

New York's New Sexual Harassment Laws: Fixing What Wasn't Broken in the "Severe or Pervasive Standard"

by Ian-Paul A. Poulos

A few years ago, on October 15, 2017, actress Alyssa Milano delivered a tweet that sparked a social movement. She wrote, "If all the women who have been sexually harassed or assaulted wrote 'Me Too.' as a status, we might give people a sense of the magnitude of the problem."¹ The public's response was monumental. That single tweet unleashed a social media hailstorm with half a million tweets within twenty-four hours² and twelve million posts across Facebook within the same timeframe.³

The "#MeToo" hashtag on social media served as a way for those who have experienced sexual harassment in various forms to unite under a single message, against what has been both a social and legal concern for decades. As *Time Magazine* put it, "Women have had it with bosses and co-workers who not only cross boundaries but don't even seem to know that boundaries exist.... These silence breakers have started a revolution of refusal, gathering strength by the day, and in the past two months alone, their collective anger has spurred immediate and shocking results: nearly every day, CEOs have been fired, moguls toppled, icons disgraced. In some cases, criminal charges have been brought."⁴ By October 2018, those who had been toppled included Harvey Weinstein (the former American film producer), Senator Al Franken, actor Kevin Spacey, news host Charlie Rose, New York Attorney General Eric T. Schneiderman, and at least 196 others.⁵

In New York, however, this movement helped further a legislative agenda that was already years in the making at both the state and local level. In 2005, the New York City Council passed Local Law 85 ("The Restoration Act") in an effort to "clarify[] a number of [New York City Human Rights Law] provisions and...underscor[e] that protections afforded by New York City's human rights law are not to be limited by restrictive interpretations of similarly worded state and federal statutes."⁶ In the wake of the #MeToo movement, New York State and New York City subsequently passed legislation, recently amended portions of which will be discussed below, that notably altered the standard applicable in sexual harassment and other discrimination cases; expanded protections for non-employees and employees of small employers; restricted the use of non-disclosure provisions in cases involving sexual harassment and other forms of discrimination; prohibited mandatory arbitration clauses (a section which is arguably unenforceable and preempted by federal law⁷); and created mandatory notice, policy, and training requirements, among other things.

As demonstrated below, this Article focuses on the "severe or pervasive" test that courts have developed as a litmus test for determining what conduct is actionable sexual harassment. First New York City and now New York State have taken drastic steps away from this traditional standard routinely applied under federal law, and, in doing so, have turned a well-established approach upside-down. In the Author's view, adopting an entirely new analysis was unnecessary, because the traditional approach had the mechanisms necessary to accomplish the legislature's goals.

Some Statistics: Sexual Harassment in the Workplace

In the 2018 fiscal year, the Equal Employment Opportunity Commission (“EEOC”), the federal agency empowered to enforce federal discrimination laws, fielded 90,558 charges of discrimination. About 32.3 percent of those (24,655) involved allegations of sexual discrimination or harassment.⁸ In 2017, following the advent of the #MeToo movement, the EEOC experienced a 13.6 percent increase in sexual harassment allegations.⁹

The general trend was similar locally. At the New York City level, Carmelyn P. Malalis, the Commissioner of the New York City Commission on Human Rights, testified before the New York City Council that, in 2017, claims of gender-based discrimination were the most prevalent form of discrimination investigated by the NYC Commission, constituting 17 percent of all employment-related claims. The Commissioner also reported that in the two years prior to her testimony, sexual harassment complaints increased 43 percent.¹⁰ In the same vein, independent, non-governmental studies report that roughly 38 percent of women have experienced sexual harassment in the workplace.¹¹

The Federal Framework

Prohibition on Sex Discrimination—A “Congressional Joke?”

The framework that governs federal sex discrimination law is rooted in a 1964 statute enacted in the wake of ongoing civil rights protests in Birmingham, Alabama. At the time, gender discrimination was not the focus. A year before the passage of the Civil Rights Act of 1964, then-President John F. Kennedy addressed Congress, emphasizing that “[r]ace discrimination hampers our economic growth by preventing the maximum development and utilization of our manpower. It hampers our world leadership by contradicting at home the message we preach abroad.... Above all, it is wrong.”¹² He urged Congress to take action: “The cruel disease of discrimination knows no sectional or state boundaries. The continuing attack on this problem must be equally broad. It must be both private and public—and it must include both legislative and executive action.”¹³ A few months later, the President prodded Congress again because both Houses had failed to act: “Although these recommendations were transmitted to the Congress some time ago, neither House has yet had an opportunity to vote on any of these essential measures [concerning various forms of discrimination].”¹⁴ Significantly, nowhere in President Kennedy’s two speeches to Congress did he mention sex discrimination.

One year after President Kennedy’s two speeches and some months after his assassination, Congress enacted the Civil Rights Act of 1964. The initial draft of the legislation did not mention sex discrimination or harassment; it addressed voting rights, public accommodation, public facilities, and public education. The title addressed employment discrimination with respect to the terms, conditions, and privileges of employment on the basis of race, color, national origin, or religion, but it did not mention sex. The initial theory, perpetuated for years (even by the courts¹⁵), was that opponents of the legislation added “sex” as a protected category as a way to prevent the bill from advancing, but leading treatises have since abandoned this view in the face of contrary evidence.¹⁶

Representative Howard W. Smith of Virginia, then-Chair of the House Rules Committee, introduced an amendment to add sex discrimination into Title VII of the Civil Rights Act of 1964. In a letter to an author of an early article discussing sex discrimination, Congressman Smith explained that the “statement that the amendment was ‘slipped in’ the bill by me in an attempt to delay voting, is utterly untrue, as the record shows. The amendment was a popular one. Particularly active in its adoption were the women and Members of the House. It was debated fully and adopted in the House in open debate, and subsequently approved in the Senate.”¹⁷

On Saturday, July 12, 1964, the Civil Rights Act became law with the prohibition on sex discrimination in employment intact. Curiously, the EEOC Executive Director at the time was less than enthused out of concern that the EEOC would become the “sex commission.”¹⁸ Nonetheless, from then on, Title VII, the title involving discrimination in employment, made it unlawful for an employer to discriminate against any individual with

respect to his or her “compensation terms, conditions, or privileges of employment[] because of such individual’s race, color, religion, sex, or national origin.”¹⁹

The Current State of Federal Sex Discrimination and Sexual Harassment Law

Sex discrimination law as a topic for discussion is broad. As mentioned above, Title VII prohibits an employer from discriminating against an employee based on gender, which can include sex stereotyping, making it “an unlawful employment practice...to discriminate against any individual with respect to...terms, conditions, or privileges of employment, because of such individual’s...sex.”²⁰ In its simplest form, sex discrimination includes an employment action taken against an individual because of his or her gender. But this can occur in different forms.

An employee may, for example, demonstrate that he or she has been discriminated against based on sex under a disparate treatment theory, where the argument is a female employee was qualified for the job but experienced an adverse employment action—such as being rejected for a promotion, terminated, or demoted—under circumstances that give rise to an inference of unlawful discrimination. If the employee establishes these elements—that is, puts forth a *prima facie* case—then the burden shifts to the employer to “articulate some legitimate, nondiscriminatory reason” for the alleged adverse action. Following that showing, the burden returns to the employee to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons but were a pretext for discrimination.²¹ This method of proof, which is still how courts analyze disparate treatment claims today, was established in 1973 by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

As the courts continued to develop the *McDonnell Douglas* framework for analyzing discrimination cases, they realized that not every claim involves tangible employment actions. While a disparate treatment claim “requires a showing of an adverse employment action ‘either because of gender or because a sexual advance was made by a supervisor and rejected,’”²² not all instances of sex discrimination are so direct. With this realization in mind, the Supreme Court recognized in 1986 that sexual harassment in the form of a hostile work environment is also actionable. The standard used to determine whether harassment is actionable is whether it has “the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.”²³ According to the Supreme Court in *Meritor Sav. Bank, FSB v. Vinson*, “[t]he phrase ‘terms, conditions, or privileges of employment’ evinces a congressional intent to ‘strike at the entire spectrum of disparate treatment of men and women’ in employment.”²⁴ Importantly, for “sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of [the victim’s] employment and create an abusive working environment.”²⁵

Understanding the “Severe or Pervasive” Standard

This Article critiques the newly enacted sexual harassment standards in New York. Understanding the federal “severe or pervasive” standard applicable in sexual harassment cases is crucial to this critique because New York State, following New York City’s lead, flipped this standard on its head with its new law.

As the standard began to evolve, the Supreme Court stepped in to clarify what it meant by “severe or pervasive” in *Meritor*. A woman working for a forklift leasing company in Tennessee in the 1980s was subjected to what she viewed as a hostile work environment. Teresa Harris was a Rental Manager, and her boss and the president of the company, Charles Hardy, had a habit of making sexually charged, inappropriate comments to her during work. He would tell her, “[Y]ou’re a woman, what do you know?” On numerous occasions, he stated that “we need a man as the rental manager.” And his sense of humor often involved “jokes” such as, “Let’s go to the Holiday Inn to negotiate your raise.” With little guidance on what “severe or pervasive” entailed, the lower court believed that “Charles Hardy’s comments cannot be characterized as much more than annoying and insensitive. The other women working at Forklift considered Hardy a joker. Most of Hardy’s wisecracks about females’ clothes and anatomy were merely inane and adolescent[.]”²⁶ Although the court sympathized that Ms. Harris was

“offended,” it did “not believe [the inappropriate sexual comments] were so severe as to seriously affect [Harris’s] psychological well-being. A reasonable woman manager under like circumstances would have been offended by Hardy, but his conduct would not have risen to the level of interfering with that person’s work performance.”²⁷ In other words, according to the Court, a reasonable woman would have just shrugged off Hardy’s comments. The Supreme Court disagreed.

In a rather sharply worded reversal, the Supreme Court emphasized that “Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employees’ psychological well-being, can and often will detract from employees’ job performance, discourage employees from remaining on the job, or keep them from advancing in their careers.”²⁸ The Court clarified that, although the test is not “mathematically precise,” we can determine whether an environment is hostile or abusive by “looking at all the circumstances” while balancing factors such as “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.”²⁹ The test has two prongs: “[A] sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.”³⁰ Therefore, conduct is “severe or pervasive” enough to alter the conditions of employment and create an abusive working environment when “the environment would reasonably be perceived, and is perceived, [by the victim,] as hostile or abusive.”³¹

Aside from the difference between the objective and subjective elements, it is important to note that the test is satisfied by conduct that is *either* severe *or* pervasive—it does not have to be both. In this way, a single incident can be sufficiently severe or pervasive, but a combination of different actions or words can be enough as well. Isolated incidents, unless they are on their own severe, will often not rise to the level of creating a sexually harassing, hostile work environment, nor will sporadic, occasional comments easily support the claim. Stray remarks are not often actionable because “[e]veryone can be characterized by sex, race, ethnicity, [age,] or (real or perceived) disability,” so “it is therefore important in hostile work environment cases to exclude from considerations [acts taken against the plaintiff] that lack a linkage or correlation to the claimed ground of discrimination.”³² A one-time, sex-based tirade targeted at the plaintiff can certainly be enough, but the purpose of Title VII is to root out discriminatory conduct, not to establish a general civility code in the workplace. Realizing that these descriptions can make the “severe or pervasive” standard appear overly strict, courts often emphasize that “the fact that the law requires harassment to be severe or pervasive before it can be actionable does not mean that employers are free from liability in all but the most egregious cases.”³³ Courts make fact-specific, case-by-case inquiries, and cases that present genuine issues of material fact should not be dismissed.

The New York City Framework

For years, both New York State and New York City followed the federal standards discussed above. They each had their own laws, but the wording and concepts were close enough to Title VII that courts would mush their analysis of three laws into one, borrowing Title VII concepts and transposing them across the State and City sexual harassment analysis.³⁴ Even when the New York City Council amended the New York City Human Rights Law in 1991 (“1991 Amendments”), the courts glossed over any attempt at differentiation because the Council did not make changes to the text of the construction provision; without express language in the law from the Council clearly noting a departure from traditional concepts, the default approach was to follow already established law at the federal level. Curiously, the Council wrote in its Committee Report that the 1991 Amendments would “put the city’s law at the forefront of human laws,” and Mayor Dinkins even stated in his remarks at the time that “it is the intention of the council that judges interpreting the City’s Human Rights Law are not to be bound by restrictive state and federal rulings and are to take seriously the requirements that this law be liberally and independently construed.”³⁵

How did New York’s highest court react to these remarks? “We are not persuaded.” In *McGrath*, a case involving Toys R Us, the New York Court of Appeals explained that the “broad expressions of overriding policy

[in the Human Rights law] offer no basis to overlook the textual similarities between [the City law] and the federal statutes or to abandon [the] general practice of interpreting comparable civil rights statutes consistently, particularly since these broad policies are identical to those underlying the federal statutes.”³⁶ The Court of Appeals was looking for clear direction—not policy proclamations made outside of the law. Taking the criticism to heart, the City Council reacted.

Flipping the “Severe or Pervasive” Standard Upside-down

Shortly after the decision in *McGrath*, the Council enacted the Local Civil Rights Restoration Act of 2005, which amended the New York City Human Rights Law. The Council enacted the Restoration Act to clarify that (1) some provisions of the City Human Rights Law were textually distinct from its state and federal counterparts, (2) all provisions of the City Human Rights Law required independent interpretation to accomplish the new City law’s uniquely broad and remedial purposes, and (3) cases that failed to recognize these differences—such as *McGrath*—were being legislatively overruled. The Council specifically amended the construction provision of the law, adding that the City Human Rights Law should be construed liberally for the accomplishment of the “uniquely broad and remedial” purposes of the law, “regardless of whether federal or New York State civil rights law, including those laws with provisions comparably-worded...[,] have been so construed.”³⁷ In its Committee Report, the Council also openly poked at “recent judicial decisions” that “underscore the need to clarify the breadth of protections afforded by New York City’s human rights law.”³⁸ The “Court of Appeals reasoned [in *McGrath*] that broad statements regarding the intended liberal construction of the City’s human rights law are insufficient to justify interpretation of the law to afford broader rights than are protected under comparably worded state or federal laws,” quipped the Council in a vexatious tone. Therefore, the Restoration Act “explicitly states that the human rights law must be construed independently from both federal and New York State civil and human rights laws, including laws with comparably worded provisions.”³⁹ In other words, the Council thought it made its intentions clear in the 1991 Amendments, but since the Courts continued to merge federal, state, and local standards, the Council decided to intervene once more. This time, however, the Courts heard the Council loud and clear.

The Appellate Division, New York’s intermediate appellate court, jumped on the opportunity to redefine the contours of sexual harassment analysis under City law as soon as it could. In fact, the parties did not even have to ask. (The dissent in the case criticized the majority for adopting a new standard without any input from the parties involved.) In *Williams*, the First Department of the Appellate Division affirmed a decision for the employer, but it did so after explicitly abandoning the “severe or pervasive” test in favor of a much lower, plaintiff-friendly standard applicable to the City Human Rights Law. The Court explained that the “‘severe or pervasive’ rule has resulted in courts ‘assigning a significantly lower importance to the right to work in an atmosphere free from discrimination’ than other terms and conditions of work.”⁴⁰ The Court took issue with the “middle of the road” approach established in *Harris* and explained that the words “severe or pervasive” imply that some discrimination is acceptable in the workplace so long as it is not “severe” or “pervasive.” According to the First Department, the traditional analysis equates a workplace that is entirely free from discrimination with one that has some discrimination but not enough to be actionable. This leeway was deemed unacceptable.

To address what it perceived as a gap between harassment cases that fall between “severe or pervasive” and “merely” offensive stray remarks, the First Department created a new test: “the primary issue for a trier of fact in harassment cases...is whether the plaintiff has proven by a preponderance of the evidence that she has been treated less well than other employees because of gender.”⁴¹ The Court went on to explain that efforts by employers to dismiss cases under this standard should “normally be denied” where material facts are in dispute. In an attempt to quell justified gasps from employers that were essentially just informed, even factually sparse cases would not be dismissed, the Court explained with a verbal pat on the shoulder: “[W]e assure employers that summary judgment will still be available where they can prove that the alleged discriminatory conduct in question does not represent a ‘borderline’ situation but one that could only be reasonably interpreted by a trier of fact as representing no more than petty slights or trivial inconveniences.”⁴² From the Court’s perspective, unless the employer can affirmatively show that the actions alleged are nothing more than a petty slight or a trivial

inconvenience, off to trial we go! Some later cases have doubled down on this analysis, emphasizing that under the “less well” standard employers will prevail on summary judgment and successfully dismiss sex discrimination cases “only if the record establishes as a matter of law that discrimination played no role in its actions.”⁴³

Before continuing, it is important to underscore a couple conceptual points about New York City’s “less well” test. First, the words “less well” appeared in neither the Council’s Committee Report nor in the text of the Restoration Act itself. Even though the Council made it clear that the City Human Rights Law should be interpreted in a more liberal fashion, it did not actually state that the “severe or pervasive” test was wrong. It criticized courts for being restrictive, and it emphasized that “similarly worded provisions of federal and state civil rights laws [should serve] as a floor below which the City’s Human Rights law cannot fall,” but it never affirmatively stated, at least in the Author’s view, that traditional standards would be completely abandoned and turned upside-down.

Observing that federal standards have been interpreted too narrowly does not necessitate a complete departure from those standards; one could, perhaps, address the issue by relaxing existing standards and legislatively disavowing court decisions that miss the mark. In fact, this has been done before. When Congress amended the Americans with Disabilities Act in 2008, it did so because the Supreme Court had interpreted the provisions of the Act too narrowly. In response, Congress passed the Americans with Disabilities Act Amendments of 2008, which legislatively overruled numerous Supreme Court decisions by name and expanded existing definitions and rules of construction.⁴⁴ Just as the Council did with the Restoration Act, Congress expressed disappointment that the courts were not interpreting the ADA with the same expansive breadth that Congress originally intended when the law was enacted in 1990. Thereafter, Courts responded accordingly, interpreting the ADA in a more liberal and plaintiff-friendly manner, but they did not have to adopt entirely new tests as the First Department did in *Williams*.

Second, the “less well” standard, when coupled with the “petty slight or trivial inconveniences” defense, is a clear table-turn of the federal “severe or pervasive” standard. The criticism is that the “severe or pervasive” test allows for *some* discrimination in the workplace, but that is not necessarily true. At least, it does not have to be. The “severe or pervasive” standard as developed through *Meritor*, *Harris*, and other cases attempted to differentiate between occasional stray remarks or mere utterances—perhaps words that as an afterthought were said when they should not have been—and a sexually harassing environment. The new “less well” test, even with its disclaimer that it does not mean to establish a general civility code, makes it much easier to turn one-time or infrequent slips into actionable conduct. This observation should not be read as an endorsement of discrimination in the workplace. It is not. Without question, no one should have to endure *any amount* of discriminatory conduct—sexual or otherwise—while at work (or anywhere, for that matter). But lowering the standard to such an extent that efforts to dismiss cases will “normally be denied” may be unjustified. As demonstrated below, the federal standard was more than capable of allowing arguably meritorious cases to continue to trial, but it did so without creating a paranoia that an accidental utterance that was more than a “petty slight” (whatever that means) could result in a multi-year litigation requiring tens, if not hundreds, of thousands of dollars to defend.

For example, the Author can recall reading one particularly memorable situation where an employer defended a sexual harassment case for over five years before it was resolved. The plaintiff’s allegations were inconsistent and self-contradictory to the point that they were, at most times, logically non-sensical. Even after the plaintiff admitted that almost all her allegations did not happen, the court refused to dismiss the case under the auspices of the City Human Rights Law’s uniquely broad and remedial mandates. The “less well” standard is well-intentioned, and perhaps courts will be able to apply it fairly as the jurisprudence develops, but another approach could have been loosening existing standards instead of turning them upside-down.

The New York State Framework

New York State has amended its Human Rights Law numerous times. The past few years alone have seen substantial changes. In 2018, in the wake of the #MeToo movement, Governor Cuomo signed into law the 2019

New York State budget, which included numerous amendments to the State Human Rights Law, some of which included the following.

The protections of the State Human Rights Law were extended to non-employees, such as contractors, subcontractors, vendors, consultants, and others providing services to New York employers. For this reason, employers can now be held liable when these non-employees are sexually harassed on-site.

Limitations were also placed on confidentiality and arbitration clauses that concern sexual harassment claims. Agreements or contracts that attempt to limit the disclosure of facts underlying sexual harassment claims are unenforceable, unless such provisions are the victim's preference. There are also timing requirements involved with such provisions: the person agreeing to confidentiality must be afforded 21 days to decide whether to accept or reject such a non-disclosure provision. The 2018 amendments also made mandatory arbitration clauses that cover sexual harassment claims illegal, but, as mentioned above, this section of the law may be preempted by the Federal Arbitration Act.

New York State, in line with New York City, also requires that employers provide sexual harassment training to employees. In addition to satisfying other specific requirements, employers must adopt a sexual harassment policy.

In 2019, New York State continued to expand its Human Rights Law's reach. Some of the most notable changes included, but were not limited to, expanding the State Human Rights Law to all employers; extending the time period during which a person can file a complaint for sexual harassment with the New York State Division of Human Rights; creating the potential for individual liability by definition as opposed to only those instances where an individual "aids" or "abets" conduct prohibited by the State Human Rights Law; and expanding the rules that were previously particular to sexual harassment to all forms of discrimination.

Significantly, and of particular interest for this Article, the State legislature eliminated both the "severe or pervasive" standard, bringing itself in line with New York City's "less well" test, and the two-part *Ellerth / Faragher* affirmative defense available under Title VII, which allowed employers to avoid liability for sexual harassment so long as the supervisor's sexually harassing conduct did not result in the victim experiencing a tangible adverse employment action, the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise.⁴⁵

The New York State legislature expressly stated that "sexual harassment is [now] an unlawful discriminatory practice when it subjects an individual to *inferior terms, conditions or privileges of employment* because of the individual's membership in one or more...protected categories," "regardless of whether such harassment would be considered *severe or pervasive* under precedent applied to harassment claims."⁴⁶ Furthermore, "[t]he fact that [an] individual did not make a complaint about the harassment to [his or her] employer...shall not be determinative of whether such employer...shall be liable."⁴⁷ Making it abundantly clear that it was aligning itself with the New York City standards, the State legislature added an affirmative defense: "[H]arassing conduct does not rise above the level of what a reasonable victim of discrimination with the same protected characteristic would consider *petty slights or trivial inconveniences*."⁴⁸

In this way, in one legislative move, New York State abandoned its longstanding practice of following federal standards in favor of joining New York City's more plaintiff-friendly "less well" approach. Although the State Human Rights Law does not use the words "less well," defining sexual harassment as being subjected to "inferior terms, conditions or privileges of employment," when combined with "petty slights" defense, equates to an adoption of the City Human Rights Law's "less well" standard.

The Proven Flexibility of the "Severe or Pervasive" Test

The primary criticism of the “severe or pervasive” test is that it has allowed judges to dismiss otherwise viable cases. But the criticism, as demonstrated below, is misplaced. The fault lies with the judges applying the test, not in the test itself. If the legislature felt that cases were being dismissed too easily, it could have liberalized the existing analytical structure instead of redefining the approach entirely—just as Congress did with the American with Disabilities Act Amendments of 2008.

For example, in *Howley*, a female lieutenant firefighter, Ellen Howley, who was attempting to receive a promotion, was exposed to a tirade of sexual comments from her co-worker. During a firefighters’ benevolent association meeting, William Holdsworth used explicit, offensive, and derogatory language to denigrate Howley and to express his views that she was not promoted to chief based on her withholding or poorly performing sexual favors.⁴⁹ Although the district court held that one instance of verbal harassment, standing alone, could not support a hostile environment claim under the “severe or pervasive” standard, the Second Circuit disagreed. The Court engaged in a detailed analysis, explaining that there is no magic threshold number of harassing incidents that give rise to a hostile environment. The “severe or pervasive” test has the flexibility to adjust to various situations—even those where the alleged conduct only occurred once. With this in mind, the court held that “[a]lthough Holdsworth made his obscene comments only on one occasion, the evidence is that he did so at length, loudly, and in a large group in which Howley was the only female and many of the men were her subordinates. And his verbal assault included charges that Howley had gained her office of lieutenant only by [granting sexual favors]. It cannot be concluded as a matter of law that no rational juror could view such a tirade as humiliating and resulting in an intolerable alteration of Howley’s working conditions.”⁵⁰

This case demonstrates that the traditional criticism that the “severe or pervasive” test is inflexible and *requires* the dismissal of viable cases is misplaced. It is certainly the case that the “severe or pervasive” test is sometimes misapplied or misstated as “severe *and* pervasive,” but the test itself is viable. Occasional misapplications of law are not unique to the “severe or pervasive” test; they occur in all contexts where human value judgments play a role, which is essentially everywhere.

Consider another example: the *Schiano* case. Nicole Schiano was hired as an administrative assistant and promoted to corporate financial assistant. When she asked for a raise, one of her supervisors responded that she was “sleeping with the wrong employee.” He repeated this comment in the presence of her co-workers, and while she was sitting at her desk working, he would approach her from behind and place his hands on her back, neck, or shoulders while leaning into her. Her supervisor called her “hot” and even discussed the type of underwear she wore. Her supervisor’s actions affected her so much that Schiano requested that a partition be mounted around her cubicle to keep her supervisor from seeing her. Faced with these facts, the lower court dismissed her hostile work environment claim, finding that while her supervisor’s behavior was, “on occasion, undeniably porcine, it did not alter the terms and conditions of her employment” because the incidents were not particularly severe, they did not interfere with her job performance, and the frequency of the inappropriate behavior was not particularly continuous or regular.⁵¹

In a decision that vacated and remanded the lower court’s decision concerning Schiano’s hostile work environment claim, the Second Circuit reminded the district court that “the fact that the law requires harassment to be severe or pervasive before it can be actionable does not mean that employers are free from liability in all but the most egregious of cases.”⁵² Citing *Howley*, the Court explained that “[w]hether any single act was as severe as the single act in *Howley* is not dispositive. By extracting the question of how ‘humiliating’ an instance was from the larger context of the case, the district court failed to evaluate the relevant conduct as a whole.”⁵³

The decisions in *Howley* and *Schiano* demonstrate why the criticism of the “severe or pervasive” standard is misplaced. As the Court in *Schiano* emphasized, the “severe or pervasive” test is a fact-intensive, case-by-case standard, and it does not render itself to overarching generalizations. When Courts attempt to paint in broad strokes, as the lower court did in *Schiano*, the appellate courts are there to remedy misapplications of law.

Conclusion

In the past decade or so, we have seen first New York City and subsequently New York State expend significant effort to differentiate themselves from federal law. The goal—for both the City and State—has been to establish a strong departure from what the legislature representing each region has viewed as a tolerance for sexual harassment in the workplace. The goal itself—that is, combatting sexual harassment in the workplace—is unquestionably important. But in the author’s view, a complete abandonment of the “severe or pervasive” test was unnecessary for the reasons stated above.

Turning the standards applicable to hostile work environment cases upside-down will have serious ramifications for society and business. From one perspective, one could say that an unforgiving standard will create the best form of deterrence. From another perspective, such a standard—one that requires the court to ascertain if one was treated “less well” based on gender—has the potential to allow frivolous cases to fester in court for years, which has both a fiscal cost and societal cost: fiscal because defendants are forced to expend thousands of dollars defending meritless cases and societal because bad cases divert resources and attention away from those whose cases should be vindicated.

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RESOURCES

Office of the NYS Attorney General
Civil Rights Bureau
28 Liberty Street,
New York, NY 10005
(212) 416-8250
civil.rights@ag.ny.gov

U.S. Equal Employment Opportunity Commission
1-800-669-4000 1-800-669-6820 (TTY)
info@eEOC.gov eEOC.gov

NYS Division of Human Rights
1-888-392-3644
<http://www.dhr.ny.gov>

NYC Commission on Human Rights (NYCCHR)
311 or 212-306-7450
<http://www.nyc.gov/html/cchr/>

IF YOU NEED SUPPORT

Being sexually harassed can be a traumatic experience. Places to find support include:

- Woman’s Justice NOW Helpline: (212) 627-9895
- Legal Momentum Equality Works Program: (212) 925-6635
- Safe Horizon Crime Victim’s Hotline:
(866) 689-HELP (4357) or
Rape & Sexual Assault Hotline:
(212) 227-3000

¹ Alyssa Milano (@Alyssa_Milano), Twitter (Oct. 15, 2017, 3:21 PM), <https://twitter.com/alyssa_milano/status/919659438700670976?lang=en>.

² Lisa Respers France, *#MeToo: Social Media Flooded with Personal Stories of Assault*, CNN.COM (Oct. 16, 2017), available at <https://www.cnn.com/2017/10/15/entertainment/me-too-twitter-alyssa-milano/index.html>.

³ Andrea Park, *#MeToo Reaches 85 Countries with 1.7M Tweets*, CBSNEWS.COM (Oct. 24, 2017), available at <https://www.cbsnews.com/news/metoo-reaches-85-countries-with-1-7-million-tweets/>.

⁴ Stephanie Zacharek, Eliana Dockerman, & Haley Sweetland Edwards, *The Silence Breakers*, TIME.COM (Dec. 6, 2017), available at <https://time.com/time-person-of-the-year-2017-silence-breakers/>.

⁵ Audrey Carlsen et al., *#MeToo Brought Down 201 Powerful Men. Newly Half of Their Replacements are Women*, THE NEW YORK TIMES (Oct. 29, 2018), available at <https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html>.

⁶ Committee Report, *The Council Report of the Governmental Affairs Division, Committee on General Welfare*, NEW YORK CITY COUNCIL (August 17, 2005), available at <http://www.antibiaslaw.com/sites/default/files/all/CommitteeReport081705.pdf> (“Restoration Act Committee Report”).

⁷ See *Latif v. Morgan Stanley & Co. LLC*, 2019 WL 2610985, at *2-3 (S.D.N.Y. June 26, 2019) (“The only dispute between the parties is whether Latif’s sexual harassment claims are subject to the Arbitration Agreement in light of recently enacted New York Law, N.Y.

C.P.L.R. § 7515....Under the terms of the Arbitration Agreement, Latif’s sexual harassment claims are subject to mandatory arbitration....The [Federal Arbitration Act] sets forth a strong presumption that arbitration agreements are enforceable and this presumption is not displaced by § 7515.”).

⁸ Press Release, *EEOC Releases Fiscal Year 2018 Enforcement and Litigation Data*, EEOC (April 10, 2019), available at <https://www1.eeoc.gov/eeoc/newsroom/release/4-10-19.cfm>.

⁹ *What You Should Know: EEOC Leads the Way in Preventing Workplace Harassment*, EEOC (last visited September 20, 2019), available at https://www.eeoc.gov/eeoc/newsroom/wysk/preventing-workplace-harassment.cfm?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=.

¹⁰ Testimony of Carmelyn P. Malalis, Commissioner & Chair of the New York City Commission on Human Rights, *Committee on Women and Civil and Human Rights* (Feb. 28, 2018), available at https://www1.nyc.gov/assets/cchr/downloads/pdf/SexualHarassmentHearing_Testimony.pdf.

¹¹ Rhitu Chatterjee, *A New Survey Finds 81 Percent of Women Have Experienced Sexual Harassment*, NPR.ORG. (Feb. 21, 2018), available at <https://www.npr.org/sections/thetwo-way/2018/02/21/587671849/a-new-survey-finds-eighty-percent-of-women-have-experienced-sexual-harassment>.

¹² President John F. Kennedy, Special Message to the Congress on Civil Rights (Feb. 28, 1963), available at <https://www.presidency.ucsb.edu/documents/special-message-the-congress-civil-rights>.

¹³ *Id.*

¹⁴ President Kennedy, Special Message to the Congress on Civil Rights and Job Opportunities (June 19, 1963), available at <https://www.presidency.ucsb.edu/documents/special-message-the-congress-civil-rights-and-job-opportunities>.

¹⁵ See *Rabidue v. Osceola Refining Co.*, 584 F. Supp. 419, 428 n.36 (E.D. Mich. 1984) (This Court—like all Title VII enthusiasts—is well aware that the sex discrimination prohibition was added to Title VII as a joke by the notorious civil rights opponent Howard W. Smith. But the joke backfired on Smith when the amendment was adopted on the floor of the House....”) (citing Francis J. Vaas, Title VII: Legislative History, 7 B.C. Int’l & Comp. L. Rev. 431, 441-42 (1966), *aff’d*, 805 F.2d 611 (6th Cir. 1986).

¹⁶ Gilbert F. Casellas & Diane M. Soubly, WORKPLACE HARASSMENT LAW 1.1 (2d Ed.) (2018).

¹⁷ Robert C. Bird, *More Than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137, 160 (1997) (hereinafter “Bird”).

¹⁸ Bird, *supra* note 17, at 139 n. 7.

¹⁹ 42 U.S.C. § 2000e-2(a).

²⁰ 42 U.S.C. § 2000e-2(a).

²¹ See *Texas Dep’t of Comm. Affairs v. Burdine*, 450 U.S. 248, 252-54 (1981).

²² *Alfano v. Costello*, 294 F.3d 365, 373 (2d Cir. 2002).

²³ 29 C.F.R. § 1604.11(a)(3).

²⁴ *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (“*Meritor*”).

²⁵ *Meritor*, 477 U.S. at 67.

²⁶ *Harris v. Forklift Systems, Inc.*, 1991 WL 487444, *6 (M.D. Tenn. Feb. 4, 1991), *aff’d*, 976 F.2d 733 (6th Cir. 1992), *rev’d*, 510 U.S. 17 (1993).

²⁷ *Id.* at 7.

²⁸ *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22 (1993).

²⁹ *Id.* at 23.

³⁰ *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998) (citing *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993)).

³¹ *Harris*, 510 U.S. at 22.

³² *Paul v. Postgraduate Center for Mental Health*, 97 F. Supp. 3d 141, 168 (E.D.N.Y. 2015).

³³ *Schiano v. Quality Payroll Systems, Inc.*, 445 F.3d 597, 606 & 608 (2d Cir. 2006) (noting that “of course, [there are] cases in which it is clear...that after assessing the frequency of the misbehavior in light of the seriousness, the facts cannot, as a matter of law, be the basis of a successful hostile work environment claim.”).

³⁴ *Estate of Hamilton v. City of New York*, 627 F.3d 50, 55 (2d Cir. 2010) (“Our consideration of claims brought under the state and city human rights laws parallels the analysis used in Title VII claims.”), *superseded by legislation*, *Mihalik v. Credit Agricole Cheuvreux North America, Inc.*, 715 F.3d 102 (2d Cir. 2013).

³⁵ Craig Gurian, *A Return to Eyes on the Prize: Litigating Under the Restored New York City Human Rights Law*, 33 FORDHAM URB. L. J. 255, 262 (2006).

³⁶ *McGrath v. Toys “R” Us, Inc.*, 3 N.Y.3d 421, 433 (2004), *superseded by statute*, The Restoration Act of 2005, Local Law No. 85 of the City of New York (2005).

³⁷ The Restoration Act of 2005, Local Law No. 85 of the City of New York (2005).

³⁸ Comm. On Gen. Welfare. Report on Prop. Int. No. 22-A, at *4 (Aug. 17, 2005).

³⁹ *Id.*

⁴⁰ *Williams v. New York City Housing Authority*, 61 A.D.3d 62, 74 (1st Dep’t 2009).

⁴¹ *Id.* at 39 (emphasis added).

⁴² *Id.* at 80 (emphasis added).

⁴³ *Mihalik v. Credit Agricole Cheuvreux North America, Inc.*, 715 F.3d 102, 110 fn. 8 (2d Cir. 2013).

⁴⁴ Americans with Disabilities Amendments Act of 2008, PL 110-325 (S 3406), available at <https://www.eeoc.gov/laws/statutes/adaaa.cfm>.

⁴⁵ *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

⁴⁶ A. 8421, 2019-2020 Reg. Sess., at § 2 (June 16, 2019), available at <https://legislation.nysenate.gov/pdf/bills/2019/A8421>.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Howley v. Town of Stratford*, 217 F.3d 141, 148 (2d Cir. 2000).

⁵⁰ *Id.* at 154.

⁵¹ *Schiano v. Quality Payroll Systems, Inc.*, 2005 WL 1638167, at *1-6 (E.D.N.Y. July 12, 2005), *aff’d in part & vacated in part*, 445 F.3d 597 (2d Cir. 2006).

⁵² *Schiano v. Quality Payroll Systems, Inc.*, 445 F.3d 597, 606 (2d Cir. 2006).

⁵³ *Id.*