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LITIGATING SEXUAL HARASSMENT: ATTACKING AN OLD PROBLEM USING CREATIVE APPROACHES (WITH THE ILLINOIS GENDER VIOLENCE ACT AS A MODEL FOR A NEW APPROACH)

DISCLAIMER

- This presentation is intended to give an overview of litigating sexual harassment claims under federal law, and to provide some state law-derived examples (primarily but not exclusively from Illinois) on other strategies to pursue these claims
- We do not have time to cover everything relevant, so please keep in mind that this is not exhaustive.

DISCLAIMER

- Employers and employees have other rights and obligations not enumerated in this presentation. The the Equal Employment Opportunity Commission ("EEOC"), the Illinois Department of Human Rights ("IDHR") (in Illinois, other states have similar state agencies), and other state and federal agencies provide countless fact sheets, guidelines, and other helpful and user-friendly resources that people should consult for more exhaustive and detailed requirements and best practices.

OVERVIEW

- Let's mention "at-will".
- Illinois/7th Circuit will be a minor focus, but there will be case law from nationwide, and we'll touch on all circuits and several states.
- "Crash course" in federal discrimination laws to provide a base of knowledge.
- Federally recognized causes of action for sexual harassment.
- Brief overview of companion state laws to Title VII.
- The Illinois Gender Violence Act as a model for how some states have addressed issues related to statutes of limitations and delayed outcry claims.
- Examining some states with similar laws.
- Presentation intended to provide a framework for what you should consider.
- Feel free to reach out for clarification or follow-up questions.

Fair warning: we're going to do a lot of set-up to get to the Illinois Gender Violence Act.

AT-WILL EMPLOYMENT

- General Rule in Illinois (and most states):
  - It means that an employer can terminate an employee at any time for any reason, except an illegal one, or for no reason without incurring legal liability.
  - Likewise, an employee is free to leave a job at any time for any or no reason with no adverse legal consequences.
  - Empty employment agreements are common.

FEDERAL ANTI-DISCRIMINATION STATUTES

- Not "everything" is legal. Discrimination is prohibited by statute.
  - Based on protected characteristics under various civil rights statutes:
    - Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* ("Title VII") prohibits employment discrimination on the basis of:
      - Race, color, religion, sex, and national origin.
        - "Sex" now covers gender identity and sexual orientation.
          - *Bostock v. Clayton County* (2020) (sexual orientation)
          - *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission* (2020) (gender identity)

FEDERAL ANTI-DISCRIMINATION STATUTES (CONTINUED)

- Illegal reasons for discriminating (continued):
  - § 1981 of the Civil Rights Act of 1991, 42 U.S.C. §1981: forbids race discrimination in contractual relationships
    - The same requirements for proving discrimination apply to claims under Title VII, § 1981, and § 1983. *Egonmwan v. Cook County Sheriff's Dept.*, 602 F.3d 845, 850, n. 7 (7th Cir. 2010).
  - Age Discrimination in Employment Act of 1967 ("ADEA") forbids employment discrimination on the basis of:
    - Age (people aged 40 or older it does not protect workers under the age of 40).

FEDERAL ANTI-DISCRIMINATION STATUTES (CONTINUED)

- Americans with Disabilities Act of 1990 ("ADA") prohibits employment discrimination on the basis of:
  - Individuals with a disability, as defined by the ADA as a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such an impairment, or a person who is perceived by others as having such an impairment. The ADA does not specifically name all of the impairments that are covered.

FEDERAL ANTI-DISCRIMINATION STATUTES (CONTINUED)

- The Genetic Information Nondiscrimination Act of 2008 prohibits discrimination based on genetic information.
- Equal Pay Act of 1963 prohibits gender-motivated pay discrimination.
- Believe it or not…
  - This is not an exhaustive list.
  - Many states also have companion/stronger laws!

WHAT DO WE MEAN BY "DISCRIMINATION?"

Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer ... to discriminate against any individual with respect to his *compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.*" 42 U.S.C. § 2000e–2(a)(1).

Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 63 (1986) (emphasis added)

WHAT DO WE MEAN BY "DISCRIMINATION?" (CONTINUED)

Recognized forms of unlawful discrimination:

- Disparate treatment (i.e. two similarly situated (not identical) employees are treated differently with respect to the terms and conditions of employment (pay, promotions, work assignments, discipline, etc…).
- Stereotyping (typically but not always gender) as a mechanism for such disparate treatment:
  - *Price Waterhouse v. Hopkins*:
    - The U.S. Supreme Court held that discrimination based on gender stereotyping is a form of sex discrimination prohibited by Title VII of the Civil Rights Act.
    - This means that employers cannot make employment decisions based on stereotyped expectations of how men or women should look or behave. The Court noted that an employer who acts based on the belief that a woman cannot be aggressive, or that a man cannot be gentle, is engaging in sex discrimination.
    - In other words, an employer who discriminates against a woman because she does not wear dresses or makeup, or against a man because he does wear dresses or makeup, has acted on the basis of gender.
    - This principle has been applied in subsequent cases to prohibit discrimination based on nonconformity with gender norms or expectations, including cases involving same-sex harassment, and racial stereotyping cases.

WHAT DO WE MEAN BY "DISCRIMINATION?" (CONTINUED)

Retaliation (occurs when an employer takes an adverse employment action against an employee because they have engaged in a protected activity (i.e. opposing a practice deemed unlawful by statute by complaining/reporting, "saying no," filing a charge, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under the statute).

- Adverse employment action?
  - one that is materially adverse, meaning it is more than a mere inconvenience or an alteration of job responsibilities, and is reasonably likely to deter employees from engaging in protected activity. This can include actions such as unfavorable job references, changes in work schedules, and other employment decisions that have an impact on the employment status or conditions. To establish a prima facie case of retaliation, an employee must demonstrate that they engaged in a protected activity, they suffered an adverse employment action, and there is a causal link between the activity and the employment action.

WHAT DO WE MEAN BY "DISCRIMINATION?" (CONTINUED)

Harassment (based on race, sex, religion, national origin) and, later (age (ADEA), disability status (ADA), gender identity (Title VII), sexual orientation (Title VII), and others covered by state laws.

- First recognized by SCOTUS in *Meritor Savings Bank v. Vinson* (1986).
  - Supreme Court held that sexual harassment that creates a hostile or abusive work environment constitutes a form of sex discrimination under Title VII of the Civil Rights Act of 1964. The Court held that an employer could be held liable for the sexual harassment perpetrated by its employees under certain circumstances.

WHAT DO WE MEAN BY "DISCRIMINATION?" (CONTINUED)

- For sex harassment, specifically, two types:
  - Quid pro quo harassment:
    - occurs when a supervisor or other person with authority demands sexual favors in exchange for job benefits or threatens negative employment consequences if the employee does not comply with the sexual demands (*Meritor)*
      - *Quid pro quo* sexual harassment consists of unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature, if submission to such conduct is made either implicitly or explicitly a term or condition of an individual's employment, or if submission or rejection is used as the basis for employment decisions affecting an individual.
        Ramirez v. Kelly, 1997 WL 223053, at *2 (N.D. Ill. May 1, 1997).
  - Hostile work environment sexual harassment (today's topic).

HOSTILE WORK ENVIRONMENT / HARASSMENT (CONTINUED)

Brief note: we're only addressing hostile work environment sexual harassment, but know that with some minor nuances, the hostile work environment tests we are addressing today are applicable to harassment based on race, age, disability, and other protected characteristics.

HOSTILE WORK ENVIRONMENT / HARASSMENT

Sexual harassment first recognized as an actionable form of discrimination in *Meritor Sav. Bank, FSB, v. Vinson:*

"Since the Guidelines were issued, courts have uniformly held, and we agree, that a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment. As the Court of Appeals for the Eleventh Circuit wrote in *Henson v. Dundee,* 682 F.2d 897, 902 (1982):

> "Sexual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets." Accord, *Katz v. Dole,* 709 F.2d 251, 254–255 (CA4 1983); *Bundy v. Jackson,* 205 U.S.App.D.C., at 444–454, 641 F.2d, at 934–944; *Zabkowicz v. West Bend Co.,* 589 F.Supp. 780 (ED Wis.1984)."

Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66–67, 106 S. Ct. 2399, 2405, 91 L. Ed. 2d 49 (1986)

HOSTILE WORK ENVIRONMENT / HARASSMENT (CONTINUED)

Not all harassment is actionable. Harassment must create a hostile work environment:

> Of course, as the courts in both *Rogers* and *Henson* recognized, not all workplace conduct that may be described as "harassment" affects a "term, condition, or privilege" of employment within the meaning of Title VII. See *Rogers v. EEOC, supra,* at 238 ("mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee" would not affect the conditions of employment to sufficiently significant degree to violate Title VII); *Henson,* 682 F.2d, at 904 (quoting same). ***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***." *Ibid.* Respondent's allegations in this case—which include not only pervasive harassment but also criminal conduct of the most serious nature—are plainly sufficient to state a claim for "hostile environment" sexual harassment.

Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67, 106 S. Ct. 2399, 2405–06, 91 L. Ed. 2d 49 (1986) (internal citations omitted) (emphasis added)

Takeaway: not "loose or stray" comments

HOSTILE WORK ENVIRONMENT / HARASSMENT (CONTINUED)

Test clarified in *Harris v. Forklift Systems*:

> "But we can say that whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required."

Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993)

HOSTILE WORK ENVIRONMENT / HARASSMENT (CONTINUED)

Same-sex sexual harassment claims recognized as actionable.

Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998)

HOSTILE WORK ENVIRONMENT / HARASSMENT (CONTINUED)

In order to establish a prima facie case of hostile environment sexual harassment, a plaintiff must show that:

(1) she was subjected to sexual harassment in the form of sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature;
(2) the foregoing advances, etc… were unwelcome;
(3) the harassment was based on sex;
(4) the sexual harassment had the effect of unreasonably interfering with the plaintiff's work performance in creating an intimidating, hostile or offensive working environment that affected seriously the psychological well-being of the plaintiff; and
(5) there is a basis for employer liability.

Parkins v. Civ. Constructors of Illinois, Inc., 163 F.3d 1027, 1032 (7th Cir. 1998)

HOSTILE WORK ENVIRONMENT / HARASSMENT (CONTINUED)

Note the "fun" wrinkle for sex harassment claims:

> In order to prove her case under either form of sexual harassment, plaintiff must prove, by a preponderance of the evidence, that Kelly's sexual advances were unwelcome. *See Meritor,* 477 U.S. at 68, 106 S.Ct. at 2406 (**"The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.' "** (citing 29 CFR § 1604.11(a) (1985))).

Ramirez v. Kelly, 1997 WL 223053, at *2 (N.D. Ill. May 1, 1997) (emphasis added)

HOSTILE WORK ENVIRONMENT / HARASSMENT (CONTINUED)

Faragher/Ellerth (12 years after *Meritor* & *Harris*):

Seminal cases, apply to liability…but we'll mention here!

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

HOSTILE WORK ENVIRONMENT / HARASSMENT (CONTINUED)

Faragher/Ellerth (12 years after *Meritor* & *Harris*):

- The Supreme Court reaffirmed the "severe or pervasive" test—*Harris's* core holding—in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998).
- Cases invalidate a portion of prior caselaw in certain circuits and required a recasting of the analytical framework for a hostile-work-environment claim based on a supervisor's actions.
- Previously, to establish such a claim, a plaintiff had to show not only that (1) she was a member of a protected class; (2) she was subject to unwelcomed sexual harassment; (3) the harassment was based on her sex; and (4) the harassment created a hostile work environment; but also that (5) the supervisor's harassing actions were foreseeable or fell within his or her scope of employment, and the employer failed to respond adequately and effectively.
- After *Faragher* and *Burlington Industries,* however, it is no longer enough for an employer to take corrective action; employers now have an *affirmative duty* to prevent sexual harassment by supervisors. Once an employee has established actionable discrimination involving "no tangible employment action," *Faragher,* 118 S.Ct. at 2293, an employer can escape liability only if it took reasonable care to *prevent and correct* any sexually harassing behavior. *Id.*

HARASSMENT BASED ON SEX?

- Courts determine whether harassment is based on sex by examining the nature of the conduct and the context in which it occurred. The harassment must be shown to be not merely tinged with offensive sexual connotations, but to actually constitute "discrimination... because of... sex" *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82, 118 S. Ct. 998, 1003, 140 L. Ed. 2d 201 (1998)
- Courts may consider if the harassing behavior was "sex-specific and derogatory" indicating that the harasser was motivated by general hostility to the presence of a particular sex in the workplace.
    - Evidence that the harasser treats members of one sex differently from the other could also be used to show that the harassment was based on sex.
    - For example, if women were the primary target of such harassment, this could indicate that the harassment was based on sex.
    - Ex. Not always "sexual" in nature, sometimes it involves gender-motivated insults or comments alone.
- Not always obvious/opposite sex:
    - Ex. *Nichols v. Azteca Rest. Enterprises, Inc.*, 256 F.3d 864, 874 (9th Cir. 2001) ("Sanchez asserts that the verbal abuse at issue was based upon the perception that he is effeminate and, therefore, occurred because of sex. In short, Sanchez contends that he was harassed because he failed to conform to a male stereotype.").

HARASSMENT BASED ON SEX?

- Circumstantial evidence, even if the harassing conduct and statements are facially neutral, can be used to show that such harassment was, in fact, because of sex.
  - This could include evidence that the harasser did not subject male employees to similar mistreatment.
- Therefore, the determination depends on the totality of the circumstances, including the nature of the conduct, the context in which it occurs, and the differential treatment of individuals based on their sex.
  - Ex. *Livingston v. Marion Bank & Tr. Co.*, 30 F. Supp. 3d 1285, 1305 (N.D. Ala. 2014):

"Accordingly, whether an otherwise potentially ambiguous statement or incident might be reasonably construed as motivated by a prohibited animus may depend on a host of factors and circumstances, including the immediately surrounding context, the parties' prior course of dealings, local custom, and historical practices. *See id.,* 683 F.3d at 1297–99 (finding a question of fact with regard to whether banana peels left on a truck driven by the African–American plaintiff was intended "to send a message of racial intolerance."); *Ash v. Tyson Foods, Inc.,* 546 U.S. 454, 456, 126 S.Ct. 1195, 163 L.Ed.2d 1053 (2006) (rejecting the Eleventh Circuit's suggestion that a plant manager's reference to each of the African–American plaintiffs as "boy" could not be evidence of discriminatory animus unless it was "modified by a racial classification like 'black' or 'white.' ")."

SEVERE OR PERVASIVE?

- Not all conduct is severe or to be "policed":

  We expect a certain level of maturity and thick skin from employees. "Offhand comments, isolated incidents, and simple teasing do not rise to the level of conduct that alters the terms and conditions of employment." *Passananti v. Cook Cty.*, 689 F.3d 655, 667 (7th Cir. 2012). "Discrimination laws do not mandate admirable behavior from employers, through their supervisors or other employees. Instead, the law forbids an employer from creating an actionably hostile work environment for members of protected classes." *Russell v. Bd. of Trs. of Univ. of Ill. at Chicago*, 243 F.3d 336, 343 (7th Cir. 2001). As the dissent rightfully points out, the environment need not reach the point of "hellishness," as some cases once argued. ***The Supreme Court standard dictates that the discrimination must be only so severe or pervasive so as to affect the terms and conditions of employment***. *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, 21–22, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993). This is a far cry from hellish.

Johnson v. Advoc. Health & Hosps. Corp., 892 F.3d 887, 900–01 (7th Cir. 2018) (emphasis added) (internal citations omitted)

SEVERE OR PERVASIVE (CONTINUED)

> Sexual harassment which is so " 'severe *or* pervasive as to 'alter the conditions of the victim's employment and creates an abusive working environment' violates Title VII." *Faragher v. City of Boca Raton,* 524 U.S. 775, ——, 118 S.Ct. 2275, 2283, 141 L.Ed.2d 662 (1998) (quoting *Meritor Sav. Bank, FSB v. Vinson,* 477 U.S. 57, 67, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986) (internal quotations omitted)).

Parkins v. Civ. Constructors of Illinois, Inc., 163 F.3d 1027, 1032 (7th Cir. 1998) (emphasis added)

*Note: the same "severe or pervasive" as to "alter the conditions of the victim's employment" standard also applies to claims for harassment based on gender identity, sexual orientation, race, age, disability, etc…

**Note: severe *or* pervasive, not *and.*

HOSTILE WORK ENVIRONMENT / HARASSMENT (CONTINUED)

- What is "severe or pervasive"?

  When the workplace is permeated with "discriminatory intimidation, ridicule, and insult," 477 U.S., at 65, 106 S.Ct., at 2405, that is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment," *id.,* at 67, 106 S.Ct., at 2405 (internal brackets and quotation marks omitted), Title VII is violated.

Harris v. Forklift Sys., Inc., 510 U.S. 17, 21, 114 S. Ct. 367, 370, 126 L. Ed. 2d 295 (1993)

HOSTILE WORK ENVIRONMENT / HARASSMENT (CONTINUED)

- What is "severe or pervasive"? (continued)

  Whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances, which may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is relevant in determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.

Harris v. Forklift Sys., Inc., 510 U.S. 17, 114 S. Ct. 367, 368–69, 126 L. Ed. 2d 295 (1993)

TYPICALLY, A FACT QUESTION!

WHAT IS "SEVERE OR PERVASIVE" (CIRCUIT-BY-CIRCUIT):

What is "severe or pervasive" (circuit-by-circuit (not DC Circuit)):

- 1st:

  In the Title VII context, "to amount to a hostile work environment, the alleged harassment must be 'severe or pervasive,' " in light of (i) "the frequency and severity of the discriminatory conduct," (ii) whether it was "physically threatening or humiliating," (iii) whether it "unreasonably interfered with the employee's work performance," and (iv) "the effect of the conduct on the employee's psychological well-being." *See, e.g., Gómez-Pérez v. Potter*, 452 F. App'x 3, 9 & n.8 (1st Cir. 2011) (unpublished) (quoting *Che v. Mass. Bay Transp. Auth.*, 342 F.3d 31, 40 (1st Cir. 2003)). "Where an employee cannot establish pervasiveness, she carries the burden to show that the retaliatory harassment was 'so severe that it rendered her work environment objectively hostile and abusive.' " *Id.* (quoting *Marrero v. Goya of P.R., Inc.*, 304 F.3d 7, 26 (1st Cir. 2002)).

Salmon v. Lang, 57 F.4th 296, 314, n11 (1st Cir. 2022)

WHAT IS "SEVERE OR PERVASIVE" (CIRCUIT-BY-CIRCUIT): (CONTINUED)

What is "severe or pervasive" (circuit-by-circuit):

- 2nd:

  To survive summary judgment on a claim of hostile work environment harassment, a plaintiff must "produce evidence that the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment." *Cruz*, 202 F.3d at 570 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993)) (internal quotation marks omitted). Hostile work environment claims brought under Title VII, § 1981, and the NYSHRL are assessed using the same standard. *See, e.g.*, *Littlejohn v. City of New York*, 795 F.3d 297, 320-21 (2d Cir. 2015); *Zheng-Smith v. Nassau Health Care Corp.*, 486 F. Supp. 3d 611, 623 (E.D.N.Y. 2020); *Farmer v. Shake Shack Enters., LLC*, 473 F. Supp. 3d 309, 334 (S.D.N.Y. 2020) (citing *Summa v. Hofstra Univ.*, 708 F.3d 115, 123-24 (2d Cir. 2013)).

  We employ a totality of the circumstances approach to evaluate whether an environment is hostile and abusive, 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." *Harris*, 510 U.S. at 23, 114 S.Ct. 367. "Isolated incidents of harassment ordinarily do not rise to this level," *Cruz*, 202 F.3d at 570 (citing *Kotcher v. Rosa & Sullivan Appliance Ctr., Inc.*, 957 F.2d 59, 62 (2d Cir. 1992)), but we have recognized that "a single act can create a hostile work environment if it in fact 'works a transformation of the plaintiff's workplace.' " *Feingold v. New York*, 366 F.3d 138, 150 (2d Cir. 2004) (quoting *Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 149 (2d Cir. 1997)) (alteration adopted).

Banks v. Gen. Motors, LLC, 81 F.4th 242, 261–62 (2d Cir. 2023)

WHAT IS "SEVERE OR PERVASIVE" (CIRCUIT-BY-CIRCUIT): (CONTINUED)

What is "severe or pervasive" (circuit-by-circuit):

- 2nd:

  A plaintiff must show that "either a single incident was extraordinarily severe, or that a series of incidents were 'sufficiently continuous and concerted' to have altered the conditions of her working environment." *Alfano v. Costello*, 294 F.3d 365, 374 (2d Cir. 2002) (quoting *Cruz*, 202 F.3d at 570). This assessment has both an objective and subjective component: "the misconduct shown must be severe or pervasive enough to create an objectively hostile or abusive work environment, and the victim must also subjectively perceive that environment to be abusive." *Rasmy v. Marriott Int'l, Inc.*, 952 F.3d 379, 387 (2d Cir. 2020); *see also McGullam v. Cedar Graphics, Inc.*, 609 F.3d 70, 79 (2d Cir. 2010).

Banks v. Gen. Motors, LLC, 81 F.4th 242, 261–62 (2d Cir. 2023)

WHAT IS "SEVERE OR PERVASIVE" (CIRCUIT-BY-CIRCUIT): (CONTINUED)

What is "severe or pervasive" (circuit-by-circuit):

- 3rd:

  Regardless of what a harasser's intention is, if a plaintiff presents sufficient evidence to give rise to an inference of ***279** discrimination by offering proof that her "workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment," *Harris v. Forklift Sys., Inc.,* 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993) (internal quotation marks and citation omitted), and the conduct is based on one of the categories protected under Title VII, a hostile work environment claim will survive summary judgment. Here, almost all of the incidents alleged centered around Abramson's insistence that she not work during the Sabbath. Therefore, we hold that where, as here, the evidence tends to show that the harasser's conduct was intentionally directed toward the plaintiff because of her religion, the first prong of the prima facie case is met.

Abramson v. William Paterson Coll. of New Jersey, 260 F.3d 265, 278–79 (3d Cir. 2001)

WHAT IS "SEVERE OR PERVASIVE" (CIRCUIT-BY-CIRCUIT): (CONTINUED)

What is "severe or pervasive" (circuit-by-circuit):

- 3rd:

> Turning to the remaining elements of the prima facie case for hostile work environment, we find that the evidence Abramson presented was sufficient to satisfy her burden on the other prongs as well. We conclude that the many incidents recounted by Abramson, coupled with the declarations of other WPC professors, are relevant and probative as to prongs two through four of the prima facie case for hostile work environment claims.[8] Though we will address each prong individually, first, we briefly note the evidence that the District Court should have considered when ruling on Abramson's hostile work environment claim:[9] (1) Seminoff's "unprecedented" monitoring of Abramson's conferences and absences; (2) WPC charging Abramson with a sick day on a Jewish holiday when she was not scheduled to teach; (3) both Wepner and Seminoff, on separate occasions, criticizing and raising their voices at Abramson regarding her lack of availability during the Sabbath; (4) Wepner scheduling meetings on Jewish holidays and refusing to change them so Abramson could attend; (5) Wepner's pointed statement to Abramson regarding her faith and behavior ("The trouble with you is that it doesn't show that you are Orthodox.").

Abramson v. William Paterson Coll. of New Jersey, 260 F.3d 265, 278–79 (3d Cir. 2001)

WHAT IS "SEVERE OR PERVASIVE" (CIRCUIT-BY-CIRCUIT): (CONTINUED)

What is "severe or pervasive" (circuit-by-circuit):

- 4th:

  To demonstrate a hostile work environment claim, an employee must prove that (1) he experienced unwelcome conduct, (2) the conduct was based on a protected characteristic under the relevant statute, (3) the conduct was sufficiently severe or pervasive to alter the conditions of employment and create an abusive atmosphere, and (4) the conduct is imputable to the employer. *See, e.g., Laurent-Workman v. Wormuth*, 54 F.4th 201, 210–12 (4th Cir. 2022); *Chapman v. Oakland Living Ctr., Inc.*, 48 F.4th 222, 229 (4th Cir. 2022); *Perkins v. Int'l Paper Co.*, 936 F.3d 196, 207–08 (4th Cir. 2019); *Parker v. Reema Consulting Servs., Inc.*, 915 F.3d 297, 302 (4th Cir. 2019); *Boyer-Liberto v. Fontainebleau Corp.*, 786 F.3d 264, 277 (4th Cir. 2015) (en banc); *Okoli v. City of Baltimore*, 648 F.3d 216, 220–21 (4th Cir. 2011); *E.E.O.C. v. Fairbrook Med. Clinic, P. A.*, 609 F.3d 320, 327 (4th Cir. 2010); *Ziskie v. Mineta*, 547 F.3d 220, 224 (4th Cir. 2008); *Ocheltree v. Scollon Prods., Inc.*, 335 F.3d 325, 331 (4th Cir. 2003) (en banc); *Coleman v. Altec, Inc.*, No. 5:16-CV-954, 2018 WL 4289610, at *3 (E.D.N.C. Sept. 7, 2018) (unpublished); *Brown v. Wake Cnty. Gov't*, No. 5:16-CV-806, 2017 WL 2982971, at *5 (E.D.N.C. July 12, 2017) (unpublished). An employee also must show that his protected characteristic was the "but for" cause of the alleged harassment. *See, e.g., Gilliam v. S.C. Dep't of Juv. Just.*, 474 F.3d 134, 142 (4th Cir. 2007).

  To determine whether conduct was sufficiently severe or pervasive to alter the employee's terms and conditions of employment and create an abusive working environment based on a protected characteristic, the court examines the allegations both subjectively and objectively. *See, e.g., Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–22, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993). First, the employee must subjectively consider the conduct to be sufficiently severe or pervasive as to alter his conditions of employment. *See, e.g., Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 270–71, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001) (per curiam); *Faragher v. City of Boca Raton*, 524 U.S. 775, 787–88, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998); *Boyer-Liberto*, 786 F.3d at 277. Second, a court views the conduct from the perspective of a reasonable person in the employee's position to determine whether it is objectively severe or pervasive. *See, e.g., Breeden*, 532 U.S. at 271, 121 S.Ct. 1508; *Faragher*, 524 U.S. at 787–88, 118 S.Ct. 2275; *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81–82, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998); *Boyer-Liberto*, 786 F.3d at 277.

Torres v. Duke Energy Progress, LLC, No. 5:22-CV-369-D, 2023 WL 5420221, at *2–3 (E.D.N.C. Aug. 22, 2023)

WHAT IS "SEVERE OR PERVASIVE" (CIRCUIT-BY-CIRCUIT): (CONTINUED)

What is "severe or pervasive" (circuit-by-circuit):

- 4th:

  These factors include the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Okoli v. City of Baltimore*, 648 F.3d 216, 220 (4th Cir. 2011). However, "[a]ctivities like simple teasing, offhand comments, and off-color jokes, while often regrettable, do not cross the line into actionable misconduct." *E.E.O.C. v. Fairbrook Med. Clinic, P.A.*, 609 F.3d 320, 328 (4th Cir. 2010).

Laurent-Workman v. Wormuth, 54 F.4th 201, 211 (4th Cir. 2022)

WHAT IS "SEVERE OR PERVASIVE" (CIRCUIT-BY-CIRCUIT): (CONTINUED)

What is "severe or pervasive" (circuit-by-circuit):

- 5th Circuit:

  "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 environment."[16] Reviewing courts must consider "all the circumstances," which may include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[17]

Matherne v. Ruba Mgmt., 624 F. App'x 835, 839 (5th Cir. 2015)

HOSTILE WORK ENVIRONMENT / HARASSMENT (CONTINUED)

What is "severe or pervasive" (circuit-by-circuit):

- 6th Circuit:

  In determining whether the harassment is sufficiently severe or pervasive to create a hostile work environment, "the conduct in question must be judged by both an objective and a subjective standard." *Abeita v. TransAmerica Mailings, Inc.*, 159 F.3d 246, 251 (6th Cir. 1998) (quoting *Black v. Zaring Homes, Inc.*, 104 F.3d 822, 826 (6th Cir. 1997)). This means that "[t]he conduct must be severe or pervasive enough to create an environment that a reasonable person would find hostile or abusive, and the victim must subjectively regard that environment as abusive." *Id.* (quoting *Black*, 104 F.3d at 826).

Johnson v. Ford Motor Co., 13 F.4th 493, 505 (6th Cir. 2021)

WHAT IS "SEVERE OR PERVASIVE" (CIRCUIT-BY-CIRCUIT): (CONTINUED)

What is "severe or pervasive" (circuit-by-circuit):

- 6th Circuit:

> We have clarified that "[t]he totality of the circumstances, of necessity, includes all incidents of alleged harassment;" therefore, "the issue is not whether each incident of harassment *standing alone* is sufficient to sustain the cause of action in a hostile environment case, but whether—taken together—the reported incidents make out such a case." *Williams v. Gen. Motors Corp.*, 187 F.3d 553, 562 (6th Cir. 1999). Generally, "simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment." *Faragher v. City of Boca Raton*, 524 U.S. 775, 788, 118 S.Ct. 2275, 141 L.Ed.2d 662 (1998) (internal quotation marks and citation omitted). But we have noted that "comments and harassing acts of a 'continual' nature are more likely to be deemed pervasive" and evidence of an objectively hostile work environment. *Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 333 (6th Cir. 2008) (quoting *Abeita*, 159 F.3d at 252).
>
> *Johnson v. Ford Motor Co.*, 13 F.4th 493, 505–06 (6th Cir. 2021) (internal citations omitted)

WHAT IS "SEVERE OR PERVASIVE" (CIRCUIT-BY-CIRCUIT): (CONTINUED)

What is "severe or pervasive" (circuit-by-circuit):

- 6th Circuit:

> For example, in *Abeita*, we reversed the district court's conclusion that Abeita's evidence of sexual harassment was not sufficiently severe or pervasive to constitute an objectively hostile work environment—finding that the district court failed to consider Abeita's contention that the harassing comments "were commonplace, ongoing, and continual." 159 F.3d at 252. Although Abeita mentioned a few specific instances of the defendant's sexual comments, only one of which was directed at her, she also testified that the defendant's "sexual comments ... 'went beyond business and into the personal' about models and other female employees" and "were 'ongoing,' 'commonplace,' 'continuing,' and too numerous to recall in detail beyond the detail described[.]" *Id.* at 248–49. As a result, while the comments individually were not severe, they were sufficiently pervasive such that Abeita had presented enough evidence of an objectively hostile work environment to survive summary judgment. *Id.* at 252.
>
> *Johnson v. Ford Motor Co.*, 13 F.4th 493, 506 (6th Cir. 2021)

WHAT IS "SEVERE OR PERVASIVE" (CIRCUIT-BY-CIRCUIT): (CONTINUED)

What is "severe or pervasive" (circuit-by-circuit):

- 7th:

  An employer creates a hostile work environment when "the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Alexander v. Casino Queen, Inc.*, 739 F.3d 972, 982 (7th Cir. 2014). To establish such a claim, "a plaintiff must show: (1) the work environment was both subjectively and objectively offensive; (2) the harassment was based on membership in a protected class; (3) the conduct was severe or pervasive; and (4) there is a basis for employer liability." *Trabanas v. Northwestern Univ.*, 64 F.4th 842, 853 (7th Cir. 2023). Several considerations play into whether an environment is hostile: "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." *Casino Queen*, 739 F.3d at 982 (quoting *Mendenhall v. Mueller Streamline Co.*, 419 F.3d 686, 691–92 (7th Cir. 2005)). What matters is whether the conduct became so severe or pervasive that "a reasonable person would find [it] hostile or abusive." *Harris v. Forklift Sys.*, 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993).

  Hambrick v. Kijakazi, 79 F.4th 835, 842–43 (7th Cir. 2023)

WHAT IS "SEVERE OR PERVASIVE" (CIRCUIT-BY-CIRCUIT): (CONTINUED)

What is "severe or pervasive" (circuit-by-circuit):

- 8th Circuit:

> To establish a prima face case of a hostile work environment, Yang is required to show: (1) she is a member of a protected group; (2) unwelcome harassment occurred; (3) a causal nexus existed between the harassment and her protected group status; and (4) the harassment affected a term, condition, or privilege of employment. *Hesse v. Avis Rent A Car Sys., Inc.*, 394 F.3d 624, 629 (8th Cir. 2005). "The conduct must have been severe or pervasive enough to create an objectively hostile or abusive work environment." *Id.* Title VII does not prohibit general workplace harassment. *Id.* at 630.
>
> In determining whether a hostile work environment existed, all circumstances of Yang's employment must be considered, "including the frequency of the offending conduct, its severity, whether it was physically threatening or humiliating, and whether it unreasonably interfered with work performance."

Yang v. Robert Half Int'l, Inc., 79 F.4th 949, 965 (8th Cir. 2023*), reh'g denied*, No. 22-2592, 2023 WL 6313679 (8th Cir. Sept. 28, 2023)

WHAT IS "SEVERE OR PERVASIVE" (CIRCUIT-BY-CIRCUIT): (CONTINUED)

What is "severe or pervasive" (circuit-by-circuit):

- 9th:

> The offensive conduct must be "sufficiently severe or pervasive to alter the conditions of employment." *Christian v. Umpqua Bank*, 984 F.3d 801, 809 (9th Cir. 2020). Notably, individual targeting is not required to establish a Title VII violation. *See Reynaga v. Roseburg Forest Prods.*, 847 F.3d 678, 687 (9th Cir. 2017). "It is enough," we have held, "if such hostile conduct pollutes the victim's workplace, making it more difficult for her to do her job, to take pride in her work, and to desire to stay on in her position." *Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1463 (9th Cir. 1994). "When the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993) (internal quotation marks and citations omitted).

Sharp v. S&S Activewear, L.L.C., 69 F.4th 974, 978 (9th Cir. 2023)

WHAT IS "SEVERE OR PERVASIVE" (CIRCUIT-BY-CIRCUIT): (CONTINUED)

What is "severe or pervasive" (circuit-by-circuit):

- 10th:

  Beyond evidence of the defendant's motive, the plaintiff must offer evidence that the defendant's conduct was so severe or pervasive as to alter the terms or conditions of employment. Proof of either severity or pervasiveness can serve as an independent ground to sustain a hostile work environment claim. *Lounds*, 812 F.3d at 1222. To make this determination, we look to the "totality of the circumstances" and "consider such factors 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." *Morris v. City of Colo. Springs*, 666 F.3d 654, 664 (10th Cir. 2012).

  We assess this element both objectively and subjectively. It is not enough that the plaintiff perceived the conduct to be severe or pervasive. Rather, the plaintiff must "show that a rational jury could find that the workplace is permeated with discriminatory intimidation, ridicule, and insult." *Sanderson*, 976 F.3d at 1176. So, "the run-of-the mill boorish, juvenile, or annoying behavior that is not uncommon in American workplaces is not the stuff of a Title VII hostile work environment claim." *Morris*, 666 F.3d at 664. And "a few isolated incidents" of discriminatory conduct does not make the harassment pervasive. *Id.* at 666.

Throupe v. Univ. of Denver, 988 F.3d 1243, 1252 (10th Cir. 2021)

WHAT IS "SEVERE OR PERVASIVE" (CIRCUIT-BY-CIRCUIT): (CONTINUED)

What is "severe or pervasive" (circuit-by-circuit):

- 11th:

  Showing that harassment is sufficiently severe or pervasive requires showing both a subjective and objective component. *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1246 (11th Cir. 1999) (en banc). Specifically, "[t]he employee must 'subjectively perceive' the harassment as sufficiently severe and pervasive ... and this subjective perception must be objectively reasonable." *Id.* (quoting *Harris*, 510 U.S. at 21, 114 S.Ct. 367). Yelling has met her burden as to the subjective showing; she presented evidence clearly showing she subjectively perceived her coworkers' conduct as severe or pervasive. But she falls short as to the objective component.

  "[T]he objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.' " *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998) (quoting *Harris*, 510 U.S. at 23, 114 S.Ct. 367). The Supreme Court, this court, and other Circuits have identified a nonexhaustive list of factors "to delineate a minimum level of severity or pervasiveness necessary for harassing conduct." *Mendoza*, 195 F.3d at 1246 (citations omitted). Those factors are (1) the conduct's frequency, (2) its severity, (3) whether it was physically threatening or humiliating, rather than "mere offensive utterance[s]," and (4) whether it unreasonably interfered with the employee's job performance. *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 647 (11th Cir. 1997) (citing *Harris*, 510 U.S. at 23, 114 S.Ct. 367).

Yelling v. St. Vincent's Health Sys., 82 F.4th 1329, 1335 (11th Cir. 2023)

WHAT IS "SEVERE OR PERVASIVE" (CIRCUIT-BY-CIRCUIT): (CONTINUED)

What is "severe or pervasive" (circuit-by-circuit):

- 11th:

  > We examine the conduct in its context, "not as isolated acts." *Mendoza*, 195 F.3d at 1246 (citing *Allen*, 121 F.3d at 647). And this context includes comments and conduct beyond the timeframe otherwise actionable. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 104-05, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002) (holding that the scope of harassment claims includes conduct that occurred outside 42 U.S.C. § 2000e-5(e)(1)'s EEOC filing period so long as the last-contributing act occurred within that period).

Yelling v. St. Vincent's Health Sys., 82 F.4th 1329, 1335 (11th Cir. 2023)

WHAT IS "SEVERE OR PERVASIVE" (CIRCUIT-BY-CIRCUIT): (CONTINUED)

Examples?

- *Ellsworth v. Pot Luck Enterprises, Inc.*, 624 F. Supp. 2d 868 (M.D. Tenn. 2009): defendant's verbal conduct was beyond workplace teasing or off-color jokes. The plaintiff was propositioned for sex multiple times, and there were frequent, open speculations about his genitalia and sexual performance. The court, considering the totality of circumstances, held that this constituted a hostile work environment claim under Title VII.
- *Abeita v. TransAmerica Mailings, Inc.*, 159 F.3d 246 (6th Cir.1998): the court found a supervisor's pervasive sexual comments over seven years were sufficient to support a Title VII claim. The comments were commonplace, ongoing, and continual, establishing pervasiveness sufficient to support the claim.
- *Baty v. Willamette Indus., Inc.*, 985 F. Supp. 987, 992 (D. Kan. 1997), *aff'd*, 172 F.3d 1232 (10th Cir. 1999): the harassment was deemed sufficiently pervasive and hostile to constitute a hostile work environment, despite not involving physical touching, supervisory personnel or visible graffiti. The plaintiff presented evidence of numerous and regular comments that were extremely sexual and demeaning.
- *Savino v. C.P. Hall Co.*, 988 F. Supp. 1171 (N.D. Ill. 1997), *aff'd*, 199 F.3d 925 (7th Cir. 1999): court held that there were genuine issues of material fact about whether a supervisor's conduct was sufficiently "severe and pervasive" to create a hostile environment. The employee alleged at least ten specific instances of inappropriate behavior which, along with more general allegations that the supervisor frequently stared at her and often followed her around, could support a reasonable jury's determination that the conduct was pervasive.

SEVERE (SINGLE INCIDENT)?

- Some circuit divergence here, but…different circuits provide examples where a single instance of sexual harassment was considered adequate to meet the severe or pervasive test.
- Can one really severe incident create a hostile work environment? Sometimes!
- To establish a hostile work environment with a single incident, it must be "extremely severe."

SEVERE (SINGLE INCIDENT)? (CONTINUED)

- Examples?
  - 9th Circuit: A plaintiff being drugged, kidnapped, and raped multiple times during the evening was considered "extremely severe" and thus met the criteria. *Little v. Windermere Relocation, Inc.*, 301 F.3d 958 (9th Cir. 2002).
  - 7th Circuit: A single incident "was held to be sufficient" because the plaintiff had been slapped, beaten, hit in the head with a radio, choked with a phone cord, raped, and held captive overnight. *Al-Dabbagh v. Greenpeace, Inc.*, 873 F. Supp. 1105, 1108 (N.D. Ill. 1994), *supplemented* (Dec. 21, 1994), *supplemented*, No. 94 C 4941, 1995 WL 12518 (N.D. Ill. Jan. 11, 1995) (cited by 9th Circuit approvingly as an example of "extremely severe").

SEVERE (SINGLE INCIDENT)? (CONTINUED)

- 5th Circuit:
  - *Guadalajara v. Honeywell Int'l, Inc.*, 224 F. Supp. 3d 488, 501 (W.D. Tex. 2016):

  However, "isolated incidents, if egregious, can alter the terms and conditions of employment." *Royal v. CCC & R Tres Arboles, L.L.C.*, 736 F.3d 396, 403 (5th Cir. 2013) (quoting *Harvill*, 433 F.3d at 436). For example, "deliberate and unwanted touching of ... intimate body parts" can constitute severe sexual harassment." *See Harvill*, 433 F.3d at 436.

  Indeed, the Fifth Circuit has approvingly cited a Seventh Circuit decision, *Worth v. Tyer*, 276 F.3d 249, 268 (7th Cir. 2001), for the proposition that touching of an intimate body part is "one of the most severe" kinds of sexual harassment. *Harvill*, 433 F.3d at 435–36 (citing *Worth*, 276 F.3d at 268). In *Worth*, an employee alleged that her employer had stroked her face and buttocks, and had put his hand down her shirt, touching her breast for several seconds. *Worth*, 276 F.3d at 256–57. The Seventh Circuit emphasized the contact with her breast in finding that the evidence was sufficient for the jury to have found that the employee had experienced a hostile work environment: "[I]mportantly, in the present case, of the several touching incidents, one involved [the employer] touching an intimate body part." *Id.* at 268.

SEVERE (SINGLE INCIDENT)? (CONTINUED)

- 5th Circuit:
  - *Matthews v. Nwankwo*, 36 F. Supp. 3d 718, 724 (N.D. Miss. 2014)

  As to the nature of the harassment, the record reflects that on a single occasion, Nwankwo grabbed Plaintiff's buttocks and attempted to kiss her. While this was an isolated incident, single severe incidents of misconduct may satisfy the harassment standard. *WC & M,* 496 F.3d at 400 ("Under the totality of the circumstances test, a single incident of harassment, if sufficiently severe, could give rise to a viable Title VII claim as well as a continuous pattern of much less severe incidents of harassment."). In this regard, "the deliberate and unwanted touching of [a person's] intimate body parts can constitute severe sexual harassment." *Harvill v. Westward Communications, L.L.C.,* 433 F.3d 428, 436 (5th Cir.2005). Likewise, such conduct is both physically threatening and humiliating. *See Lockard v. Pizza Hut, Inc.,* 162 F.3d 1062, 1072 (10th Cir.1998) ("Grabbing Ms. Lockard's hair and breast ... is physically threatening and humiliating behavior.").

  BUT: be mindful that not all courts have held this way, some 11th Circuit district court decisions suggest a hostility to this theory!

EMPLOYER LIABILITY & AN AFFIRMATIVE DEFENSE

- Depends on the perpetrator!
  - Coworker harassment is subject to a negligence standard: *Vance v. Ball State Univ.*, 570 U.S. 421, 445–46, (U.S. 2013) ("In such cases, the victims will be able to prevail simply by showing that the employer was negligent in permitting this harassment to occur, and the jury should be instructed that the nature and degree of authority wielded by the harasser is an important factor to be considered in determining whether the employer was negligent.").
  - Supervisor harassment:
    - Quid pro quo: strict liability (see *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (U.S. 1998) and *Faragher v. Boca Raton,* 524 U.S. 775 (U.S. 1998)).
    - Hostile work environment: strict liability where a tangible employment action is the culminating act (firing).
    - Hostile work environment (no tangible employment action): strict liability, unless the employer's affirmative defense prevails (*Faragher-Ellerth* defense) (next slide).

NOTE (RE SUPERVISORS)

- Not all supervisors are "supervisors"…*See Vance*:
  - An employee is a "supervisor" for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim

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

EMPLOYER LIABILITY & AN AFFIRMATIVE DEFENSE (CONTINUED)

Harassment/Establishing liability (based on harasser):

An employer's liability for hostile environment sexual harassment depends upon whether the harasser is the victim's supervisor or merely a co-employee. *Faragher*, 524 U.S. at ——— – ———, 118 S.Ct. at 2292–93; *Guess,* 913 F.2d at 465. Harassment "by co-workers differs from harassment by supervisors...." *Hunter v. Allis–Chalmers Corp.*, 797 F.2d 1417, 1422 (7th Cir.1986).

Where the harasser is a supervisor and the victim suffered no tangible employment action, an employer is strictly liable, although there is the possibility of an affirmative defense. *Faragher,* 524 U.S. at ———, 118 S.Ct. at 2293. "An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, ———, 118 S.Ct. 2257, 2270, 141 L.Ed.2d 633 (1998).

Because employers do not entrust mere co-employees with any significant authority with which they might harass a victim, employers are liable for a co-employee's harassment only "when they have been negligent either in discovering or remedying the harassment." *Perry v. Harris Chernin, Inc.*, 126 F.3d 1010, 1013 (7th Cir.1997); *accord Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 432 (7th Cir.1995).

An employer's legal duty in co-employee harassment cases will be discharged if it takes "reasonable steps to discover and rectify acts of sexual harassment of its employees." *Id.*

Parkins v. Civ. Constructors of Illinois, Inc., 163 F.3d 1027, 1032 (7th Cir. 1998)

EMPLOYER LIABILITY & AN AFFIRMATIVE DEFENSE (CONTINUED)

- *Faragher-Ellerth* affirmative defense:

  An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule Civ. Proc. 8(c).

  The defense comprises two necessary elements:

  (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and

  (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

  While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense.

  And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense. No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action.

  Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 745, 118 S. Ct. 2257, 2261, 141 L. Ed. 2d 633 (1998)

STATE COMPANION STATUTES (BRIEF OVERVIEW)

- Illinois Human Rights Act, 775 ILCS 5 *et seq.* ("IHRA")
  - Race, color, religion, sex, national origin, citizenship status (with regard to employment) ancestry, age (40 and over), order of protection status, marital status, familial status (with regard to housing), physical or mental disability, arrest record, military status, sexual orientation, and unfavorable discharge from military service.
    - Now covers employers with one employee.
- No damage cap, but no punitive damages, same(ish) administrative exhaustion requirements (some minor nuances)

STATE COMPANION STATUTES (BRIEF OVERVIEW) (CONTINUED)

- No state Title VII equivalent/expansion laws:
  - Alabama;
  - Arkansas;
  - George (for private employers); and
  - Mississippi.
- States with Title VII equivalent/expansion laws:
  - Everyone else!

ADMINISTRATIVE EXHAUSTION / THE 300-DAY PROBLEM

- Different for certain race claims (§ 1981), but you must first file a charge with the Equal Employment Opportunity Commission ("EEOC") or the state equivalent agency (Illinois Department of Human Rights).
  - Most have cross-filing agreements (but be sure to confirm)!
  - Some state statutes of limitations are shorter (ex. Illinois WAS 180 days until 2018 or 2019, Indiana is still 180 days).
  - California – 3 years!

STATUTE OF LIMITATIONS/ THE 300-DAY PROBLEM (CONTINUED)

- In Illinois, a complainant must file a charge with the EEOC within 300 days of when the allegedly unlawful employment practice occurs. *See* 42 U.S.C. § 2000e–5(e)(1); *Nagle v. Village of Calumet Park,* 554 F.3d 1106, 1121 (7th Cir.2009) (quoting *Filipovic v. K & R Express Sys., Inc.,* 176 F.3d 390, 395 (7th Cir.1999)). The complainant's "[f]ailure to do so renders the charge untimely." *Nagle,* 554 F.3d at 1121.

  Parker v. Side by Side, Inc., 50 F. Supp. 3d 988, 1004 (N.D. Ill. 2014)

CONTINUING VIOLATION THEORY

- Not ALL harassment must have occurred within the last 300 days…just some!

  In *National Railroad Passenger Corp. v. Morgan,* 536 U.S. 101, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002), the Supreme Court held that "[a] charge alleging a hostile work environment claim ... will not be time barred so long as all acts which constitute the claim are part of the same unlawful employment practice and at least one act falls within the [300–day] time period." 536 U.S. at 122, 122 S.Ct. 2061, 153 L.Ed.2d. Additionally, the Court determined that an "entire hostile work environment encompasses a single unlawful employment practice." *Id.* at 117, 122 S.Ct. 2061, 153 L.Ed.2d 106; *see also Isaacs v. Hill's Pet Nutrition, Inc.,* 485 F.3d 383, 385 (7th Cir.2007) ("The Supreme Court treats a hostile work environment as one unlawful employment practice." (citing *Morgan*)). Since *Morgan,* the Seventh Circuit has repeatedly stated that an employee can base a hostile work environment claim on acts that occurred at any time during his or her employment as long as the hostile work environment continued into the 300–day limitations period.

Parker v. Side by Side, Inc., 50 F. Supp. 3d 988, 1004–05 (N.D. Ill. 2014)

WHAT ABOUT *REALLY* DELAYED OUTCRY CLAIMS?

- What of the survivor unprepared to move forward until after 300 days?

A SOLUTION (ALBEIT LIMITED)!

- Not an option in all states, but…look for gender violence statutes (solely for survivors of actual gender-related/sexual violence, not all harassment claims).
- The Illinois Gender Violence Act, 740 ILCS 82/1, *et seq*.
  - Passed in 2003 to help combat gender-related violence.
  - Clarified that domestic violence is a form of gender-related violence.
  - Clarified that gender-related violence is a form of sex discrimination.
  - Recognized the problem caused by the 300-day statute of limitations issue (deprives survivors of time to process and heal before being ready to pursue).

THE ILLINOIS GENDER VIOLENCE ACT

- Features:
  - Private cause of action for gender-related violence;
  - 7-year and 2-year statutes of limitations; and
  - In an action brought under this Act, the court may award damages, injunctive relief, or other appropriate relief. The court may award actual damages, damages for emotional distress, or punitive damages. A judgment may also include attorney's fees and costs. 740 Ill. Comp. Stat. Ann. 82/15

THE ILLINOIS GENDER VIOLENCE ACT (CONTINUED)

§ 10. Cause of action. Any person who has been subjected to gender-related violence as defined in Section 5 may bring a civil action for damages, injunctive relief, or other appropriate relief against a person or persons perpetrating that gender-related violence. For purposes of this Section, "perpetrating" means either personally committing the gender-related violence or personally encouraging or assisting the act or acts of gender-related violence.

740 Ill. Comp. Stat. Ann. 82/10

THE ILLINOIS GENDER VIOLENCE ACT (CONTINUED)

Definitions:

§ 5. Definition. In this Act, "gender-related violence", which is a form of sex discrimination, means the following:

(1) One or more acts of violence or physical aggression satisfying the elements of battery under the laws of Illinois that are committed, at least in part, on the basis of a person's sex, whether or not those acts have resulted in criminal charges, prosecution, or conviction.

(2) A physical intrusion or physical invasion of a sexual nature under coercive conditions satisfying the elements of battery under the laws of Illinois, whether or not the act or acts resulted in criminal charges, prosecution, or conviction.

(3) A threat of an act described in item (1) or (2) causing a realistic apprehension that the originator of the threat will commit the act.

740 Ill. Comp. Stat. Ann. 82/5

THE ILLINOIS GENDER VIOLENCE ACT

- Vicarious liability/is a "person" also a corporate entity?
  - *Gasic vs. Marquette Mgnt. Inc.*, 2019 IL App (3d) 170756, 146 N.E.3d 10
  - In 2019 Illinois Appellate Court decision.
    - Court ruled that employers could be held liable for the actions of their employees who commit gender-motivated violence/sexual assault under certain unspecified circumstances.
    - Despite this decision, federal courts have consistently ruled that employers cannot be held liable, creating a split between state and federal law.
    - Also, certain state trial courts have mistakenly ruled that domestic violence is not covered under the GVA as a form of gender violence.
    - Non-employment setting.

THE ILLINOIS GENDER VIOLENCE ACT (CONTINUED)

- Recent Amendment (full disclosure, I helped author and advocate for these changes):
  - Confirms/clarifies that an employer can be held liable for gender-related violence committed in the workplace (when they failed to supervise, train or monitor the employee who engaged in the violence; fail to investigate complaints or reports provided to a supervisor or manager and failed to take remedial measures in response to the complaints; and if the gender-related violence was the proximate cause of an injury).
  - Reiterates what was in the GVA's original legislative intent, to treat domestic violence as a form of gender-related violence as well.
  - Establishes a four-year statute of limitation for bringing a claim of gender-related violence against an employer, meaning certain survivors who would otherwise be time-barred from bringing these claims.

THE ILLINOIS GENDER VIOLENCE ACT (CONTINUED)

- Some of the Amended/Added Definitions:
  - "Employee" has the meaning provided in Section 2-101 of the Illinois Human Rights Act. "Employer" has the meaning provided in Section 2-101 of the Illinois Human Rights Act. "Gender-related gender-related violence", which is a form of sex discrimination, means the following: (1) One or more acts of violence or physical aggression satisfying the elements of battery under the laws of Illinois that are committed, at least in part, on the basis of a person's sex, whether or not those acts have resulted in criminal charges, prosecution, or conviction. (2) A physical intrusion or physical invasion of a sexual nature under coercive conditions satisfying the elements of battery under the laws of Illinois, whether or not the act or acts resulted in criminal charges, prosecution, or conviction.
  - "Workplace" means the employer's premises, including any building, real property, and parking area under the control of the employer, or any location used by an employee while in the performance of the employee's job duties. "Workplace" includes activities occurring off-premises at employer-sponsored events where an employee is not performing the employee's job duties.
  - Confirms domestic violence is a form of gender-related violence.

THE ILLINOIS GENDER VIOLENCE ACT (CONTINUED)

New Provision: (740 ILCS 82/11 new)

Sec. 11. Employer liability for an employee or agent.

(a) An employer is only liable for gender-related violence committed in the workplace by an employee or agent of the employer when the interaction giving rise to the gender-related violence arises out of and in the course of employment with the employer. Liability only extends to gender-related violence that occurs: (i) while the employee was directly performing the employee's job duties and the gender-related violence was the proximate cause of the injury; or (ii) while the agent of the employer was directly involved in the gender-related violence and the performance of the contracted work was the proximate cause of the injury. Proximate cause exists when the actions of the employee or the agent of the employer were a substantial factor in causing the injury.

An employer is liable if the employer has acted in a manner inconsistent with how a reasonable person would act under similar circumstances.

(b) Notwithstanding subsection (a), an employer is only liable for gender-related violence if the employer:

(1) failed to supervise, train, or monitor the employee who engaged in the gender-related violence. An employer providing training pursuant to Section 2-109 of the Illinois Human Rights Act shall have an affirmative defense that adequate training was provided to the employee; or

(2) failed to investigate complaints or reports directly provided to a supervisor, manager, owner, or another person designated by the employer of similar conduct by an employee or agent of the employer and the employer failed to take remedial measures in response to the complaints or reports.

(c) Nothing in this Act precludes a person who has been the victim of gender-related violence from pursuing any other right or cause of action created by statute or common law.

HOW MIGHT THIS WORK IN PRACTICE?

- Consider the logic behind what you couch as "gender-related" violence:
  - Same-sex gender-related violence (hate crime case);
  - Attempted (or "successful") sexual assault;
  - VERY delayed outcry cases;
  - Individuals; and
  - Domestic violence cases.

SO…WHAT ABOUT OTHER STATES?

- Some other jurisdictions have similar statutes (not all):
  - New York City: Victims of Gender-Motivated Violence Protection Law (VGM)
    - See *Breest v. Haggis*, 180 A.D.3d 83 115 N.Y.S.3d 322 (2019) (discussing viability of and bases for causes of action)
    - VGMVPL provides a civil cause of action for victims of crimes of violence "committed because of gender or on the basis of gender, and due, at least in part, to an animus based on the victim's gender."
    - It allows a survivors of such a gender-based violent crime to collect money damages from the perpetrator, in addition to other possible civil claims for sexual harassment or assault and battery.

SO…WHAT ABOUT OTHER STATES? (CONTINUED)

- VGM (continued)
  - Temporarily extended SOL:
    - Beginning on March 1, 2023, the statute of limitations for allegations under NYC's VGMVPL was extended for two years to afford survivors of gender motivated violence a two-year lookback window to bring a civil action for claims that have been previously time barred.
    - Individuals will have from March 1, 2023 to March 1, 2025 to commence a civil suit against such alleged wrongdoers and institutions where they may seek compensatory and punitive damages, injunctive and declaratory relief, attorney's fees and costs, and such other relief as a court may deem appropriate under VGMVPL for participation in such crimes.

SO…WHAT ABOUT OTHER STATES? (CONTINUED)

- Every state is different…
  - Check your local laws for causes of action akin to the IGVA, state statutes of limitations for opportunities to pursue claims in excess of 300 days from the sexual misconduct, and the like.
  - Consider common law tort claims, depending on whether your state has preemption (workers' compensation preemption or preemption by state civil rights claims).
  - Some states, like NY, have enacted extensions whereby claims previously barred by SOLs are now temporarily actionable.

TIP OF THE ICEBERG

- This presentation only touches on some aspects of some relevant issues.
- Included in materials are additional useful (and free) resources to consult.

OTHER RESOURCES (NATIONAL)

- **Workplace Fairness**

<https://www.workplacefairness.org/>

- **Equal Employment Opportunity Commission (EEOC)**

https://www.eeoc.gov/

- **National Employment Lawyers Association (NELA)**
  <https://nela.org>
- **National Women's Law Center / Times Up Legal Defense Fund**

<https://nwlc.org/times-up-legal-defense-fund/legal-help-for-sex-discrimination-and-harassment/>

QUESTIONS?

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