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Reasonableness in Hostile Work Environment Cases After #MeToo

Danielle A. Bernstein
University of Michigan Law School

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REASONABLENESS IN HOSTILE WORK
ENVIRONMENT CASES AFTER #METOO

*Danielle A. Bernstein**

ABSTRACT

The #MeToo movement, a global social response to sexual harassment in the workplace, has turned the traditional approach to sexual harassment on its head. Instead of shielding perpetrators and discrediting survivors, employers, the media, and the public have begun to shift from presuming the credibility of the perpetrator to presuming the credibility of the survivor. But this upending of the status quo has occurred almost entirely in the social sphere—and the legal system, where survivors of workplace sexual harassment can seek remedies for the abuse they have suffered, is proving much slower to adapt.

While our social presumptions are flipping to center the behavior of the accused instead of the accuser, the legal standard for workplace sexual harassment still focuses squarely on the victim's reasonableness. In order to bring a legally actionable claim of sexual harassment, a victim must demonstrate that she was objectively and subjectively reasonable in believing that she was subjected to sexual harassment. Even if she succeeds in demonstrating this, if her employer had mechanisms in place to address sexual harassment, she must also demonstrate that her response to her harassment—such as reporting or not reporting the harassment through an employer's complaint process—was reasonable.

This Comment analyzes the effects of the #MeToo movement on federal courts' definitions of sexual harassment under the existing legal standard. Since reasonableness is a socially-defined term, courts have plenty of room to incorporate shifting conceptions of sexual harassment into their jurisprudence—but many are remarkably slow to do so. While it is too soon to state definitively

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what effect #MeToo will have on sexual harassment law in the long run, this Comment should leave practitioners and scholars with a clearer picture of the direction circuit courts have taken since #MeToo began.

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I. INTRODUCTION

In October 2017, the #MeToo movement began to offer what traditional sexual harassment law has not yet provided: a social presumption in favor of victims' allegations, and, in many cases, a renunciation of the status long afforded to powerful harassers.¹ This seemingly inde-

1. The social standards for sexual harassment since #MeToo have become much less deferential to the accused individual. *See, e.g.,* Joan C. Williams, *#MeToo Changed Norms, Not the Law*, BLOOMBERG (Nov. 20, 2019), <https://www.bloomberg.com/opinion/articles/2019-11-20/-metoo-changed-sexual-harassment-norms-not-the-law> [<https://perma.cc/FZ54-FZEP>]. By contrast, in cases just preceding the #MeToo movement, courts dismissed harassment claims that included sexual references from coworkers, repeated remarks about plaintiffs' body parts, and other forms of sexual propositioning. Sandra F. Sperino & Suja A. Thomas, *Boss Grab Your Breasts? That's Not (Legally) Harassment*, N.Y. TIMES (Nov. 29, 2017), <https://www.nytimes.com/2017/11/29/opinion/harassment-employees-laws-.html> [<https://perma.cc/LE83->

fatigable movement has not yet lost steam.² In addition to pressuring companies to rid themselves of predators and encouraging men to reevaluate their past actions, #MeToo has also spurred greater litigation efforts. For the fiscal year of 2018, the Equal Employment Opportunity Commission (EEOC), the federal agency that enforces civil rights laws against workplace discrimination, including sexual harassment, saw a 13.6% increase in charges alleging sexual harassment and itself filed 50% more lawsuits challenging sexual harassment than in the prior fiscal year.³ Moreover, soon after the #MeToo movement began, polling showed that the percentage of Americans who stated that they believe that sexual harassment is a serious problem was 64%.⁴ Eighty-six per-

PHZB]. While certain lone instances of sexual harassment have made waves in the news, a lone instance of sexual harassment does not typically meet the severe or pervasive legal standard of a “hostile work environment,” which is the legal classification for one of the two types of sexual harassment that the Supreme Court has recognized (the other being “quid pro quo”). CATHARINE A. MACKINNON, *SEX EQUALITY* 1050-52 (3d ed. 2016); see, e.g., Patrick Dorrian, *Boss’s Overheard Sex Talk Not Harassment, Court Says*, BLOOMBERG L. (Mar. 21, 2018), <https://www.bna.com/bosss-overheard-sex-n57982090148/> [<https://perma.cc/97CE-JSXX>].

2. See Catharine A. MacKinnon, *Where #MeToo Came from, and Where It’s Going*, ATLANTIC (Mar. 24, 2019), <https://www.theatlantic.com/ideas/archive/2019/03/catharine-mackinnon-what-metoo-has-changed/585313/> [<https://perma.cc/RF64-94XR>].
3. *What You Should Know: EEOC Leads the Way in Preventing Workplace Harassment*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (Oct. 4, 2018), <https://www.eeoc.gov/eeoc/newsroom/wysk/preventing-workplace-harassment.cfm> [<https://perma.cc/S2EY-LXW5>]. For the fiscal year of 2019, the number of charges filed with the EEOC alleging sexual harassment was comparable to prior years. *Charges Alleging Sex-Based Harassment (Charges Filed with EEOC) FY 2010-FY 2019*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (2020), <https://www.eeoc.gov/enforcement/charges-alleging-sex-based-harassment-charges-filed-eeoc-fy-2010-fy-2019> [<https://perma.cc/5FE6-DSA9>]. The EEOC had previously found that many women experience sexual harassment in the workplace without perceiving it to be such. CHAI R. FELDBLUM & VICTORIA A. LIPNIC, U.S. EQUAL EMP. OPPORTUNITY COMM’N, REPORT OF THE CO-CHAIRS OF THE SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (June 2016), https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm [<https://perma.cc/9W8Z-WQDM>]. A 2016 report showed that surveys using probability samples found that only 25% of women experienced “sexual harassment” if given a question incorporating the phrase, but when given more specific descriptors, such as “unwanted sexual attention,” the incidence rate increased to 60%. *Id.* Further, when given actual examples of behavior constituting sexual harassment, the incidence rate was as high as 75%. *Id.* The #MeToo movement may encourage individuals both to bring more claims of sexual harassment and to identify more instances of sexual harassment for what they are. This, in turn, could encourage even more legal claims or formal complaints.
4. Joan C. Williams, Jodi Short, Margot Brooks, Hilary Hardcastle, Tiffanie Ellis & Rayna Sharon, *What’s Reasonable Now? Sexual Harassment Law After the Norm Cas-*

cent of Americans now endorse a zero-tolerance policy regarding sexual harassment in the workplace.⁵

The post-#MeToo definition of sexual harassment—unwelcome or uninvited sexual behavior in the workplace—may not seem particularly new.⁶ But this definition just a year prior allowed then-presidential candidate Donald Trump to minimize his recorded boasting of forcible kissing and groping as “locker-room talk.”⁷ Since then, the cultural definition has broadened to encompass a range of conduct, including lewd comments or suggestive emails—behaviors that had always fit the technical definition of sexual harassment, but which were easier for the public to treat as insignificant.⁸ Beyond this, the #MeToo movement has more broadly offered a presumption that an accuser is not operating under an ulterior motive; a cultural context acknowledging sexual harassment as pervasive in the American (and global) workplace; and a stricter conception of how sexual harassment should be punished or deterred, at least in the public arena.⁹

This shift is evidence of a “norm cascade”—a sea change in what behaviors are widely considered to constitute sexual harassment and

cade, 2019 MICH. ST. L. REV. 139, 142 (2019) [hereinafter Williams et al.] (citing Gary Langer, *Unwanted Sexual Advances Not Just a Hollywood, Weinstein Story, Poll Finds*, ABC NEWS (Oct. 17, 2017), <https://abcnews.go.com/Politics/unwanted-sexual-advances-hollywood-weinstein-story-poll/story?id=50521721> [https://perma.cc/V8LS-Y42Z]).

5. *Id.* at 145; Williams, *supra* note 1; Chris Jackson, *American Attitudes on Sexual Harassment*, IPSOS (Dec. 15, 2017), <https://www.ipsos.com/en-us/news-polls/npr-sexual-harassment-2017-12-14> [https://perma.cc/7YL4-RT89].
6. *See, e.g.*, Williams, *supra* note 1 (citing *The Behaviors Americans Count as Sexual Harassment*, BARNA (Nov. 28, 2017), <https://www.barna.com/research/behaviors-americans-count-as-harassment/> [https://perma.cc/6M4J-372G]).
7. David A. Fahrenthold, *Trump Recorded Having Extremely Lewd Conversation About Women in 2005*, WASH. POST (Oct. 8, 2016), https://www.washingtonpost.com/politics/trump-recorded-having-extremely-lewd-conversation-about-women-in-2005/2016/10/07/3b9ce776-8cb4-11e6-bf8a-3d26847eed4_story.html [https://perma.cc/6PDS-HE57].
8. *See, e.g.*, Debra Birnbaum, *CBS Diversity Showcase Director Rick Najera Exits amid Harassment Allegations*, VARIETY (Oct. 26, 2017), <https://variety.com/2017/tv/news/cbs-diversity-showcase-director-rick-najera-exits-harassment-allegations-1202600365/> [https://perma.cc/B6BV-C6Z6] (detailing the ousting of Rick Najera, a producer at CBS, who resigned after he was accused of making lewd comments to performers during an annual sketch comedy showcase); Suki Kim, *Public-Radio Icon John Hockenberry Accused of Harassing Female Colleagues*, CUT (Dec. 1, 2017), <https://www.thecut.com/2017/12/public-radio-icon-john-hockenberry-accused-of-harassment.html> [https://perma.cc/BFG8-X7SB] (detailing the retirement of radio journalist John Hockenberry after investigations into unwelcome overtures to women employees and bullying behavior toward women of color co-hosts).
9. *See, e.g.*, Williams, *supra* note 1.

what might be considered “reasonable” for a victim or an employer to perceive as problematic.¹⁰ But while the court of public opinion has shifted, whether the courts themselves will shift with it is another matter.

Institutions that previously protected predators in their ranks have increasingly yielded to public pressure to cut ties with those accused.¹¹ At present, however, such institutions and individuals may face a greater threat from public shaming than from litigation. Though public perception of what constitutes sexual harassment may have expanded, the legal standards governing civil sexual harassment claims can be far more stringent, offering robust protections for those accused of harassment. In part, this is a matter of line-drawing in vastly different contexts. The cultural movement against sexual harassment does not necessitate one particular outcome for the accused harasser and can operate on a sliding scale: In response to some behaviors, the public may expect resignations or firings, and in response to others only explanations or apologies. But to define a behavior as sexual harassment in legal terms creates legal liability.¹²

The Supreme Court first recognized the legal claim of workplace sexual harassment¹³ in *Meritor Savings Bank v. Vinson* in 1986, three decades before the groundswell of #MeToo.¹⁴ In fact, the codification of

10. See generally Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT’L ORG. 887 (1998) (empirically establishing the relationship of “norm cascades” with law and society); Williams et al., *supra* note 4, at 149-54 (describing four new norms post-#MeToo as evidence of a “norm cascade”). See also Catharine A. MacKinnon, *#MeToo Has Done What the Law Could Not*, N.Y. TIMES (Feb. 4, 2018), <https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html> [<https://perma.cc/HD5Y-2M5L>].

11. Audrey Carlsen, Maya Salam, Claire Cain Miller, Denise Lu, Ash Ngu, Jugal K. Patel & Zach Wichter, *#MeToo Brought Down 201 Powerful Men. Nearly Half of Their Replacements Are Women.*, N.Y. TIMES (Oct. 29, 2018), <https://www.nytimes.com/interactive/2018/10/23/us/metoo-replacements.html> [<https://perma.cc/3VBQ-2ESB>].

12. Sexual harassment falls within prohibited sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e-2 (Westlaw through P.L. 116-259) (discussed *infra* Section I.A). See also MACKINNON, *supra* note 1, at 1050-52 (describing legally actionable types of sexual harassment). Of course, such liability is subject to legal defenses, discussed *infra* Section III.

13. Sexual harassment law can be divided into two distinct types of claims: “quid pro quo” and hostile work environment harassment. MACKINNON, *supra* note 1, at 1050-52. The former involves the exchange of sexual favors for advancement in the workplace; the latter depends on a generally sex-based discriminatory environment. *Id.* This Comment will focus only on the hostile work environment form, interchangeably referred to as “workplace sexual harassment.”

14. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986).

sexual harassment law, through cases like *Meritor*, could be considered the prerequisite for this later cultural movement by bringing the issue to the fore, offering victims of sexual harassment a form of redress, and establishing a deterrence mechanism for mistreatment in the workplace.¹⁵ But along with this landmark decision came obstacles for plaintiffs attempting to convince judges and juries that what had happened to them constituted sexual harassment. One such hurdle is the use of a “reasonableness” standard at two points in the evaluation of a claim.¹⁶ The standard asks factfinders to determine: 1) Was a victim objectively and subjectively reasonable in believing that she was subjected to sexual harassment; and 2) if the employer had mechanisms in place to address sexual harassment, was the victim’s response to her harassment reasonable?¹⁷ This standard has left many women—and men¹⁸—without recourse against workplace harassers. Legal reasonableness has always been defined by and reflective of the existing social status quo.¹⁹ As long as that status quo is unequal, reasonableness both represents and gives cover to that inequality. The #MeToo movement offers an opportune moment to redefine what constitutes reasonableness in the legal sphere as it has already done in the public sphere. Courts have already begun to reckon with how to evaluate this cultural definition of reasonableness amidst an ongoing cultural revolution.²⁰

15. See MacKinnon, *supra* note 2.

16. Note that this court-imposed standard has no basis in the text of Title VII of the Civil Rights Act of 1964 and was instead imported from tort law. See 42 U.S.C.A. § 2000e-2 (Westlaw through Pub. L. 116-259).

17. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 745 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998). See *infra* Section I.B.

18. Men, of course, also experience sexual harassment, but at much lower rates than women. See, e.g., Michael Alison Chandler, *Men Account for Nearly 1 in 5 Complaints of Workplace Sexual Harassment with the EEOC*, WASH. POST (Apr. 8, 2018), https://www.washingtonpost.com/local/social-issues/men-account-for-nearly-1-in-5-complaints-of-workplace-sexual-harassment-with-the-eeoc/2018/04/08/4f7a2572-3372-11e8-94fa-32d48460b955_story.html [https://perma.cc/XYE3-NYSC]. Given those lower rates, the women-centered discourse around #MeToo, and the predominance of women as plaintiffs in sexual harassment cases, this Comment largely focuses on sexual harassment against women.

19. “Legal standards for reasonableness and unwelcomeness . . . themselves refer to social standards . . .” *Berkeley Talks Transcript: Feminist Legal Scholar Catharine MacKinnon on the Butterfly Politics of #MeToo*, BERKELEY NEWS (June 7, 2019), <https://news.berkeley.edu/2019/06/07/berkeley-talks-transcript-catharine-mackinnon-metoo-conference/> [https://perma.cc/8FCZ-K6LY].

20. See *infra* Sections II and III.

This Comment explores how federal courts are responding to the cultural shift in perceptions of what constitutes sexual harassment. It begins with background on the existing legal standards in sexual harassment law. Taking those standards in turn, it then catalogues where federal courts currently stand in their application of those standards primarily by evaluating summary judgment decisions, as such decisions reflect courts' line-drawing with respect to which behaviors can fit the definition of sexual harassment. While it is too soon to state definitively what effect #MeToo will have on sexual harassment law, this Comment should leave practitioners and scholars with a clear picture of the direction circuit courts have taken with regard to sexual harassment law since #MeToo.²¹

A. *The Creation of the Reasonable Victim*

Under Title VII of the Civil Rights Act of 1964, the federal anti-discrimination law barring discrimination in the workplace on the basis of sex and other protected characteristics, an employee may sue her employer for workplace sexual harassment.²² As the Supreme Court decided in *Meritor*, this includes having to operate in a hostile work environment as long as the conduct creating such an environment is “severe or pervasive.”²³ In 1993, the Court elaborated on this standard, holding in *Harris v. Forklift Systems* that “severity or pervasiveness” must be evaluated on the basis of whether a reasonable person would experience the conduct at issue as hostile.²⁴ Since the conduct in *Meritor* had been especially egregious—involving repeated rape over three years—in *Harris*, the Court went out of its way to clarify that a wide range of behaviors, not just those rising to the level of sexual assault, could create a hostile

21. Since #MeToo began, there has been some scholarship on its effect on courts and how the legal standards for sexual harassment law ought to change. *See, e.g.*, Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L.J.F. 22 (2018); Ramit Mizrahi, *Sexual Harassment Law After #MeToo: Looking to California as a Model*, 128 YALE L.J.F. 121 (2018); Sarah David Heydemann & Sharyn Tejani, *Legal Changes Needed to Strengthen the #MeToo Movement*, 22 RICH. PUB. INT. L. REV. 69, 237, 249 (2019); Deborah L. Rhode, *#MeToo: Why Now? What Next?*, 69 DUKE L.J. 377, 422 (2019).

22. 42 U.S.C.A. § 2000e-2 (Westlaw through P.L. 116-259).

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

24. “Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII’s purview.” *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

work environment.²⁵ The Court elucidated several factors for whether the harassment is sufficiently severe, stating that this must be determined by looking at all the circumstances, including “the frequency of the discriminatory conduct; . . . whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.”²⁶ The Court also required as a necessary precondition that the plaintiff herself subjectively experienced the conduct as hostile—a standard judged separately from the objective test.²⁷ Since *Harris*, the Court has also made it clear that an isolated incident will not rise to the level of egregiousness required by the severe or pervasive standard.²⁸

25. *Harris*, 510 U.S. at 22.

26. *Harris*, 510 U.S. at 23. Note that the Court embedded yet another reasonableness standard into this totality-of-the-circumstances analysis with respect to work performance interference. *Id.* at 22.

27. *Harris*, 510 U.S. at 21-22. Otherwise, per the Court, “the conduct has not actually altered the conditions of the victim’s employment, and there is no Title VII violation.” *Id.* This paper does not address the subjective standard, but it is worth considering whether courts’ analysis of the subjective reasonableness of the plaintiff may change over time. Even in a situation in which a plaintiff meets the objective reasonableness standard, her subjective perceptions could theoretically sink her case. In one pre-*Harris* case, for example, a district court held that a plaintiff “lacked credibility when she testified that she was offended by” pornographic materials distributed around her office since she had previously taken nude photographs. *Burns v. McGregor Elec. Indus., Inc.*, 955 F.2d 559, 565 (8th Cir. 1992). Though the Eighth Circuit reversed and the opinion preceded the objective and subjective reasonableness tests, its analysis suggests that under those tests the district court would have found for the employer given the judge’s perception of the plaintiff’s subjective response to the harassment she faced. *Id.*

28. The Supreme Court has held that “isolated incidents (unless extremely serious)” should not be considered a form of sexual harassment. *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998). See also *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 271 (2001). The severity of that single or isolated incident apparently must be quite extreme: An influential Ninth Circuit case decided by former Judge Alex Kozinski, who himself has been credibly accused of sexual harassment, held that a coworker’s groping of the plaintiff’s breasts—something that led to his criminal conviction for sexual assault—did not qualify as severe or pervasive enough to constitute sexual harassment. *Brooks v. City of San Mateo*, 229 F.3d 917, 927 (9th Cir. 2000); Niraj Chokshi, *Federal Judge Alex Kozinski Retires Abruptly After Sexual Harassment Allegations*, N.Y. TIMES (Dec. 18, 2017), <https://www.nytimes.com/2017/12/18/us/alex-kozinski-retires.html> [<https://perma.cc/5Y8W-8VKW>]. Some deem this the “one free grab” or “single grope rule” case. See generally Williams et al., *supra* note 4; Heydemann & Tejani, *supra* note 21. Some scholars argue that an “overly stringent judicial application of the ‘severe or pervasive’ standard may have resulted from outlier decisions in early harassment jurisprudence, written by overwhelmingly older male judges hostile to harassment claims,” or are simply a misinterpretation of Supreme Court jurisprudence. Elizabeth C. Tippet, *The Legal Implications of the MeToo*

Circuit courts remain split as to whether the objective prong should take into account the plaintiff's gender. In 1998, in *Oncale v. Sundowner Offshore Services*, the Court suggested in dictum that the objective reasonableness standard be modified to "a reasonable person *in the plaintiff's position*," though it did not expressly adopt such a standard as its holding.²⁹ Today, despite *Oncale*, there is still substantial debate over whether the standard should consist of a reasonable person, reasonable woman, or some other version of reasonableness that more explicitly takes into account the victim's characteristics. The majority of circuits that have decided this issue have either rejected gender specificity or maintained a reasonable person standard without addressing the issue of incorporating gender into the reasonableness analysis.³⁰

In contrast, the Third and Ninth Circuits use a standard that explicitly incorporates the plaintiff's gender. The Ninth Circuit first established a "reasonable victim standard" in *Ellison v. Brady*.³¹ The *Ellison*

Movement, 103 MINN. L. REV. 229, 241 (2018) (citing SANDRA F. SPERINO & SUJA A. THOMAS, *UNEQUAL 37* (David Kairys ed., 2017)); Judith J. Johnson, *License to Harass Women: Requiring Hostile Environment Sexual Harassment to Be "Severe or Pervasive" Discriminates Among "Terms and Conditions" of Employment*, 62 MD. L. REV. 85, 86 (2003).

29. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81-82 (1998) (emphasis added).

30. The Fifth Circuit has explicitly rejected the reasonable woman standard. *DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 594 (5th Cir. 1995) ("The test is an objective one, *not* a standard of offense to a 'reasonable woman.'"). The Sixth Circuit has also explicitly rejected the standard. *Hartleip v. McNeilab, Inc.*, 83 F.3d 767, 776 (6th Cir. 1996) (adopting *Radtke v. Everett*, 501 N.W.2d 155, 165 (Mich. 1993) (holding that "a gender-conscious standard must be rejected")). The Eighth Circuit previously applied a reasonable woman standard but then rejected the standard after *Harris*. *Gillming v. Simmons Indus.*, 91 F.3d 1168, 1172 (8th Cir. 1996). The remaining circuits apply a gender-neutral reasonableness standard. *See, e.g.*, *Valentin-Almeyda v. Municipality of Aguadilla*, 447 F.3d 85, 94 (1st Cir. 2006); *Jennings v. Univ. of N.C.*, 444 F.3d 255, 269 (4th Cir. 2006); *Whittaker v. N. Ill. Univ.*, 424 F.3d 640, 645 (7th Cir. 2005); *Stinnett v. Safeway, Inc.*, 337 F.3d 1213, 1219 (10th Cir. 2003); *Watkins v. Bowden*, 105 F.3d 1344, 1352, 1356 (11th Cir. 1997). The Second Circuit previously weighed applying a reasonable woman standard, but ultimately side-stepped the issue. *Petrosino v. Bell Atl.*, 385 F.3d 210, 221-22 (2d Cir. 2004) ("[W]e need not choose between these two options because we conclude that the evidence in this case . . . would permit a jury to conclude that a reasonable person, regardless of gender," would deem the environment hostile.). For more on this issue, see Blair Druhan, *Severe or Pervasive: An Analysis of Who, What, and Where Matters When Determining Sexual Harassment*, 66 VAND. L. REV. 355, 362-63 (2013) and Nicole Newman, *The Reasonable Woman: Has She Made a Difference?*, 27 B.C. THIRD WORLD L.J. 529, 532-33 (2007). The Supreme Court has not commented on the matter since *Oncale*.

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

analysis considers whether “a reasonable victim of the same sex as the plaintiff would consider the comments [or actions] sufficiently severe or pervasive to alter a condition of employment and create an abusive working environment.”³² Similarly, the Third Circuit has applied a standard of a “reasonable person of the same sex in that position.”³³

If courts were to adopt the *Oncale* dicta measuring objectivity in terms of “a reasonable person in the plaintiff’s position,” sexual harassment law could adapt much faster to the changing societal demands of the moment. There is an intersectional evaluation implicit in the *Oncale* approach, rendering it sensitive to inequality: “The plaintiff’s position” naturally includes her race, gender, past experiences of sexual harassment—which could exacerbate perceptions of or the harm experienced from a hostile work environment—and more.³⁴ In the meantime, the application of different reasonableness standards creates dissimilitude in how plaintiffs are treated across circuits.³⁵

32. *Ellison*, 924 F.2d at 878 (“A complete understanding of the victim’s view requires, among other things, an analysis of the different perspectives of men and women. Conduct that many men consider unobjectionable may offend many women.”). This holding can be traced to Judge Damon Keith’s dissent in *Rabidue v. Osceola Refining Co.*, in which the Sixth Circuit established a traditional reasonable person standard. *Rabidue v. Osceola Refin. Co.*, 805 F.2d 611, 626 (Keith, J., dissenting). In his dissent, Judge Keith argued that “the reasonable person perspective fails to account for the wide divergence between most women’s views of appropriate sexual conduct and those of men.” *Id.* Similarly, two influential pre-*Oncale* decisions reflect how courts can apply reasonableness standards that take into account the victim’s unique position. In *Hicks v. Gates Rubber*, the Tenth Circuit determined that “[aggregating] evidence of racial hostility with evidence of sexual hostility” was permissible to determine whether the plaintiff, a Black woman, was subjected to a hostile work environment. *Hicks v. Gates Rubber*, 833 F.2d 1406, 1416-17 (10th Cir. 1987). In *Anthony v. County of Sacramento*, where the plaintiff was a Black woman, the Eastern District of California maintained that “objective hostility is determined from the perspective of a reasonable person with the same fundamental characteristics as [the] plaintiff,” therefore analyzing how “a reasonable African-American woman” would have assessed the conduct alleged. *Anthony v. County of Sacramento*, 898 F. Supp. 1435, 1447 (E.D. Cal. 1995).

33. *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3d Cir. 1990).

34. For more on this issue, see, e.g., MACKINNON, *supra* note 1 at 1063-74; Angela Onwuachi-Willig, *What About #UsToo?: The Invisibility of Race in the #MeToo Movement*, 128 YALE L.J.F. 105, 109 (2018) (advocating for a “standard based on a reasonable person in the complainant’s intersectional and multidimensional shoes”); Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 464-71 (1997); Catharine MacKinnon, *Directions in Sexual Harassment Law*, 31 NOVA L. REV. 2, 5 (2007) (arguing that “usually, it is perpetrators who have to be reasonable”).

35. See Newman, *supra* note 30, at 552-55.

Before #MeToo—and in some circuit courts, after it—the standard for deeming workplace behaviors sexual harassment could be almost insurmountable for plaintiffs alleging less overtly outrageous offenses than what occurred in *Meritor*, even as courts applied the *Harris* factors. Courts across all circuits have dismissed cases involving allegations of unwelcome sexual advances or even battery from a harasser as not sufficiently severe or pervasive to be actionable.³⁶ Despite the range of behaviors *Harris* provides for, pre-#MeToo courts often required plaintiffs to have suffered the most egregious or cruel forms of harassing behavior in order to have a legally actionable claim. Only then could victims of sexual harassment be confident they might be found “reasonable.”

B. *The Reasonable Victim’s Response to Harassment*

If a plaintiff is successful in arguing that she was the victim of workplace sexual harassment, employers may still escape liability through a second reasonableness test. Two companion cases from 1998 established a reasonableness standard for both employers and plaintiffs in handling the aftermath of sexual harassment in the workplace. Taken together, *Faragher v. City of Boca Raton* and *Burlington Industries v. Ellerth* created what is colloquially known as the *Faragher-Ellerth* defense: If there has been no tangible, adverse employment action against the plaintiff, such as a demotion or firing,³⁷ employers may raise the two-prong affirmative defense that 1) they exercised reasonable care to prevent and correct the harassing behavior, and 2) the plaintiff unreasonably failed to take advantage of corrective opportunities the employ-

36. See, e.g., *Legrand v. Area Res. for Cmty. & Hum. Servs.*, 394 F.3d 1098, 1102-03 (8th Cir. 2005) (finding that explicit, unwelcome sexual advances were not severe or pervasive enough to create a hostile work environment); *Burnett v. Tyco Corp.*, 203 F.3d 980, 981, 984-85 (6th Cir. 2000) (finding that a single instance of battery, as well as multiple comments from the harasser to the plaintiff such as “Since you have lost your cherry, here’s one to replace the one you lost” when handing her a cough drop, did not create a hostile work environment); *Mormol v. Costco Wholesale Corp.*, 364 F.3d 54, 58-59 (2d Cir. 2004) (finding that plaintiff’s manager’s repeated request for sex was not severe or pervasive enough to create a hostile work environment); *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1251 (11th Cir. 1999) (en banc) (finding that supervisor’s constant following of the plaintiff, staring at her groin and rubbing against her did not constitute actionable harassment); *Brooks v. City of San Mateo*, 229 F.3d 917, 927 (9th Cir. 2000) (finding that a groping that resulted in a criminal conviction did not create a hostile work environment).

37. 42 U.S.C.A. § 2000e-3 (Westlaw through P.L. 116-259). Often, a tangible adverse employment action can support an employee’s case that she was harassed or discriminated against. *Id.*

er provided.³⁸ Yet again, the plaintiff is subjected to a purportedly objective reasonableness test, and another obstacle to making her case.



The #MeToo movement has created an atmosphere in which courts can reevaluate a plaintiff's reasonableness with respect to the perception of a hostile work environment and with respect to her response to that environment. This is because reasonableness is socially defined. In other words, to determine what a reasonable person would do, courts and juries necessarily impose a societal standard for what constitutes reasonableness, which typically reflects the status quo.³⁹ Now, a handful of post-#MeToo court decisions offer a snapshot of where courts may be headed in a society that has begun to reckon with its past expectations for and treatment of targets of sexual harassment.⁴⁰ This development

38. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 745 (1998).

39. See generally Lani Guinier & Gerald Torres, *Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740 (2014). This of course reflects the perennial question of whether culture drives law or vice versa (or perhaps whether both influence one another). Lani Guinier and Gerald Torres, evaluating the effect of racial justice activism on courts, argue that social movements have had “a decisive effect” on giving “heft and constitutional value” to legal changes. *Id.* at 2743. In their view, those seeking social change “cannot simply rely on judicial decisions as the solution” but instead must “integrate lawyers not as leaders but as fellow advocates” to create “a new paradigm” of “demosprudence”: democratic efforts that legitimize lasting legal change, not the equivalent of a great man theory for individual judicial victories. *Id.* at 2749. For more on how the legal and cultural aspects are intertwined, see LANI GUINIER & GERALD TORRES, *THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY* (2002). Given the influence social activism can have on judicial approaches, the fact that the #MeToo movement arose in part out of social media may expedite its effects on the legal system, as victims of sexual harassment were able to congregate under a hashtag, amplifying one another's stories in a way that would have been near-impossible before the internet age. See generally Stacey B. Steinberg, *#Advocacy: Social Media Activism's Power to Transform Law*, 105 KY. L.J. 413 (2016). For more on the effect of the internet on social movements and legal advocacy, see *id.*

40. Notably, as seen in the cases cited in Sections II.A-C and III, most of the decisions evaluating reasonableness since #MeToo involve litigation that began prior to the inception of the movement in October 2017. *E.g.*, *Malin v. Orleans Par. Comm'n Dist.*, 718 F. App'x 264 (5th Cir. 2018). If more cases arising from post-#MeToo understandings of sexual harassment are brought, an influx of cases involving single incidents or incidents not previously considered severe may encourage courts to reevaluate reasonableness as well—but not enough time has passed to track the spillover from the #MeToo movement into the types of claims being pursued through the

raises the question: If the creation of workplace sexual harassment law was a precondition for the #MeToo movement, could the movement be a precondition for broadening the legal definition of sexual harassment?⁴¹

II. REASONABLENESS IN PERCEIVING A HOSTILE WORK ENVIRONMENT POST-#METOO

In the three years since the #MeToo movement took off, federal courts have primarily only hinted at how their application of the reasonableness standard might change.⁴² As of yet, no court has commented expressly on the influence of #MeToo on the reasonableness test.⁴³ It may be too soon to tell definitively the direction that courts are moving in with respect to this standard, but some cases offer insight.

Though the majority of courts purport to apply a gender-neutral model for reasonableness, the type of reasonableness standard courts apply does not necessarily appear to have an outcome-determinative effect.⁴⁴ Notably, the courts that apply a gendered model, the Third and Ninth Circuits, have not re-assessed the hostile work environment reasonableness standard since #MeToo began.⁴⁵ Courts applying the gender-neutral standard post-#MeToo fall on a spectrum of favorable to

legal system. There are also a number of other elements of sex discrimination law that the #MeToo movement stands to affect, including other prongs of hostile work environment evaluations, educational sexual harassment claims arising under Title IX, and more.

41. See MacKinnon, *supra* note 2. Note that, to date, litigators have not made explicit #MeToo arguments in new briefs or complaints with respect to reasonableness, though the movement has come up in passing on some complaints. Docket Search Results for “#MeToo,” “#MeToo Movement,” “Me Too,” and “Me Too Movement,” BLOOMBERG L., <https://www.bloomberglaw.com> (in Bloomberg Law, search starting point field for “#MeToo,” “Me Too,” “Me Too Movement,” and “#MeToo Movement” within the date range of 10/01/2017 to 03/05/2021; then narrow to federal courts and the categories “Civil Rights: Employment” and “Civil Rights: Other;” yielding seventy-seven results) (last visited Mar. 5, 2020).
42. See *infra* Sections II.A-C.
43. See, e.g., all cases cited *infra* Section II.A-C. None of the opinions in these cases expressly mention #MeToo in their discussions of reasonableness.
44. Limited research into the effects of applying gender, or not, suggest there is no particular trend of success for plaintiffs depending on the standard used. See Newman, *supra* note 30, at 552-55 (tracking rates of plaintiff success in establishing a claim).
45. Citing References to 42 U.S.C.A. § 2000e-2, WESTLAW, <https://1.next.westlaw.com> (in Westlaw, search within “Citing References” of 42 U.S.C.A. § 2000e-2; narrow to “Cases”; narrow to Third and Ninth Circuits, and search “hostile work environment”; yielding 188 case results) (last visited Mar. 14, 2021).

unfavorable for plaintiffs; as others have noted, “Courts across the country lack a reliable metric for uniformly analyzing which conduct rises to [the] level of ‘severe or pervasive.’”⁴⁶

While several circuits have weighed in on this issue, decisions from the Fourth, Fifth, and Seventh Circuits best represent the varying approaches to reasonableness today. The Fifth Circuit offers a continuation of the same application of the reasonableness standard that applied pre-#MeToo, while the Fourth and Seventh Circuits represent opposite ends of the spectrum: The Fourth Circuit has expanded its definition of reasonableness without commenting on the influence of #MeToo, while the Seventh Circuit has almost engaged in a backlash against the changing social standards for appropriate workplace behavior.⁴⁷ To make matters more confusing, the EEOC—whose decisions courts and employers can look to when attempting to evaluate or create workplace standards—has been inconsistent in its own jurisprudence, falling all over this spectrum.⁴⁸ Since the EEOC is one of many bodies that have been slow to adjust its reasonableness analysis and address the elephant in the room that is #MeToo, litigants are left uncertain of how, if at all, changing social norms will affect the legal standards to which their claims are held. An examination of summary judgment decisions shows how insular courts can be relative to the cultural movement, as in some cases courts can even be hostile to potentially meritorious claims.

A. *Post-#MeToo, the Continuation of Pre-#MeToo Standards*

Given the societal evolution stemming from #MeToo and the elasticity of a reasonableness standard, a court that maintains the status quo of reasonableness—one in which only the most egregious or repetitive behaviors rise to the level of a hostile work environment—is effectively making a statement against the turning tides outside the courtroom. Ironically, courts that maintain narrow conceptions of reasonableness have invoked *Oncale*'s reminder that Title VII is not a “general civility code” despite the flexibility *Oncale* actually discussed extending to the reasonableness evaluation.⁴⁹

46. Heydemann & Tejani, *supra* note 21, at 81.

47. *See infra* Section II.C.

48. EEOC decisions demonstrating this are discussed *infra* in each section. Note that the Supreme Court has held that the EEOC's interpretation of Title VII should be given “great deference” and that courts should look to its decisions for guidance. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971).

49. *See Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 81-82 (1998).

The preexisting standard that a single incident does not typically rise to the level of severity—and certainly not pervasiveness—required to create a hostile work environment quite clearly informs many post-#MeToo decisions that continue to adhere to status-quo conceptions of reasonableness.⁵⁰ Take, for instance, an EEOC administrative decision from March 2018.⁵¹ A technician for the Social Security Administration in Tulsa, Oklahoma alleged that an administrative law judge sexually harassed her by hitting her bottom with his cane and later referring to her as “Pocahontas,” leading the complainant to raise sexual and race harassment claims.⁵² The EEOC held that the singular instance of touching was not “so severe or pervasive . . . that a reasonable person would consider the conduct hostile.”⁵³ Calling the incident “inappropriate,” the EEOC reiterated the standard that “[n]ot every unpleasant or undesirable act which occurs in the workplace constitutes a discrimination violation.”⁵⁴ But even repeated incidents that are more physical in nature may still not rise to the EEOC’s interpretation of the reasonable person standard. In one case in February 2019, the EEOC held that a man’s allegation of sexual harassment by his woman supervisor—including three separate occasions during which she attempted to rub and massage him—did not meet the “reasonable person” standard.⁵⁵

When a single incident involves a more explicitly physical altercation, the EEOC has deemed it severe enough for a reasonable person to perceive a hostile work environment. For instance, in *Taryn S. v. O’Rourke*, a medical support assistant alleged that a physician hugged her, forcibly grabbed her neck, kissed her, grabbed the belt loops of her pants, and persistently told her he wanted to have sex with her.⁵⁶ Though the Department of Veterans Affairs’ agency review deemed this an isolated incident that a reasonable person would not find created a

50. *See, e.g.*, *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (noting “isolated incidents (unless extremely serious)” should not be considered a form of sexual harassment).

51. Marielle L., EEOC Appeal No. 0120162299, 2018 WL 1737437, at *1 (Mar. 29, 2018).

52. Marielle L., 2018 WL 1737437, at *1. The complainant was “both Caucasian and Native American”; the EEOC made no decision with respect to the race discrimination claim because, it stated, there was not enough evidence that the remark was made in the first place. *Id.* at *5-6.

53. Marielle L., 2018 WL 1737437, at *2.

54. Marielle L., 2018 WL 1737437, at *6.

55. Monroe M., EEOC Appeal No. 0120172219, 2019 WL 1397601, at *1, *4-5 (Feb. 28, 2019).

56. Taryn S., EEOC Appeal No. 0120162172, 2018 WL 4692613, at *1-2 (Sept. 14, 2018).

hostile work environment, the EEOC, without much elaboration, disagreed, stating only that in “certain circumstances” a single incident could be severe enough to create a hostile work environment.⁵⁷ The EEOC also looked to the complainant’s subjective reasonableness, noting that she was “embarrassed, humiliated, and nervous” as a result of the incident.⁵⁸

This same reasoning persists in circuit courts. In *Malin v. Orleans Parish Communications District*, the Fifth Circuit held that a reasonable person would not believe that six interactions in which a woman human resources manager graphically described sexual encounters to the woman plaintiff—despite her protestations—met the severe or pervasive threshold.⁵⁹ Though the court referred to the commentary as “unprofessional, unwelcome and distasteful,” it emphasized *Oncale* dicta that “Title VII is not a ‘general civility code.’”⁶⁰

Though courts do not necessarily misconstrue sexual harassment precedents by foreclosing relief for single incident claims, doing so at the summary judgment stage can demonstrate courts’ hostility to potentially meritorious claims. When judges grant summary judgment to defendants in sexual harassment cases, they foreclose the jury’s ability to find the hostile work environment claim reasonable in favor of their own determination that it is not. By preventing juries from weighing in on the reasonableness question, judges engage in line-drawing that may be out of step with today’s cultural climate, cutting many plaintiffs off from relief that a post-#MeToo jury with its own conception of reasonableness might otherwise grant. By 2020, the Sixth and Eighth Circuits followed the same path as the Fifth Circuit, allowing summary judgment decisions for defendants to stand in hostile work environment cases—taking it out of the jury’s hands—despite the potential for a trier of fact to find

57. Taryn S., 2018 WL 4692613, at *9.

58. Taryn S., 2018 WL 4692613, at *9.

59. *Malin v. Orleans Par. Commc’ns Dist.*, 718 F. App’x 264, 266, 272 (5th Cir. 2018). *Malin* involved a retaliation claim, but the *Oncale* standard still applies to determine whether the plaintiff engaged in a protected activity when reporting the incidents. *Id.* at 272. The *Malin* court noted that in order to establish a retaliation claim, the plaintiff must prove she reasonably believed the conduct she reported was an unlawful employment practice under Title VII—again, the elusive reasonableness standard. *Id.* (citing *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 428 (5th Cir. 2000)).

60. *Malin*, 718 F. App’x at 273 (citing *Oncale v. Sundowner Offshore Servs.*, 523 U.S. at 81 (1998)). The court did not comment on the shared gender of the women apart from an indirect reference to the “innocuous differences in the ways men and women routinely interact with members of the same sex.” *Id.*

a valid claim.⁶¹ In *McDaniel v. Wilkie*, Natalie A. McDaniel, a Black woman employed by the Department of Veterans Affairs, alleged that she was subjected to “inappropriate touching, comments, subjective evaluations, workplace sabotage, false accusations of misconduct, failure to promote, failure to grant her reasonable accommodation[,] and the removal of the assets/tools necessary for her to perform her job.”⁶² More specifically, she alleged that, among other transgressions, supervisors inappropriately asked whether women employees were in relationships with other women employees; “stroked her hair”; and called her a “bitch.”⁶³ The Sixth Circuit upheld a district court’s decision to grant summary judgment to the defendants because “[e]ven viewed in the best light for her case, the events that McDaniel alleged [did] not show an environment ‘that a reasonable person would find hostile or abusive,’”⁶⁴ emphasizing from Supreme Court precedents that “simple teasing,”⁶⁵ “‘offhand comments, and isolated incidents (unless extremely serious) will not amount to’ a hostile work environment.”⁶⁶ But a court *could* choose to treat these repeated incidents as pervasive, in particular when the case is construed in the light most favorable to the plaintiff at summary judgment, and allow the facts to come before a jury to make its own determination.⁶⁷ In other words, especially in light of the #MeToo movement, a reasonable person could perceive these same behaviors as not isolated and more than simple teasing, characterizing them as sexual

61. Courts review appeals of summary judgment decisions *de novo*. See, e.g., *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 465 n.10 (1992) (“[O]n summary judgment we may examine the record *de novo* without relying on the lower courts’ understanding . . .”). When resolving summary judgment motions, courts must view the evidence in the light most favorable to the non-moving party. E.g., *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (“[O]n summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion.” (citation omitted)).

62. *McDaniel v. Wilkie*, No. 19-3304, 2020 WL 1066007, at *1 (6th Cir. Jan. 31, 2020) (quotation marks omitted).

63. *McDaniel*, 2020 WL 1066007, at *1.

64. *McDaniel*, 2020 WL 1066007, at *3 (quoting *Oncale*, 523 U.S. at 81-82).

65. *McDaniel*, 2020 WL 1066007, at *3 (quoting *Oncale*, 523 U.S. at 81-82).

66. *McDaniel*, 2020 WL 1066007, at *3 (quoting *Faragher v. City of Boca Raton*, 524 U.S. at 775, 787 (1998)) (citations omitted).

67. Certainly, the #MeToo movement has led to the treatment of these types of behaviors as forms of sexual harassment. See Birnbaum, *supra* note 8; Kim, *supra* note 8. But courts have contributed to this reform as well. See, e.g., *Parker v. Reema Consulting Servs., Inc.*, 915 F.3d 297, 300 (4th Cir. 2019) (holding the spread of a single rumor was a sufficient incident to meet the hostile work environment standard).

harassment.⁶⁸ Therefore, it is equally—perhaps more—plausible that these facts meet the hostile work environment standard and the claim should survive summary judgment to allow a jury to determine reasonableness.

The Eighth Circuit even admitted as much, openly acknowledging the problematic behavior of a particular defendant while still deeming his behavior to be insufficient to survive a motion for summary judgment.⁶⁹ Jennifer Paskert, a sales associate at a used car dealership, brought a hostile work environment suit against her employer due to her supervisor Brent Burns's treatment of her and other women.⁷⁰ According to the evidence provided, Burns was, in the Eighth Circuit's words, "volatile" and "frequently lost his temper with everyone"; he would "[use] derogatory names" for "female customers"; and his "treatment of women was demeaning, sexually suggestive, and improper."⁷¹ More than one person testified to having heard Burns remark that he "never should have hired a woman" and wonder aloud if he could make Paskert cry.⁷² Burns also "openly bragged at work about his purported sexual conquests."⁷³ On one occasion, another employee "witnessed Burns attempt to rub Paskert's shoulders and say he was going to give her a hug."⁷⁴ One time, after Paskert criticized Burns' treatment of her, he replied, "Oh, if you weren't married and I wasn't married, I could have you . . . You'd be mine . . . I'm a closer."⁷⁵

The court showed clear distaste for Burns's conduct, calling it "certainly reprehensible and improper."⁷⁶ Despite this, the court held Burns's conduct was still "not so severe or pervasive as to alter the terms and conditions of Paskert's employment."⁷⁷ In part, this was because "Paskert only allege[d] one instance of unwelcome physical con-

68. See, e.g., Birnbaum, *supra* note 8 (detailing the ousting of Rick Najera, a producer at CBS, who resigned after he was accused of making lewd comments to performers during an annual sketch comedy showcase); Kim, *supra* note 8 (detailing the retirement of radio journalist John Hockenberry after investigations into unwelcome overtures to women employees and bullying behavior toward women of color co-hosts); Carlsen et al., *supra* note 11 (detailing the range of behaviors that led to the firing or resignations of 201 men after #MeToo began).

69. Paskert v. Kemna-ASA Auto Plaza, Inc., 950 F.3d 535, 539 (8th Cir. 2020).

70. Paskert, 950 F.3d at 537.

71. Paskert, 950 F.3d at 537.

72. Paskert, 950 F.3d at 537.

73. Paskert, 950 F.3d at 537.

74. Paskert, 950 F.3d at 537.

75. Paskert, 950 F.3d at 537.

76. Paskert, 950 F.3d at 538.

77. Paskert, 950 F.3d at 538.

tact”⁷⁸ Of course, nothing in *Harris* or *Oncale* limits the definition of sexual harassment to physical contact.⁷⁹ While the court did not mince words in stating that the defendants—both the company and Burns himself—“should both be embarrassed and ashamed” of their treatment of Paskert, it nonetheless stood firm that this behavior could not meet the severe or pervasive standard.⁸⁰

B. *The Path Toward Expansion*

While the pre-#MeToo approach to reasonableness is alive and well in some circuits, there is reason to believe that the tides are turning in others. No court has yet overtly made reference to the #MeToo movement in its reasonableness analysis, but reading between the lines of their decisions, there are hints that the movement-led cultural shift has influenced that analysis. While we are, as of yet, unable to empirically tie these courts’ willingness to uphold hostile work environment claims directly to the #MeToo movement, some courts’ treatment of less severe instances of harassment or less frequent harassing behaviors as legally cognizable is nonetheless in step with the movement’s cultural treatment of those same behaviors. In particular, by allowing the reasonableness evaluation to better incorporate the harm a plaintiff has suffered—that is, by allowing the effects of sexual harassment to support a finding that it occurred—courts offer a path for more plaintiff-friendly jurisprudence under the existing legal standard.

1. A Hedging Elaboration on Reasonableness

The Fourth Circuit has come the furthest in expanding its definition of reasonableness since #MeToo began. As early as January 2018—mere months after #MeToo got underway—the Fourth Circuit reversed a district court’s order granting summary judgment to an employer on a hostile work environment claim in *Hernandez v. Fairfax County*.⁸¹ Magaly Hernandez, a firefighter, experienced regular harassment from her station captain including inappropriate touching, his use of his body to block her path, telling her he wanted to see her in a bathing suit,

78. *Paskert*, 950 F.3d at 538.

79. See generally *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998).

80. *Paskert*, 950 F.3d at 539.

81. *Hernandez v. Fairfax County*, 719 F. App’x 184, 187 (4th Cir. 2018).

“and once [asking] Hernandez whether she would ‘be able to handle that big hose,’” which she understood to be a sexual innuendo.⁸² Though the station captain adjusted his behavior after Hernandez reported his conduct to the station’s battalion chief, the station captain then began monitoring and tracking Hernandez’s movements at work.⁸³ Nonetheless, the district court held that the conduct “was not sufficiently severe or pervasive” under the objective reasonable person standard.⁸⁴ On appeal, the Fourth Circuit disagreed and held that the facts could support a jury determination that Hernandez was subjected to a hostile work environment, particularly in light of the duration of the harassment and the physical invasion of Hernandez’s space.⁸⁵ Despite applying the same standards that led the Eighth Circuit to *reject* a similar sexual harassment claim in *Paskert*, the Fourth Circuit determined that the conduct at issue could reasonably meet the standard for a hostile work environment.⁸⁶

More than a year later, in February 2019, the Fourth Circuit again reversed a district court’s decision in favor of an employer and expanded its interpretation of reasonableness in *Parker v. Reema Consulting Services*.⁸⁷ Evangeline Parker, a manager in a warehouse facility, alleged that male employees were circulating a rumor that she was promoted due to a sexual relationship with a higher-ranking manager.⁸⁸ Parker alleged that she was generally treated with disrespect as a result, including being locked out of an all-staff meeting at which the rumor was discussed.⁸⁹ The Fourth Circuit did not expressly comment on the objective and subjective reasonableness standards when offering its holding.⁹⁰ However, in holding that the alleged harassment was sufficiently severe or pervasive to be actionable, it noted that “the harassment was continuous, preoccupying not only Parker, but also management and the employees at the . . . facility for the entire time of Parker’s employment after her

82. *Hernandez*, 719 F. App’x at 186.

83. *Hernandez*, 719 F. App’x at 186.

84. *Hernandez*, 719 F. App’x at 187.

85. *Hernandez*, 719 F. App’x at 187-88.

86. *Hernandez*, 719 F. App’x at 187-88; *Paskert v. Kemna-ASA Auto Plaza, Inc.*, 950 F.3d 535, 537-39 (8th Cir. 2020).

87. *Parker v. Reema Consulting Servs., Inc.*, 915 F.3d 297, 300 (4th Cir. 2019). The lower court granted the defendant’s motion to dismiss. *Id.* In addition to holding that the harassment was not severe or pervasive, the lower court held that the harassment was not based on sex, which the Fourth Circuit also reversed. *Id.* at 301.

88. *Parker*, 915 F.3d at 300.

89. *Parker*, 915 F.3d at 300.

90. *See Parker*, 915 F.3d. 297.

final promotion.”⁹¹ The Fourth Circuit went so far as to call the conduct against Parker “humiliating.”⁹² By implication, Parker was subjectively reasonable, and the impact on the greater office indicated that the workplace environment was objectively hostile as well.⁹³

Contrast this with the Eighth Circuit’s approach in *Paskert*, in which the court upheld a summary judgment holding for a defendant while condemning his behavior as “reprehensible and improper.”⁹⁴ There, the Eighth Circuit denounced behavior as a matter of social mores, but took pains to maintain a legal standard that allowed, by its own description, harm to the plaintiff. But if in the context of social mores, a reasonable person could—and did—deem this behavior “reprehensible and improper,” what separates that behavior from harassing behavior that is severe or pervasive? The court effectively admitted that this behavior was sexually harassing but nonetheless chose to adhere to an outdated formula for determining hostile work environments for no obvious reason other than custom. Unlike in the Eighth Circuit, the Fourth Circuit’s framing of the alleged behavior as “humiliating”—effectively synonymous with “reprehensible and improper”—gave the court room to account for the harm caused to the plaintiff as part of its reasonableness analysis. *Harris* and *Oncala* require that courts focus on the plaintiff’s perspective, yet the reasonableness standard has been shown to be fungible enough that “humiliating” treatment has led to completely different outcomes.

In a case with a similar pattern of harassment to the one the Fourth Circuit addressed in *Parker*, the Sixth Circuit recently reversed a summary judgment finding for a defendant employer based on similar reasoning.⁹⁵ In *Harper v. Elder*, Wendy Harper, an employee at a jail, alleged that her coworker Brad Conaway sexually harassed her and that her boss retaliated against her for reporting Conaway’s misconduct to him.⁹⁶ Harper alleged that Conaway “asked about her romantic availability, complimented her physical appearance, and made overt sexual

91. *Parker*, 915 F.3d at 304.

92. *Parker*, 915 F.3d at 305.

93. The case also involved a retaliation claim, which requires the plaintiff to be “objectively reasonable” in believing she was subjected to gender discrimination at the time she files a complaint. *Parker*, 915 F.3d at 300. Since the Fourth Circuit upheld her claim, by implication, Parker was objectively reasonable in perceiving a hostile work environment. *Id.*

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

95. *Harper v. Elder*, 803 F. App’x 853, 854-55 (6th Cir. 2020).

96. *Harper*, 803 F. App’x at 855.

advances.”⁹⁷ When Harper rejected Conaway, he “frequently yelled at her” in front of her colleagues, “ordered her around,” and at one point “intentionally drove his pickup truck in her direction as they left work, coming within inches of hitting [her].”⁹⁸ When Conaway was promoted, he “routinely selected Harper over her male colleagues for menial tasks,” and, due to Conaway’s repeated harassment, Harper ultimately left her job.⁹⁹ The district court held that her allegations did not meet the severe or pervasive standard and granted summary judgment to the defendant.¹⁰⁰

The circuit court reversed, holding that the conduct Harper described “could make a reasonable person in Harper’s position feel that her workplace is hostile,” in particular noting that Harper called the harassment “a daily thing” and that there was “a years-long ‘succession of harassing acts.’”¹⁰¹ The court also noted that the harassment unreasonably interfered with Harper’s work performance as she suffered migraines and nausea due to stress from the harassment, leading to a doctor’s prescription for medical leave.¹⁰² Thus, while the court did not expressly invoke the subjective element of the reasonableness test, it did find Harper’s perception of and response to the harassment to be objectively reasonable.¹⁰³ In other words, the court defined harassment in part based on its effects on the victim—which is, in fact, already a *Harris* factor in the context of unreasonable interference with work.¹⁰⁴ While Harper’s case, given the repetitive nature of the harassment and its duration, could have met the severe or pervasive standard pre-#MeToo in many courts, the district court did not appear to think it did. By granting summary judgment to the defendant, the district court showed that not only did it believe this type of behavior was not sexual harassment, but also no reasonable jury could deem it as such. But the Sixth Circuit’s focus on the harm the plaintiff suffered, without treating this as

97. *Harper*, 803 F. App’x at 855.

98. *Harper*, 803 F. App’x at 855 (quotation marks omitted).

99. *Harper*, 803 F. App’x at 855.

100. *Harper*, 803 F. App’x at 855.

101. *Harper*, 803 F. App’x at 856.

102. *Harper*, 803 F. App’x at 856.

103. *See Harper*, 803 F. App’x at 856. Courts often avoid discussion of the subjective evaluation since, if the objective standard is met, the subjective one likely is too. *Cf. Burns v. McGregor Elec. Indus., Inc.*, 955 F.2d 559, 565-66 (8th Cir. 1992) (using the objective reasonable person standard to reverse a district court’s holding that a plaintiff could not have been subjectively harmed by workplace harassment that included showing her pornography since she had previously posed for nude photographs).

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

part of the *subjective* element of reasonableness, shows how courts can incorporate a plaintiff's experience into the objective prong of the test. In so doing, the Sixth Circuit demonstrates how courts can, given the fungibility of reasonableness, evolve alongside the societal, #MeToo-driven shift in understandings of what constitutes sexual harassment.

In *Hernandez*, the Fourth Circuit accepted smaller or less repeated acts as significant enough to constitute a hostile work environment, and, in *Parker*, it accepted a single rumor as sufficient.¹⁰⁵ This approach may not be novel, but taken together it is nonetheless more deferential to the victim of harassment. While in *Harper*, the harassing behavior was more regular, the Sixth Circuit's willingness to treat lesser offenses such as yelling, coupled with other advances, as part of a hostile work environment is also more deferential to the plaintiff than courts, including the Sixth Circuit itself, have been pre-#MeToo.¹⁰⁶ In light of the speed at which social understandings of sexual harassment have evolved, that the lower courts held that the offending conduct in these cases did *not* create a hostile work environment seems all the more retrograde.

Certain EEOC administrative cases have also led to reversal of agency decisions that deny that conduct is sufficiently severe or pervasive. This suggests a greater willingness by the EEOC to broaden the nature of the conduct that it deems reasonably could create a hostile work environment. In *Lida G. v. Perdue*, handed down a few months after #MeToo began, the EEOC reversed a Department of Agriculture agency review that found the activity the complainant alleged was not severe or pervasive enough.¹⁰⁷ The complainant, a worker in a grain inspection unit of the Department of Agriculture, alleged that a coworker, possibly intoxicated, asked her to sit in his lap and told her "you know you want

105. Consider again precedent across circuits for treating even repeated, physical acts as not severe or pervasive enough. *See* *Legrand v. Area Res. for Cmty. & Hum. Servs.*, 394 F.3d 1098, 1100, 1102-03 (8th Cir. 2005) (determining three incidents, including several inappropriate comments and instances of physical contact, over nine months did not amount to a violation); *Burnett v. Tyco Corp.*, 203 F.3d 980, 984-85 (6th Cir. 2000) (finding that a battery and two offensive remarks over six months did not create a hostile work environment); *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1243, 1248-49 (11th Cir. 1999) (en banc) (finding that constantly following and staring at the plaintiff, in addition to an instance of physical contact, an inappropriate statement, and three instances of sniffing at the plaintiff—two of those times while staring at her groin—over eleven months did not meet the necessary frequency for a hostile work environment).

106. *See, e.g., Burnett*, 203 F.3d at 984 (finding that a battery and two offensive remarks over six months did not create a hostile work environment).

107. *Lida G.*, EEOC Appeal No. 0120160072, 2017 WL 6729150, at *3 (Dec. 14, 2017).

it,” in addition to alleging that he had grabbed her in the past.¹⁰⁸ In *Lelah T. v. Brennan*, the EEOC again reversed a federal agency decision on reasonableness.¹⁰⁹ A supervisor working for the U.S. Postal Service alleged that her manager harassed her by making advances and informing her about his sexual libido, continuing to make sexually charged remarks over the course of a year.¹¹⁰ The Postal Service had found that the alleged harassment did not meet the reasonableness standard; the EEOC overruled that decision.¹¹¹ Finally, in *Erlene S. v. Sessions*, the EEOC held that a supervisor who grabbed and caressed the complainant and thereafter reacted to her with anger and a raised voice on several occasions had objectively and subjectively created a hostile environment due to the pervasiveness of his actions.¹¹²

A traditional view of pervasiveness (or severity, for that matter) would not have resulted in these EEOC holdings on severe or pervasive harassment, as repeated inappropriate comments have often not risen to the traditional reasonableness standard.¹¹³ And overall, among the decisions courts have made regarding the reasonableness standard since the #MeToo movement began, the above cases appear to apply a reasonableness analysis that favors the victim by treating the victim’s perceptions or reactions to the behaviors as evidence that they are harassing in nature, and by accepting behaviors that were not traditionally understood to be egregious as legally actionable. Taken together, these cases suggest that modern views of what constitutes sexual harassment may be seeping in.

2. Avoidance of the Reasonableness Standard

Though some courts have seemingly incorporated the cultural shift of the #MeToo movement into their reasonableness approach, others have avoided the issue altogether. The First Circuit has notably sidestepped the reasonableness question while still holding for plaintiffs in

108. Lida G., 2017 WL 6729150, at *2-3.

109. Lelah T., EEOC Appeal No. 0120172533, 2020 WL 5844335, at *4, *8 (Oct. 24, 2018).

110. Lelah T., 2020 WL 5844335, at *2.

111. Lelah T., 2020 WL 5844335, at *4.

112. Erlene S., EEOC Appeal No. 0120160618, 2016 WL 4771671, at *1-2, *6 (Feb. 22, 2018).

113. See, e.g., *Legrand v. Area Res. for Cmty. & Hum. Servs.*, 394 F.3d 1098, 1100, 1102-03 (8th Cir. 2005); *Burnett v. Tyco Corp.*, 203 F.3d 980, 981, 984-85 (6th Cir. 2000); *Mormol v. Costco Wholesale Corp.*, 364 F.3d 54, 55, 58-59 (2d Cir. 2004); *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1251 (11th Cir. 1999) (en banc).

hostile work environment claims. In *Franchina v. City of Providence*, the First Circuit upheld a decision for a former firefighter who was repeatedly called “cunt,” “bitch,” and “lesbo” in the workplace, was spit on and shoved, and once had “the blood and brain matter of a suicide-attempt victim flung at her by a member of her own team.”¹¹⁴ In addition to those offenses, one of the instigators once rubbed his nipples in front the plaintiff; intentionally walked in on her while she was changing; and would encourage others to refer to the plaintiff, named Franchina, as “Frangina,” a combination of her name and the word “vagina.”¹¹⁵ The First Circuit upheld a finding of hostile work environment without commenting on the reasonableness test at all.¹¹⁶

This appears to be a trend for the First Circuit. In *Roy v. Correct Care Solutions*, Tara Roy, a nurse at a Maine Department of Corrections prison, was subjected to derogatory jokes and comments—including suggestions that a woman’s “job is to be at home”—and mistreatment from prison guards who left her alone with inmates, repeatedly called her a “bitch,” and made sexual advances that included sending her sexually explicit text messages.¹¹⁷ Though the district court held that a reasonable jury could not determine that Roy had been subjected to a hostile work environment, the First Circuit disagreed and remanded the case for trial, without commenting at all on the reasonableness of Roy’s experiencing this as harassment. Instead, it offered a recitation of the facts of the case with sparse commentary that a jury could, given those facts, find that the behavior was severe or pervasive.¹¹⁸

In *Franchina*, the First Circuit certainly pulled no punches: The court chastised the defendant for “attempts to trivialize the abuse,” calling it “nothing short of abhorrent.”¹¹⁹ By omitting a reasonableness analysis without explanation, the First Circuit leaves its logic open for interpretation, but in all likelihood, given the specific facts of these two cases, the First Circuit saw no need to discuss the reasonableness standard in light of what the court saw as such obvious cases of sexual harassment.

While the First Circuit has found for plaintiffs in these cases, the court’s avoidance of the reasonableness standard may leave plaintiffs

114. *Franchina v. City of Providence*, 881 F.3d 32, 37 (1st Cir. 2018). The court determined that the plaintiff’s claims taken together constituted a hostile work environment. *Id.* at 55.

115. *Franchina*, 881 F.3d at 39-40.

116. *Franchina*, 881 F.3d at 55.

117. *Roy v. Correct Care Sols., LLC*, 914 F.3d 52, 57-58 (1st Cir. 2019).

118. *Roy*, 914 F.3d at 64.

119. *Franchina*, 881 F.3d at 38, 61.

with dissimilar claims unsure of what facts, going forward, are sufficient to win a hostile work environment claim.

C. #MeToo Backlash

Even as some courts have demonstrated a willingness to expand their application of the reasonableness test, others have followed the opposite path, construing reasonableness more narrowly than most pre-#MeToo courts. Going beyond just maintaining the pre-#MeToo approach, the Seventh Circuit's response could even be deemed a #MeToo backlash.¹²⁰ In 2018, in *Swyear v. Fare Foods Corporation*, Amy Swyear, a former sales representative, alleged a hostile work environment by claiming that her coworkers referred to one woman customer as "Cunty" and another as "Big Tittie Blonde Carnie."¹²¹ On a business trip, Swyear's coworker repeatedly made sexual advances, insinuated that they should skinny-dip together, touched her back, and eventually entered her hotel room and crawled into her bed, suggesting that she needed a "cuddle buddy."¹²² Though the coworker left after Swyear's requests that he do so, he came back to her room throughout the night and knocked on her door repeatedly.¹²³ When Swyear reported this behavior to a supervisor, the company determined that no discipline was necessary.¹²⁴ When evaluating the objective and subjective components of Swyear's hostile work environment claim, the Seventh Circuit conceded that Swyear subjectively found the environment "to be sexist and offensive."¹²⁵ The court emphasized, however, that Swyear felt "in control of the situation," therefore inferring her coworker's actions "were much less threatening and severe" than the kinds of acts the court had

120. Though the #MeToo movement has not yet experienced a more concerted form of backlash, there have been naysayers—within the feminist movement and outside it—who critique the outcome of #MeToo as a slippery slope toward a puritanical society and/or one lacking (social) due process. See, e.g., Daphne Merkin, *Publicly, We Say #MeToo. Privately, We Have Misgivings*. N.Y. TIMES (Jan. 5, 2018), <https://www.nytimes.com/2018/01/05/opinion/golden-globes-metoo.html> [<https://perma.cc/P5B4-V5KY>]; Jia Tolentino, *The Rising Pressure of the #MeToo Backlash*, NEW YORKER (Jan. 24, 2018), <https://www.newyorker.com/culture/culture-desk/the-rising-pressure-of-the-metoo-backlash> [<https://perma.cc/G8L7-AU5D>].

121. *Swyear v. Fare Foods Corp.*, 911 F.3d 874, 878 (7th Cir. 2018).

122. *Swyear*, 911 F.3d at 879.

123. *Swyear*, 911 F.3d at 879.

124. *Swyear*, 911 F.3d at 879.

125. *Swyear*, 911 F.3d at 881.

found would create a hostile work environment.¹²⁶ With respect to the objective standard, the court determined that a reasonable person would not find the environment hostile. It cited pre-#MeToo precedents from as far back as 2002¹²⁷ to hold that a reasonable person should have “the thick skin that comes from living in the modern world.”¹²⁸

Implicit in its application of a “thick skin” standard is a critique, intentional or not, of the #MeToo movement. There is hardly a more dismissive phrase the Seventh Circuit could have used to inform Swyear that her perception of her treatment was unreasonable, especially given the extreme facts of her case. The “thick skin” colloquialism chastises the plaintiff for bringing the claim at all and evokes long-standing stereotypes of over-emotional or hyper-sensitive women—stereotypes at odds with the changing discourse surrounding women’s allegations of sexual harassment.¹²⁹

The Seventh Circuit’s view of the level of severity or pervasiveness necessary to create a hostile work environment better aligns with not only a pre-#MeToo understanding of sexual harassment but perhaps even a pre-*Harris* one, where only the most egregious behavior—such as

126. *Swyear*, 911 F.3d at 882.

127. *Swyear*, 911 F.3d at 881 (citing *Hilt-Dyson v. City of Chicago*, 282 F.3d 456, 463 (7th Cir. 2002)).

128. *Swyear*, 911 F.3d at 881 (citing *Passananti v. Cook County*, 689 F.3d 655, 667 (7th Cir. 2012)). This is far from the first time the Seventh Circuit has indicated that discrimination claims operate on a sliding scale of the victim’s sensitivities. *See, e.g.*, *Johnson v. Advoc. Health & Hosps. Corp.*, 892 F.3d 887, 900 (7th Cir. 2018) (holding for an employer in a race discrimination case on the basis that “[w]e expect a certain level of maturity and thick skin from employees”). The First and Fourth Circuits have also used the phrase in past decisions. *See, e.g.*, *Suarez v. Pueblo Int’l, Inc.*, 229 F.3d 49, 54 (1st Cir. 2000) (“The workplace is not a cocoon, and those who labor in it are expected to have reasonably thick skins—thick enough, at least, to survive the ordinary slings and arrows that workers routinely encounter in a hard, cold world.”); *Webb v. Baxter Healthcare Corp.*, 57 F.3d 1067 at *4 (4th Cir. 1995) (unpublished table decision) (describing the *Harris* standard as requiring the plaintiff to “prove her case both objectively and subjectively; standing alone, a thin skin cannot create a case”). An unpublished decision, *Webb* does not have precedential value; subsequent Fourth Circuit decisions, in particular the more expansive ones post-#MeToo, do not necessarily repudiate the “thick skin” standard, but appear to quietly disregard this view. *See supra* Section II.B.

129. The “thick skin” standard may seem at odds with the “eggshell skull” standard from tort law—that a defendant is responsible for the entirety of the harm the plaintiff suffers, regardless of whether the plaintiff had a particular sensitivity to the harm (in other words, you take your victim as you find him). *See, e.g.*, *Vosberg v. Putney*, 50 N.W. 403, 404 (Wis. 1891). The key difference here is that the “eggshell skull” analysis allows exploration of the plaintiff’s sensitivities with respect to damages and not as part of evaluating whether a harm occurred in the first place. *Id.*

the repeated rape at issue in *Meritor*—rises to the level of sexual harassment.¹³⁰ In 2018, in *EEOC v. Costco Wholesale Corporation*, the Seventh Circuit upheld a jury verdict finding a hostile work environment after a customer stalked a Costco employee for more than a year.¹³¹ The court easily concluded that a reasonable juror could determine that being stalked for over a year created a hostile work environment; it did not even address the subjective reasonableness of the victim's perception of the environment.¹³² For the court, the severity of stalking, as a matter of safety, distinguished this conduct from that of the defendant in *Sweyear*, in which the plaintiff was “in control,” but took offense to her coworker's behavior.¹³³ The Seventh Circuit has maintained a high bar for what constitutes a hostile environment since well before the #MeToo movement, even after the Supreme Court handed down the *Harris* reasonableness standard. Among the actions it has considered not severe or pervasive enough to rise to the level of a hostile work environment are: a supervisor groping a plaintiff, otherwise touching her inappropriately, and asking her out on dates; and a supervisor repeatedly kissing, touching, and chasing the plaintiff.¹³⁴ And in a post-#MeToo world, it took an egregious, widely agreed-upon form of physical unsafety for the Seventh Circuit to treat the behavior as illegal sexual harassment. In contrast, the First Circuit treated verbal sexually explicit advances alone as obvious forms of sexual harassment.¹³⁵

The Fifth Circuit employs a similarly high threshold for what constitutes sexual harassment. Consider its 2019 decision, *Gardner v. CLC of Pascagoula*, in which a nurse in an assisted living home experienced years of unwanted sexual grabbing and explicit comments from a patient with dementia.¹³⁶ A district court determined that this did not meet the

130. Recall that in *Harris*, the Supreme Court explained that the egregious actions in *Meritor* do not “mark the boundary of what is actionable.” *Harris v. Forklift Sys, Inc.*, 510 U.S. 367, 371 (1993).

131. *Equal Emp. Opportunity Comm'n v. Costco Wholesale Corp.*, 903 F.3d 618, 621 (7th Cir. 2018).

132. *Costco Wholesale Corp.*, 903 F.3d at 626-27.

133. *Sweyear*, 911 F.3d at 882.

134. See MacKinnon, *supra* note 1, at 6 (citing *Kolesch v. Beltone Elecs. Corp.*, 46 F.3d 705, 709 (7th Cir. 1995); *Saxton v. Am. Tel. & Tel.*, 10 F.3d 526, 534 (7th Cir. 1993)) (both cases decided post-*Harris* but pre-*Oncale*).

135. See, e.g., *Franchina v. City of Providence*, 881 F.3d 32, 37 (1st Cir. 2018); *Roy v. Correct Care Sols., LLC*, 914 F.3d 52, 58 (1st Cir. 2019).

136. *Gardner v. CLC of Pascagoula, LLC*, 915 F.3d 320, 325 (5th Cir. 2019). Though the case involved third-party harassment from a non-employee, employers can be liable for third-party harassers, such as customers. See, e.g., *Lockard v. Pizza Hut, Inc.*, 162 F.3d 1062 (10th Cir. 1998).

severe or pervasive standard, but the Fifth Circuit reversed, holding that a reasonable jury could determine that the objective and subjective reasonableness standards were met.¹³⁷ The nature of the harassment—which included multiple incidents of sexual assault via groping or sexual grabbing—likely distinguishes this hostile work environment claim from the allegations of repeated sexual commentary in a case like *Malin*. There, the Fifth Circuit held that a reasonable person would not believe that graphic sexual commentary from a human resources manager who was a woman was severe or pervasive.¹³⁸ What might seem like a deferential decision to the plaintiff in *Gardner* in fact reflects a high standard of repeated, physical, and unsafe conduct, leaving plaintiffs suffering from sexual harassment that is verbal or not physically endangering with no recourse. Meritorious claims in the court of public opinion, let alone other circuits, fail merely because of the plaintiff's misfortune of falling within the Fifth Circuit's jurisdiction.

Why would courts excuse inappropriate commentary more readily than overtly physical forms of sexual harassment? One probable explanation is line-drawing. Since *Oncale*, courts fear policing the workplace and introducing the much-feared court-created “civility code.”¹³⁹ Another explanation is the continued devaluing of emotional harms caused by non-physical forms of sexual harassment as real harms that would affect a reasonable person. Through changing the social standards around sexual harassment, the #MeToo movement is attempting to eliminate these barriers and in many cases has done so; but the legal system has not yet entirely caught up.

III. REASONABLENESS OF THE VICTIM IN (NOT) REPORTING HARASSMENT UNDER THE *FARAGHER-ELLERTH* STANDARD

As discussed above, the companion cases *Faragher v. City of Boca Raton* and *Burlington Industries, Inc. v. Ellerth* gave rise to the *Faragher-Ellerth* affirmative defense to sexual harassment claims.¹⁴⁰ This affirmative defense allows an employer to assert that an employee was unreasonable in her efforts to report the harassment.¹⁴¹ The two-pronged test requires that the employer show it exercised reasonable care to prevent

137. *Gardner*, 915 F.3d at 327.

138. *Malin v. Orleans Par. Commc'ns Dist.*, 718 F. App'x 264, 266 (5th Cir. 2018).

139. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 81 (1998).

140. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 745 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

141. *Ellerth*, 524 U.S. at 745; *Faragher*, 524 U.S. at 807.

and correct the harassing behavior, *and* that the plaintiff unreasonably failed to take advantage of the employer's corrective opportunities.¹⁴² Appellate review of the second reasonableness prong of this defense post-#MeToo has been scarce. But as discussed below in Section III.B, the Third Circuit has made a dramatic departure from the pre-#MeToo standard, which could pave the way for a new legal understanding of how a victim reasonably responds to sexual harassment.

Psychologists, academics, and activists explored the reasons victims of sexual harassment may not report their harassment long before #MeToo took hold. In 1995, psychologists Louise F. Fitzgerald and Suzanne Swan elucidated ten strategies, based on their research, used by victims dealing with harassment.¹⁴³ They found that the external process of seeking institutional or organizational relief was by far the most infrequent response to sexual harassment.¹⁴⁴ In fact, Fitzgerald and Swan found that “the least confrontational responses” were the most commonplace, while victims would only report via formal complaints or similar actions “as a last resort when all other efforts [had] failed.”¹⁴⁵ Some scholars consider sexual harassment the most pervasive form of violence against women, and perhaps the most tolerated.¹⁴⁶ In many if not most circumstances, it therefore would be more reasonable to avoid an institutionalized process than to go through one, as such a process will not result in any actual change, or worse, might encourage retaliatory or other negative behavior against the complainant by her harasser or even her workplace. The *Faragher-Ellerth* defense, then, at least in its original interpretation, places the victim in a circular dilemma: Making a complaint could make her

142. *Ellerth*, 524 U.S. at 745; *Faragher*, 524 U.S. at 807.

143. See generally Louise F. Fitzgerald & Suzanne Swan, *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, J. SOC. ISSUES, Spring 1995, at 117 (detailing the research the authors conducted regarding victim behavior, as well as the ten strategies victims deployed in response to sexual harassment).

144. *Id.* at 121. Some research suggests as few as 25% of women who experience sexual harassment use a complaint procedure, within their company or with the EEOC, to report their harassment. Lauren Edelman, *How HR and Judges Made It Almost Impossible for Victims of Sexual Harassment to Win in Court*, HARV. BUS. REV. (Aug. 22, 2018), hbr.org/2018/08/how-hr-and-judges-made-it-almost-impossible-for-victims-of-sexual-harassment-to-win-in-court [<https://perma.cc/8T9R-WXQZ>].

145. Fitzgerald & Swan, *supra* note 143, at 121. Considering that there is a spectrum of responses to workplace sexual harassment, and that there is no one typical behavior, such studies prompt the question: At what point should we deem a victim to be *unreasonable*?

146. See generally Louise F. Fitzgerald, *Still the Last Great Open Secret: Sexual Harassment as Systemic Trauma*, 18 J. TRAUMA & DISSOCIATION 483 (2017) (detailing the pervasiveness of sexual harassment against women).

circumstances at work worse, but she is required by law to make a complaint before taking steps to make her situation better.¹⁴⁷

A. *Post-#MeToo, the Continuation of Pre-#MeToo Standards*

Despite research indicating the typical behavior of victims, generally speaking, failure to report is fatal to a plaintiff's case unless she can demonstrate a reasonable fear of retaliation or similar consequences. Failure to report *the right way* can also vindicate an employer's affirmative defense.¹⁴⁸ In a post-#MeToo case in January 2018, the Fourth Circuit addressed the defense in a case in which a plaintiff alleged a coworker "found her in a supply closet, closed the door, kissed her, and while restraining her with his hands managed to undo his belt, pull his pants down, undo [the] Plaintiff's belt, and pull her pants down" before they were interrupted.¹⁴⁹ Because the plaintiff only "shared her allegation with two non-supervisory individuals" the court held that she had unreasonably failed to take advantage of her company's procedures.¹⁵⁰ The court relied on the same standard it had applied pre-#MeToo un-

147. MacKinnon, *supra* note 1, at 1095. A perhaps obvious solution to this dilemma, from the perspective of a court, is to "demand less of complainants and more of employers. Definitions of harassment should include a more expansive understanding, informed by social science research, about what kinds of behavior interfere with workplace performance and when it is reasonable for victims to avoid internal complaint channels." Rhode, *supra* note 21, at 422. See also Vicki Schultz, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN. L. REV. ONLINE 17 (2018).

148. For example, reporting too long after the fact of the sexual harassment can be fatal to this defense. See, e.g., Jenna P., EEOC Appeal No. 0120150825, 2018 WL 1392300 (Mar. 9, 2018). In *Jenna P.*, the complainant, an analyst for the Department of Veterans Affairs, alleged that her supervisor continually made comments about her clothing and appearance which quickly turned sexual, culminating in her supervisor exposing his penis to her and groping her, among other lewd acts. *Id.* at *1. The EEOC reversed an agency holding against liability due to a *Faragher-Ellerth* defense. *Id.* at *6. The agency determined the complainant "unreasonably delayed" reporting the behavior, since she did not do so for almost a year. *Id.* at *2. The complainant argued that she delayed reporting in order to gather tangible evidence of the harassment. *Id.* at *2-3. In its decision, the EEOC focused on the first prong of the *Faragher-Ellerth* defense, and side-stepped the issue of the complainant's reasonableness, but the agency's holding nonetheless demonstrates a pervasive, anti-plaintiff attitude regarding timing of a complaint, even post-#MeToo. *Id.* at *6.

149. *Lacasse v. Didlake, Inc.*, 194 F. Supp. 3d 494, 498 (E.D. Va. 2016), *aff'd* 712 F. App'x 231 (4th Cir. 2018).

150. *Lacasse v. Didlake, Inc.*, 712 F. App'x 231, 238 (4th Cir. 2018).

der which proof that an employee failed to follow a complaint procedure normally fulfills this element of the *Faragher-Ellerth* defense.¹⁵¹

The Seventh and Eleventh Circuits have indicated that they, too, will continue to take the same approach to this defense that they took pre-#MeToo. In 2019, in *Hunt v. Wal-Mart Stores, Inc.*, the Seventh Circuit upheld a summary judgment finding for Wal-Mart after an employee, Tristana Hunt, sued for sexual harassment by her supervisor Daniel Watson.¹⁵² Watson had been accused of sexual harassment within Wal-Mart before.¹⁵³ Prior to Hunt's work with him, Wal-Mart had received two complaints from a different employee regarding Watson's behavior, and had given him written instruction twice that he was not performing up to Wal-Mart's standards.¹⁵⁴ Hunt herself also alleged repeated sexual harassment by Watson.¹⁵⁵ When they first met, he "asked her why she was wearing a particular shirt, saying that he could see her breasts, and then commented that he did not understand how a woman could have breasts so large despite having a small body."¹⁵⁶ A month later he made another comment about her breasts and later told her he wanted to shower with her.¹⁵⁷ Later still, when Hunt showed Watson a picture of a fallen tree on her phone to explain how inclement weather had prevented her from getting to work, he took the phone and "indicated he was looking through it for naked pictures . . . and again asked when he could see her breasts."¹⁵⁸ He repeated the same advances several times thereafter.¹⁵⁹ Hunt eventually filed a complaint four months after the harassment began; the store manager had Watson complete an anti-harassment course in response, and Hunt did not report or subsequently allege new instances of sexual harassment between then and filing her lawsuit.¹⁶⁰

In evaluating the first prong of the *Faragher-Ellerth* defense—that the employer exercised reasonable care to prevent the harassing behavior—the Seventh Circuit held that "no reasonable jury could find that

151. *Lacasse*, 712 F. App'x at 238 (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998)). Psychologists and sociologists have expressed skepticism at the efficacy of having internal anti-harassment or complaint policy/procedures on the books, without more. See Tippet, *supra* note 28, at 244.

152. *Hunt v. Wal-Mart Stores, Inc.*, 931 F.3d 624, 626 (7th Cir. 2019).

153. *Hunt*, 931 F.3d at 626.

154. *Hunt*, 931 F.3d at 626.

155. *Hunt*, 931 F.3d at 626.

156. *Hunt*, 931 F.3d at 626.

157. *Hunt*, 931 F.3d at 626.

158. *Hunt*, 931 F.3d at 626.

159. *Hunt*, 931 F.3d at 626-27.

160. *Hunt*, 931 F.3d at 627.

Wal-Mart acted unreasonably” because of its “comprehensive policy that explicitly prohibited sexual harassment” and “robust” choices “for reporting retaliation.”¹⁶¹ Much like the Fourth Circuit, the court treated the adoption of an anti-harassment policy as *the* key factor in determining whether the employer exercised reasonable care.¹⁶² For the second prong—the evaluation of the plaintiff’s reasonableness—the court deemed the delay of four months to be unreasonable and therefore fatal to Hunt’s case.¹⁶³ In doing so, it relied on past Seventh Circuit precedent that “an employee’s subjective fears of confrontation, unpleasantness or retaliation do not alleviate the employee’s duty to alert the employer to the allegedly hostile environment.”¹⁶⁴

The significance of a defendant having an existing anti-sexual harassment policy seemed to sway the Eleventh Circuit in 2019 in *Joyner v. Woodspring Hotels Property Management*.¹⁶⁵ In that case, Dorothea Joyner, a hotel employee, alleged that a manager was spreading rumors that she had been promoted due to an affair with someone higher up.¹⁶⁶ Joyner heard the rumor repeated several times and after she had been terminated sent a letter to the company informing it of the behavior.¹⁶⁷ But the Eleventh Circuit focused heavily on the fact that the company “had policies in place to prevent sexual harassment.”¹⁶⁸ For the second prong of the *Faragher-Ellerth* defense, the court held that by failing to report until after her termination, Joyner “failed to take full advantage” of the reporting mechanisms available, and determined that “fear of retribution”—which Joyner alleged was her reason for not reporting until after her termination—“is not a valid reason for failing to use a company’s reporting procedures.”¹⁶⁹

This approach is out of step with the known behavior of victims of sexual harassment, especially considering the rational nature of a fear of retaliation. But unfortunately for plaintiffs, if a defendant succeeds on the first prong of the *Faragher-Ellerth* defense, a court’s application of the second prong could logically be quite favorable to the defendant.

161. *Hunt*, 931 F.3d at 630.

162. *Hunt*, 931 F.3d at 630.

163. *Hunt*, 931 F.3d at 631.

164. *Hunt*, 931 F.3d at 631 (quoting *Porter v. Erie Foods Int’l*, 576 F.3d 629, 638 (7th Cir. 2009)).

165. *Joyner v. Woodspring Hotels Prop. Mgmt. LLC*, 785 F. App’x 771, 774 (11th Cir. 2019).

166. *Joyner*, 785 F. App’x at 773.

167. *Joyner*, 785 F. App’x at 773.

168. *Joyner*, 785 F. App’x at 774.

169. *Joyner*, 785 F. App’x at 775.

For instance, an EEOC case from August 2018 chastised a complainant for neglecting to participate in an EEOC administrative hearing.¹⁷⁰ The complainant, a city carrier for the U.S. Postal Service, alleged sexual harassment by a coworker, including the coworker exposing his penis to her during a Facetime call—an incident she did not initially report—and later following her to her car and jumping in.¹⁷¹ It was at this point that she reported both incidents.¹⁷² The coworker admitted to the first, but not the second, allegation.¹⁷³ The Postal Service denied liability because it took immediate and corrective action following the plaintiff's report by separating the parties and conducting an investigation.¹⁷⁴ Though the EEOC did not explicitly refer to the *Faragher-Ellerth* defense, it effectively applied that defense in its analysis of both the agency's and complainant's actions.¹⁷⁵ It agreed that the agency acted appropriately but also indirectly reprimanded the complainant for her behavior, noting "that [the] first incident was never brought to the attention of management" and that the complainant opted not to "take advantage of" the "opportunity to have an EEOC administrative hearing."¹⁷⁶ Based on the factors the EEOC used to make its decision, a *Faragher-Ellerth* evaluation from this bench would have held the complainant had been unreasonable by failing to inform the Postal Service through its established procedures so it could learn of the harassment and take the same corrective action it later pursued.

B. *The Path Toward Expansion*

Despite past unfavorable treatment of plaintiffs at the second prong of the *Faragher-Ellerth* defense, the Third Circuit has made a major departure from the standard approach to denying plaintiffs' reasonableness when they do not come forward to report. In April 2018, the Third Circuit expressly incorporated post-#MeToo understandings of victims' behavior into its decision in *Minarsky v. Susquehanna County*.¹⁷⁷ In particular, it noted that "a mere failure to report one's harassment is

170. Regena L., EEOC Appeal No. 0120170416, 2018 WL 4358892, at *3 (Aug. 2, 2018).

171. Regena L., 2018 WL 4358892, at *1-2.

172. Regena L., 2018 WL 4358892, at *1-2.

173. Regena L., 2018 WL 4358892, at *2.

174. Regena L., 2018 WL 4358892, at *2.

175. Regena L., 2018 WL 4358892, at *3.

176. Regena L., 2018 WL 4358892, at *3.

177. *Minarsky v. Susquehanna County*, 895 F.3d 303 (3d Cir. 2018).

not *per se* unreasonable” and could be motivated by the perceived “futility of reporting” said harassment.¹⁷⁸ Sheri Minarsky, a part-time secretary at the Susquehanna County Department of Veterans Affairs, was the victim of physical and non-physical sexual harassment by her supervisor, who would massage her shoulders, attempt to kiss her on the lips at the end of the workday, touch her face, question her about her whereabouts, call her at home on her days off, and send her sexually explicit messages from his work email.¹⁷⁹ Minarsky’s employer raised the *Faragher-Ellerth* defense, suggesting Minarsky did not take advantage of reporting mechanisms the office had in place.¹⁸⁰ In response, Minarsky noted that, as someone depending on her employment to pay medical bills for her ill daughter, she feared speaking up to her supervisor about his harassment in case he reacted and became “nasty.”¹⁸¹ For similar reasons, she feared disclosing his harassment to anyone else at her work.¹⁸²

In keeping with typical applications of the defense, when the lower court examined prong two, it found that Minarsky had acted unreasonably in failing to report the harassment and granted summary judgment for her employer.¹⁸³ But noting “national news regarding a veritable firestorm of allegations of rampant sexual misconduct that has been closeted for years, not reported by victims,” the Third Circuit reversed, holding that this was instead a jury question.¹⁸⁴ Its decision determined that fear of speaking up could very reasonably prevent a plaintiff from reporting harassment.¹⁸⁵

Apart from *Minarsky* and the decisions discussed above that relied on pre-#MeToo rationales, circuit courts have addressed the *Faragher-Ellerth* defense nominally, if at all, as few cases have arisen since #MeToo began that created the need to do so.¹⁸⁶ But *Minarsky* offers striking insight into the potential for #MeToo to change the legal landscape for

178. *Minarsky*, 895 F.3d at 314.

179. *Minarsky*, 895 F.3d at 306-07.

180. *Minarsky*, 895 F.3d at 311-12.

181. *Minarsky*, 895 F.3d at 307.

182. *Minarsky*, 895 F.3d at 314.

183. *Minarsky*, 895 F.3d at 311.

184. *Minarsky*, 895 F.3d at 313 n.12.

185. *Minarsky*, 895 F.3d at 314.

186. The Second and Fourth Circuits have handed down other decisions in cases involving the *Faragher-Ellerth* defense since *Minarsky*, but neither court meaningfully commented on the defense in doing so. *Berrie v. Bd. of Educ. of Port Chester-Rye Union Free Sch. Dist.*, 750 F. App’x 41, 50 (2d Cir. 2018) (reaching no conclusion about a district court’s application of the defense); *Nzabandora v. Rectors & Visitors of Univ. of Virginia*, 749 F. App’x 173, 177 (4th Cir. 2018) (affirming a district court’s holding of a successful *Faragher-Ellerth* affirmative defense).

victims of sexual harassment. For the Third Circuit to explicitly tie its understanding of the reasonableness of a victim's response to harassment to the prevalence of news coverage stemming from #MeToo shows that #MeToo has the potential, thirty-five years after *Meritor* established sexual harassment as a legal claim, to accomplish a legal recalibration of what constitutes an appropriate expectation of victim behavior.

IV. CONCLUSION

There is no question that the #MeToo movement has shifted cultural norms and expectations. Theoretically, "reasonableness" is an elastic enough standard to shift with evolving perceptions of acceptable workplace behavior and to incorporate modern understandings of what may constitute victims' responsive behaviors. But reasonableness is defined by its fit within the status quo; it is a reflection of the existing societal dynamic (or the dynamic of the particular jury, if a reasonableness evaluation makes it to one). Before #MeToo, the status quo treated sexual harassment as valid only in its most brutal or shocking forms. As the #MeToo movement begins to shift the status quo, the reasonableness standard, despite its past failings but precisely due to its elasticity, also creates the most room for vindication of long-mistreated claims of hostile work environments and long-existing misunderstandings of victims' decisions not to report sexual harassment.

In the 1970s, the legal system resisted acknowledging sexual harassment as a form of sex discrimination at all.¹⁸⁷ Just as courts expanded the legal conception of discrimination on the basis of sex to incorporate sexual harassment, they are capable of expanding the legal conception of sexual harassment to incorporate a wider range of victims' perceptions and behaviors as reasonable. Though there is a long way to go, the #MeToo movement has already started to make that happen.♣

187. See Reva Siegal, *Introduction* to DIRECTIONS IN SEXUAL HARASSMENT LAW 1, 11-13 (Catharine A. MacKinnon & Reva B. Siegal, eds., Yale University Press 2004).