levenson & Aaron Cooper, *Bill Cosby sentenced to 3 to 10 years in prison for sexual assault*, CNN (Sept. 26, 2018), perma.cc/6B5F-PXV4.

280. Jeff Truesdell & Nicole Weisensee Egan, *Andrea Constand, the Woman Bill Cosby Sexually Assaulted in 2004, Recalls the Traumatizing Abuse*, PEOPLE (Sept. 25, 2018), https://perma.cc/2AVX-SPY7.

281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

286. Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), https://perma.cc/D3XD-EPHE.

287. *Id.*

of 2020, and again in December of 2022 for a separate sexual assault allegation.[288] While the Weinstein trial was ongoing, the New York Times investigation gave momentum to the established #MeToo movement founded by Tarana Burke. #MeToo began as a way for social media users to share "their experience with sexual violence and stand in solidarity with other survivors."[289] Over the next few months, stories flooded the news of well-known victims of Weinstein.[290] While celebrities have provided ample support to #MeToo, activists and lawyers have received support beyond Hollywood: Tina Tchen, Chief-of-Staff to Michelle Obama, is leading the Time's Up Legal Defense Fund; the Legal Network for Gender Equity was created after the 2016 presidential election to connect sexual assault and harassment survivors to lawyers across the nation; and employers are now revising their employee Human Resources and sexual harassment handbooks.[291]

Legal responses to #MeToo has varied across the profession. While lawyers and organizations immediately sought to analyze #MeToo and address sexual harassment in the industry, courts have been slower to adopt the change.[292] In February 2018, the American Bar Association's House of Delegates unanimously adopted Resolution 302, which established and recommended "policies and procedures prohibiting harassment and retaliation in the workplace based on gender, gender identity and sexual orientation."[293] Claims regarding employment misconduct issues have increased since the onset of the movement for both plaintiffs' attorneys and defense attorneys for employers.[294] In light of #MeToo and public opinion on sexual harassment, plaintiff's attorneys have revisited and revised pre-litigation strategies for claims.[295] The Tax Cuts and Jobs Act, signed into law by President Trump, eliminates the deduction from taxable income of any settlement or payment related to sexual harassment or sexual abuse, including attorneys' fees, but if the settlement is subject to a nondisclosure agreement then these fees are likely no longer nondeductible.[296]

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288. Hannah Yasharoff, *Harvey Weinstein sentenced to 16 more years, says he doesn't deserve 'life in prison'*, USA TODAY (Feb. 23, 2023), https://perma.cc/WVQ8-7487.

289. Anna Brown, *More Than Twice as Many Americans Support Than Oppose the #MeToo Movement*, PEW RSCH. CTR. (Sept. 29, 2022), https://perma.cc/L62J-YTVN.

290. *See id.*

291. Darlene Ricker, *#Metoo Movement Spurs National Legal Response*, A.B.A. J. 10 (Mar. 2018).

292. *Annual Meeting 2018: Lawyers Analyze #Metoo, Time's Up Impact On Workplace Sexual Harassment*, AM. BAR ASS'N (Aug. 3, 2018), https://perma.cc/2D6T-LTYT; *see also* Stephanie Francis Ward, *TIME'S UP: As the Me Too Movement Continues to Shed Light on Sexual Harassment and Assault, Sparking Changes in Various Industries, the Legal and Judicial Systems Have Been Slow to Adapt*, A.B.A. J. 46 (June 2018).

293. *See ABA Adopts New Policy To Combat Sexual Harassment In The Legal Workplace*, AM. BAR ASS'N (Feb. 6, 2018), https://perma.cc/DBD5-TXZZ; *see also* Ward, *supra* note 292.

294. Ricker, *supra* note 291.

295. *See* Jolianne S. Walters, *Sexual Harassment In The Workplace: Pre-Litigation Strategies From A Plaintiff's Perspective*, 30 DCBA BRIEF 8 (2018).

296. *See* Trey Cooper, *Tax Cuts and Jobs Act Limits Business Expense Deduction For Settlement Of Sexual Harassment Claims*, ARK. LAW 32 (2018).

While President Trump has been critical of the #MeToo movement, the judiciary's response has been more tepid.[297] In December 2017, Chief Justice Roberts announced an initiative to ensure there are proper procedures in place related to sexual harassment in the federal judiciary.[298] Despite this pronouncement, employees filing sexual harassment claims face an uphill battle in federal court. When seeking legal counsel, employees are often told that multiple witnesses are needed to establish credibility. If a plaintiff can find an attorney, he or she often bears the cost rather than the attorney taking the case on a contingent fee basis. Getting past summary judgment also presents a problem. A study found that when an employer files a motion for summary judgment in federal court on a sexual harassment claim, the majority of time it is granted in part or in full; in some federal jurisdictions, up to 94% of claims are dismissed.[299] Despite the "factually intensive nature" of these cases, which requires a jury to decide, federal judges, most of whom are male, are "taking the place of juries and deciding what they think is evidence."[300] Questions about how the federal judiciary will address sexual harassment in the future continue after Judge Alex Kozinski of the Ninth Circuit retired in December 2017 amid sexual harassment allegations and the appointment of Justice Brett Kavanaugh to the Supreme Court.[301]

IX. CONCLUSION

Title VII has played a major role in creating legal solutions for those who experience sexual harassment in the workplace. Many states comply with Title VII and proactively create their own state-specific anti-discrimination laws to further protect employees.[302] While some of these state laws are modeled after Title VII, many of them provide greater protection for people who experience sexual harassment in the workplace, including expanded protections for people in sexual minorities.[303] States use different tests to determine if any employer, supervisor, or co-worker has engaged in sexual harassment against an employee.[304] However, most states allow employers to use the *Ellerth* defense, and the Supreme Court has recently advanced a common definition of "supervisor" for states to use.[305] Additionally, more courts have recognized that Title VII also forbids same-sex sexual harassment and protects transgender persons from sexual

297. Felicia Somnez, *Trump Mocks MeToo Movement in Montana Rally*, WASH. POST (July 5, 2018), perma.cc/2B36-ZUCQ.

298. Robert Barnes, *Chief Justice Roberts Says Courts Will Examine Protections Against Sexual Harassment*, WASH. POST (Dec. 31, 2018), perma.cc/6CKQ-AHK2.

299. *See* Ward, *supra* note 292.

300. *Id.*

301. *See* Ryan J. Foley, *Kavanaugh's Ties To Disgraced Mentor Loom Over Confirmation*, ASSOCIATED PRESS (Aug. 28, 2018), perma.cc/S2TA-6SPM.

302. *See supra* Part IV.

303. *See supra* Part IV.

304. *See supra* Part V.

305. *See supra* Part VI.

harassment.[306] When filing or defending a sexual harassment claim, practitioners must be aware of the discrepancies between federal law and state law and the growing acceptance of sexual harassment claims against members of the LGBT community. Understanding the different administrative procedures, remedies, and judicial interpretations can help practitioners determine which law should be used to support or defend a claim so that a client may receive the most beneficial representation. Sexual harassment in the workplace is a recurring issue, and new cases and issues arise every day.[307] The advances that occur in interpreting sexual harassment law provides confidence that remedial devices may be available to more victims. Yet, these remedies and interpretations are still jurisdiction-specific in some cases.

306. *See supra* Part VII.
307. *See supra* Part VIII.