NOTE

Severe or Pervasive Meet Petty or Trivial: Lowering the Standard for Establishing a Hostile Work Environment Sexual Harassment Claim Under Title VII

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ABSTRACT

Legislators across the country have passed state and federal statutes to provide relief to victims of sexual harassment in the workplace. At the state level, there is little uniformity regarding how victims are protected or what kind of behavior constitutes a hostile work environment sexual harassment claim. At the federal level, Title VII of the Civil Rights Act of 1964 protects victims of sexual harassment. Those who do not live in states that have expanded protections beyond those in Title VII rely on the federal statute for protection from harassment.

Under Title VII, however, the desired objectives have not been realized due to high burdens on plaintiffs to establish actionable claims. This leads to confusion and inconsistent outcomes across the country for victims of sexual harassment. As a result, many victims simply remain unprotected and conditions in the workplace that allow sexual harassment to happen in the first place

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continue to persist. Federal courts should adopt and apply a lower standard if they seek to uphold the protections and promise of Title VII, erode a legal standard that sustains patriarchal power structures in the workplace, and provide victims of sexual harassment a chance to be heard in court.

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INTRODUCTION

Patricia Brooks worked as a 911 telephone dispatcher.[1] One evening, her coworker approached her while she was taking a call and placed his hand on her stomach, commenting on its "softness and sexiness."[2] Brooks told her coworker to stop touching her and forcefully pushed him away.[3] Her coworker then proceeded to stand behind her

1 Brooks v. City of San Mateo, 229 F.3d 917, 921 (9th Cir. 2000).

2 *Id.*

3 *Id.*

chair, box her in against the communications console, and force his hand underneath her sweater and bra to touch her bare breast.[4] He then said, "you don't have to worry about cheating [on your husband], I'll do everything."[5] After the incident, Brooks took six months off of work and started seeing a psychologist.[6] Once she returned to work, male employees ostracized her and supervisors mistreated her.[7] Despite Brooks's coworker's egregious behavior, the Ninth Circuit found that Brooks could not establish a hostile work environment claim because the conduct was not sufficiently severe or pervasive.[8] Although it came to light that her coworker subjected other employees to this type of conduct, the court found that the behavior as it related to Brooks was a single instance of harassment and an "entirely isolated incident."[9]

The primary federal legislation against sexual harassment in the workplace is Title VII of the Civil Rights Act of 1964 ("Title VII").[10] Title VII makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[11] In *Meritor Savings Bank, FSB v. Vinson*,[12] the Supreme Court brought sexual harassment explicitly within the scope of Title VII.[13] The Court held that a plaintiff can establish a claim for discrimination on the basis of sex by proving that sexual harassment created a hostile or abusive work environment.[14] To establish a claim under the statute, conduct must be sufficiently severe or pervasive to alter the plaintiff's working environment.[15] Some states, such as New York, have moved

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4 *Id.*

5 *Id.*

6 *Id.* at 922.

7 *Id.*

8 *Id.* at 924–27.

9 *Id.* at 927 & n.10.

10 42 U.S.C. §§ 2000e to e-17; *see also* CHRISTINE J. BACK & WILSON C. FREEMAN, CONG. RSCH. SERV., R45155, SEXUAL HARASSMENT AND TITLE VII: SELECTED LEGAL ISSUES 1 (2018).

11 42 U.S.C. § 2000e-2(a).

12 477 U.S. 57 (1986).

13 *Id.* at 66.

14 *Id.*

15 *Id.* at 67. Since *Meritor*, the Supreme Court issued two decisions that limit employer liability for a supervisor's harassment under Title VII. *See generally* Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998). These decisions limit employer liability for a supervisor's sexual harassment if the employer can prove that (1) it exercised reasonable care to prevent and correct sexual harassment and (2) the employee unreasonably failed to take advantage of the employer's preventative and corrective opportuni-

away from the severe or pervasive standard, thereby allowing plaintiffs to establish a hostile work environment claim for conduct a reasonable person considers a petty slight or trivial inconvenience.[16]

Despite the successes of the #MeToo movement in starting conversations about appropriate conduct in the workplace in the early twenty-first century, the legal system still has a long way to go in protecting victims against "boys' club" cultures that foster harassment in the workplace.[17] The burden of proof for victims under the severe or pervasive standard is extremely high in some circuit courts, creating a precedent-comparison approach that prevents cases from going to trial.[18] In other circuit courts, however, the standard does not act as a heightened barrier to asserting a claim under Title VII.[19] The result is inconsistency in a plaintiff's ability to assert a claim under Title VII based on where a person works.[20] Further, the standard insulates male value judgments and patriarchal power structures.[21]

There are independent steps that companies must take to address conditions that lead to "boys' club culture[s]" in the workplace.[22] For

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ties. *Faragher*, 524 U.S. at 807. Although this affirmative defense framework imposes a significant barrier to relief under Title VII, this Note does not discuss the limitations of the *Faragher-Ellerth* framework. For an in-depth analysis of how this two-prong affirmative defense acts as a barrier to victims of sexual harassment, see Keith Cunningham-Parmeter, *The Sexual Harassment Loophole*, 78 WASH. & LEE L. REV. 155 (2021); Joanna L. Grossman, *The Culture of Compliance: The Final Triumph of Form Over Substance in Sexual Harassment Law*, 26 HARV. WOMEN'S L.J. 3 (2003).

16 N.Y. EXEC. LAW § 296(1)(h) (McKinney 2021).

17 *See, e.g.*, Kellen Browning, *California Sues Activision, Citing "Frat Boy" Work Culture*, N.Y. TIMES, July 23, 2021, at B4; Simon Borg, *Explaining the NWSL Scandal Sending Shockwaves Across Women's Pro Soccer*, SPORTING NEWS (Oct. 7, 2021), https://www.sportingnews.com/us/soccer/news/nwsl-suspends-matches-accusations-sexual-misconduct-harassment-revealed/1l8cute9drmcp19defbsjioi4x [https://perma.cc/T5FP-H8PJ].

18 *See, e.g.*, Paskert v. Kemna-ASA Auto Plaza, Inc., 950 F.3d 535, 538–39 (8th Cir. 2020) (granting summary judgment for the defendant while finding that "[a]ll of this behavior is inappropriate and should never be tolerated in the workplace, but it is not nearly as severe or pervasive as the behavior found insufficient" in its other cases).

19 *See, e.g.*, Passananti v. Cook County, 689 F.3d 655, 659 (7th Cir. 2012).

20 *See* BACK & FREEMAN, *supra* note 10, at 3–7.

21 *See* David Cole, *Strategies of Difference: Litigating for Women's Rights in a Man's World*, 2 Law & INEQ. 33, 45–51 (1984). Cole discusses how a feminist perspective "uncovers a male bias to the very ideological foundations of our legal tradition." *Id.* at 46. Historically, this started when the British judiciary refused to include women in the definition of "persons." *Id.* at 50. As a result, "[t]he law reflects male 'value judgments' so deeply and pervasively that male values begin to look like neutral normative standards." *Id.* at 51. Feminists aim to show how "the substance and procedure of law [is] inherently male-biased." *Id.*

22 *See* Amelia Miazad, *Sex, Power, and Corporate Governance*, 54 U.C. DAVIS L. REV. 1913, 1917–19 (2021). This Note specifically references power structures between men and women in the workplace, and it specifically focuses on women as victims of sexual harassment, but it also recognizes that multiple unequal power structures exist between women and men as well

example, companies can increase diversity in board representation and upper-level management, eliminate sex segregation at work, reduce pay disparities between men and women, and conduct annual climate surveys.[23] Until companies take these steps, however, the standards that courts apply under Title VII must adapt to provide adequate relief for sexual harassment victims.

This Note argues that courts should reject Title VII's severe or pervasive standard for sexual harassment claims and instead apply New York's petty slights or trivial inconveniences standard. A lower standard for hostile work environment sexual harassment claims would better align sexual harassment jurisprudence with the goal of Title VII, allow juries to evaluate the merits of sexual harassment claims, and prompt Title VII litigation to reflect evolving societal expectations toward appropriate workplace conduct. Part I of this Note provides a background of how the #MeToo movement reinvigorated discussion about issues of sexual harassment in the workplace. It also discusses the current legal framework for sexual harassment claims under Title VII from which New York has departed and examines various applications of the severe or pervasive standard in federal circuit courts. Part II analyzes how the severe or pervasive standard reinforces "boys' club" culture, insulating a legal standard that serves male interests and maintains the status quo. It also analyzes how discrepancies in plaintiffs' ability to establish claims under Title VII result from different federal circuit court approaches to the severe or pervasive standard and, therefore, whether juries are able to decide sexual harassment claims on the merits across the country. Ultimately, Part III argues that discrepancies in how courts analyze harassment claims under the severe or pervasive standard should be resolved by adopting New York's petty slights or trivial inconveniences standard at the federal level.

I. Power and Sexual Harassment Law in the Workplace

This Note challenges traditional legal methodologies—such as determining the precedential value of a case—and embraces feminist legal methods—such as asking the "woman question"[24]—with the

as members of the same sex. *See* Daniel Goleman, *Sexual Harassment: It's About Power, Not Lust*, N.Y. Times, Oct. 22, 1991, at C1.

23 *See generally* Miazad, *supra* note 22.

24 This method of legal reasoning "asks about the gender implications of a social practice or rule" and "examin[es] how the law fails to take into account the experiences and values that seem more typical of women than of men, for whatever reason, or how existing legal standards and concepts might disadvantage women." Katharine T. Bartlett, *Feminist Legal Methods*, 103

intention of revealing a feature of sexual harassment law that has silenced and overlooked women in the workplace.[25] The analysis operates under the premise that the law has often been used to silence those without power and maintain the status quo.[26] In her article on feminist legal methods, Katharine Bartlett asserts that "these methods reflect the status of women as 'outsiders,' who need ways of challenging and undermining dominant legal conventions and of developing alternative conventions which take better account of women's experiences and needs."[27] Asking the "woman question," therefore, becomes a way to shed light on the hidden effects of law on women and a way to "insist[] upon applications of rules that do not perpetuate women's subordination."[28] This Note, therefore, operates under the assumption that blind adherence to precedent, especially in sexual harassment law, protects the status quo over addressing women's needs in the workplace.[29]

In the wake of the #MeToo movement, society continues to reckon with what constitutes harassment in the workplace and how to protect women from this harassment.[30] To understand how the #MeToo movement interacts with Title VII claims, it is important to examine how the #MeToo movement reinvigorated discussion about power imbalances in the workplace and how this expanded the definition of sexual harassment beyond pure sexual misconduct.[31] The Supreme Court's interpretation of Title VII and its establishment of the severe or pervasive standard addresses power imbalances in the workplace, although not effectively.[32] New York, however, departed from the severe or pervasive standard and adopted a lower standard after calls for substantive changes to sexual harassment laws.[33]

A. The #MeToo Movement and "Boys' Club" Culture

The #MeToo movement is a crusade against sexual abuse and sexual harassment that focuses on dismantling systems that allow sexual

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HARV. L. REV. 829, 837 (1990). Further, the woman question "assumes that some features of the law may be not only nonneutral in a general sense, but also 'male' in a specific sense." *Id.*

25 *See id.* at 837–49.

26 *See id.* at 845.

27 *Id.* at 831.

28 *Id.* at 843.

29 *Id.* at 845.

30 *See* Rebecca Hanner White, *Title VII and the #MeToo Movement*, 68 EMORY L.J. ONLINE 1014, 1014–16 (2018).

31 *See infra* Section I.A.

32 *See infra* Section II.A.

33 *See infra* Section I.D.

violence to continue, including in the workplace.[34] In 2007, activist Tarana Burke started the #MeToo movement to help victims of sexual abuse and assault.[35] The movement became national in scope when women in Hollywood came forward with allegations against Harvey Weinstein.[36] Conversations about Harvey Weinstein focused on the inherent power that the film producer had over actresses in the industry as well as the help he received from former and current employees in perpetuating his sexual assault and abuse.[37] After Harvey Weinstein gained national attention from the sexual assault allegations, survivors began sharing their stories about harassment and abuse in the workplace and in their personal lives.[38] As a result, the #MeToo movement touched almost every industry, pressuring state legislatures and Congress to curb sexual harassment in the workplace.[39]

The #MeToo movement is significant because it drew attention to workplace "boys' club" cultures.[40] The term "old boys' club" originated to refer to British elite who attended certain public schools together.[41] In modern usage, this term refers to the preservation of social elites in general.[42] A "boys' club" culture is one that is dominated by men to the exclusion of women.[43] In these environments, "[men] can schmooze, network, and interact with more powerful men in ways that are less accessible to women."[44] Further, men can use

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34 *See* Tarana Burke, *History & Inception*, ME TOO. INT'L, https://metoomvmt.org/get-to-know-us/history-inception/ [https://perma.cc/AVV6-YXPN].

35 STOP ST. HARASSMENT, THE FACTS BEHIND THE #METOO MOVEMENT: A NATIONAL STUDY ON SEXUAL HARASSMENT AND ASSAULT 9 (2018).

36 *Id.*

37 *See* Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html [https://perma.cc/LQF6-RQCD].

38 *See Survivor Story Series*, ME TOO, INT'L, https://metoomvmt.org/explore-healing/survivor-story-series/ [https://perma.cc/R468-3P75].

39 Rebecca Beitsch, *#MeToo Has Changed Our Culture. Now It's Changing Our Laws.*, PEW CHARITABLE TRS.: STATELINE (July 31, 2018), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/07/31/metoo-has-changed-our-culture-now-its-changing-our-laws [https://perma.cc/62ZR-8TUB].

40 *See* Jessica Bennett, *The #MeToo Movement: What's Next?*, N.Y. TIMES (Jan. 5, 2018), https://www.nytimes.com/2018/01/05/us/the-metoo-moment-whats-next.html [https://perma.cc/EP3X-6BBB].

41 Zoë B. Cullen & Ricardo Perez-Truglia, *The Old Boys' Club: Schmoozing and the Gender Gap* 1 n.1 (Nat'l Bureau of Econ. Rsch., Working Paper No. 26,530, 2022).

42 *Id.*

43 Emily McCrary-Ruiz-Esparza, *The Boys' Club Culture Is More Common Than You May Think*, INHERSIGHT (June 25, 2019), https://www.inhersight.com/blog/research/boys-club-culture-more-common-you-may-think [https://perma.cc/5XWB-JQKF].

44 Cullen & Perez-Truglia, *supra* note 41, at 1.

ridicule, jokes, or comments about women's appearances to ostracize or marginalize them.[45] Anecdotal evidence shows this culture is real.[46] People in the workplace can be unaware of this culture or even believe that it does not exist in their workplace.[47] Further, these conditions can result in "girls' club" equivalents or other nonmale-dominated groups.[48]

Although not all characteristics of "boys' club" cultures contribute to sexual harassment, the central idea behind "boys' club" culture creates work environments where sexual harassment can survive.[49] The central idea that the workplace is the working man's domain leads to the exclusion and ridicule of women.[50] This stems from the concept of the nuclear family—a working father and a mother whose domain is in the home.[51] This culture shows that sexual harassment in the workplace is not just about sex, it is about power.[52] If present in a workplace, therefore, "boys' club" cultures act as a mechanism to keep women in their place.[53] Through sexual harassment, "men call

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45 *See, e.g.*, Jennifer L. Berdahl, *Harassment Based on Sex: Protecting Social Status in the Context of Gender Hierarchy*, 32 ACAD. MGMT. REV. 641, 643 (2007) ("The most common form of sexual harassment is gender harassment, which involves . . . sexist comments, jokes, and materials that alienate and demean victims based on sex rather than solicit sexual relations with them.").

46 Cullen & Perez-Truglia, *supra* note 41, at 1 ("For example, 81% of women say that they feel excluded from relationship-building at work, and many also feel excluded from after-work hours socializing.").

47 Chris Maxwell, *Despite Increased Diversity, "Boys Club" Culture Has Not Disappeared . . . It Has Merely Evolved*, DYNAMIC BUS. (June 27, 2017), https://dynamicbusiness.com/topics/workplace/leadership/despite-increased-diversity-boys-club-culture-has-not-disappeared-it-has-merely-evolved.html [https://perma.cc/26ZH-S7PU].

48 *Id.* Because of the modern power imbalances in the workplace, this Note focuses on power discrepancies between men and women. *See* Cullen & Perez-Truglia, *supra* note 41, at 1 ("Among U.S. corporations, 48% of entry-level employees are women, but female representation falls to 38% at middle management, 22% at the C-Suite level, and 5% at the CEO level.").

49 *See, e.g.*, Berdahl, *supra* note 45, at 644.

50 *See* McCrary-Ruiz-Esparza, *supra* note 43.

51 *See* Liz Elting, *How to Navigate a Boys' Club Culture*, FORBES (July 27, 2018, 4:59 PM), https://www.forbes.com/sites/lizelting/2018/07/27/how-to-navigate-a-boys-club-culture/?sh=3068b7c4025c [https://perma.cc/AZY4-BM2Y].

52 *See* Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L.J. FORUM 22, 27 (2018) ("[S]exual harassment is a means of maintaining masculine work status and identity, not expressing sexuality or sexual desire. Harassment includes not only unwanted sexual advances but also a wide range of other sexist, demeaning behaviors aimed at women and others who threaten settled gender norms.").

53 *See* McCrary-Ruiz-Esparza, *supra* note 43.

attention to women's sexuality and passivity," devaluing women's role in the workplace and taking away attention from their work.[54]

The #MeToo movement changed ideas about what sort of behavior and language draw attention to a woman's sexuality and passivity and thus promote "boys' club" cultures.[55] In the 1970s, many courts were reluctant to view sexual harassment as a form of discrimination under Title VII, viewing unwelcome sexual advances as mere "personal" issues.[56] Some definitions of sexual harassment under Title VII, therefore, stem from "men enter[ing] the work place at a time when sexual teasing and innuendo were commonplace."[57] In some cases of harassment, men tend to view less severe forms of harassment, such as suggestive looks or sexist jokes, "as harmless social interactions to which only overly-sensitive women would object."[58] This impacts a plaintiff's ability to establish a hostile work environment sexual harassment claim because actionable claims are often thought not to encompass simple teasing or isolated incidences of sexist behavior.[59]

Although men are also victims of sexual harassment in the workplace, women account for most sexual harassment complaints.[60] For example, out of 5,581 sexual harassment allegations filed with the Equal Employment Opportunity Commission ("EEOC") in fiscal year 2021, males filed only 16.3% of charges.[61] Further, when women experience sexual harassment in the workplace as a result of the "boys' club" culture, many do not report the harassment out of fear of

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54 *See* MICHELE A. PALUDI & RICHARD B. BARICKMAN, ACADEMIC AND WORKPLACE SEXUAL HARASSMENT 124 (1991).

55 For example, a factsheet on New York City's Human Rights Law provides examples of sexual harassment, namely "making lewd or sexual comments about an individual's appearance, body, or style of dress," "displaying pornographic images, cartoons, or graffiti on computers, emails, cell phones, bulletin boards, etc.," and "making sexist remarks or derogatory comments based on gender." N.Y.C. COMM'N ON HUM. RTS., STOP SEXUAL HARASSMENT ACT FACTSHEET (2018); *see* Schultz, *supra* note 52, at 33–34 ("Harassment takes a wide variety of nonsexual forms, including hostile behavior, physical assault, patronizing treatment, personal ridicule, social ostracism, exclusion or marginalization, denial of information, and work sabotage directed at people because of their sex or gender.").

56 *See, e.g.*, Corne v. Bausch & Lomb, Inc., 390 F. Supp. 161, 163 (D. Ariz. 1975), *vacated*, 562 F.2d 55 (9th Cir. 1977).

57 *See* Goleman, *supra* note 22, at C12.

58 Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177, 1207 (1990).

59 *See, e.g.*, Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998).

60 *See Charges Alleging Sex-Based Harassment (Charges filed with EEOC) FY 2010–FY 2021*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/statistics/charges-alleging-sex-based-harassment-charges-filed-eeoc-fy-2010-fy-2021 [https://perma.cc/DWJ7-JBB3].

61 *See id.* As stated above, therefore, this Note focuses primarily on women as victims of sexual harassment. *See supra* note 48.

retaliation or bias against them.[62] In a 2020 survey of adults who say the United States still has work to do in achieving gender equality, 82% of women and 72% of men identified sexual harassment as the biggest obstacle to women having equal rights with men.[63]

B. The Severe or Pervasive Standard Under Title VII

Title VII makes it illegal to discriminate against a person on the basis of race, color, religion, national origin, or sex.[64] It was not until 1980, however, that the EEOC first issued guidelines that defined sexual harassment as a form of workplace, sex-based discrimination.[65] In 1986, the Supreme Court found, for the first time, in *Meritor* that a plaintiff can assert a claim under Title VII "by proving that discrimination based on sex has created a hostile or abusive work environment."[66] The Court found that for a claim to be actionable under Title VII, the victim must prove the behavior she experienced was "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[67] EEOC guidance maintains that the central inquiry in a hostile work environment claim is whether the sexual conduct unreasonably interferes with an individual's work performance or creates a hostile work environment.[68]

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62 *See* Beverly Engel, *Why Don't Victims of Sexual Harassment Come Forward Sooner?*, PSYCH. TODAY (Nov. 16, 2017), https://www.psychologytoday.com/us/blog/the-compassion-chronicles/201711/why-dont-victims-sexual-harassment-come-forward-sooner [https://perma.cc/3A78-E3WJ].

63 Carrie Blazina, *Fast Facts on Views of Workplace Harassment Amid Allegations Against New York Gov. Cuomo*, PEW RSCH. CTR. (Aug. 6, 2021), https://www.pewresearch.org/fact-tank/2021/08/06/fast-facts-on-views-of-workplace-harassment-amid-allegations-against-new-york-gov-cuomo/ [https://perma.cc/3XA3-VWKC].

64 42 U.S.C. § 2000e-2(a).

65 In 1980, the EEOC guidelines recognized two types of sexual harassment claims—quid pro quo and hostile work environment, the former of which is outside the scope of this Note. The Agency's guidelines state, "Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." Final Amendment to Guidelines on Discrimination Because of Sex, 45 Fed. Reg. 74,676, 74,677 (Nov. 10, 1980) (codified at 29 C.F.R. § 1604.11(a) (2022)). Before 1980, plaintiffs brought private lawsuits that created precedent that led to the EEOC recognizing sexual harassment as a form of sex-based discrimination. *See* Anna-Maria Marshall, *Closing the Gaps: Plaintiffs in Pivotal Sexual Harassment Cases*, 23 LAW & SOC. INQUIRY 761, 762–63 (1998).

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

67 *Id.* at 67 (alteration in original) (quoting Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

68 *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, POLICY GUIDANCE ON CURRENT ISSUES OF SEXUAL HARASSMENT 14 (1990).

As a result of *Meritor*, courts' analyses of sexual harassment claims often center on whether the alleged conduct is severe or pervasive enough to create a hostile work environment.[69] Later, in *Harris v. Forklift Systems, Inc.*,[70] the Supreme Court put forth factors to be used when considering whether harassment is sufficiently severe or pervasive such as: (1) the frequency of the harassment, (2) the severity of the conduct involved, (3) whether the conduct is physically threatening or humiliating rather than a minor offense, or (4) whether the conduct unreasonably interferes with an employee's ability to work.[71] The work environment must be viewed from the perspective of a reasonable person in the victim's position, considering the totality of the circumstances.[72] In her concurrence in *Harris*, Justice Ginsburg asserted that the primary question should be whether a reasonable person would find it "more difficult to do the job."[73] In a later case, *Oncale v. Sundowner Offshore Services, Inc.*,[74] the Court reiterated Justice Ginsburg's concurring opinion from *Harris* and acknowledged that harassment does not have to be sexual in nature.[75]

Failure to show that conduct was severe or pervasive is often the basis for dismissal of a Title VII harassment claim at the summary judgment phase.[76] The Supreme Court has said that Title VII standards exist so that the statute does not prohibit merely offensive behavior.[77] Further, the Court stated in later cases that simple teasing, offhand comments, and isolated incidents do not amount to discriminatory changes in the conditions of the workplace.[78] Although the Court interprets the severe or pervasive standard as not prohibiting merely offensive behavior, the Court recognizes that applying the standard requires consideration of the social context in which the harassment occurs and how that behavior is experienced by the victim.[79]

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

70 510 U.S. 17 (1993).

71 *See id.* at 23.

72 *See id* at 22–23.

73 *Id.* at 25 (Ginsburg, J., concurring) (quoting Davis v. Monsanto Chem. Co., 858 F.2d 345, 349 (6th Cir. 1988)).

74 523 U.S. 75 (1998).

75 *Id.* at 80 ("The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." (quoting *Harris*, 510 U.S. at 25 (Ginsburg, J., concurring))).

76 *See* Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71, 74 (1999) ("[C]ourts increasingly are granting summary judgment based on the lack of severity or pervasiveness of the harassment.").

77 *See Oncale*, 523 U.S. at 80.

78 *See* Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998).

79 *Oncale*, 523 U.S. at 81–82.

The Court has yet to resolve discrepancies in various circuit courts regarding the application of the severe or pervasive standard,[80] which may be because the Court has historically "privatiz[ed]" discrimination claims to the detriment of plaintiffs.[81]

C. Application of the Severe or Pervasive Standard in Circuit Courts

Because courts use the factors the Supreme Court set out in *Harris* to determine when harassment is sufficiently severe or pervasive, the standard leads to different outcomes in circuit courts.[82] Some circuit courts, such as the Eighth and Fifth Circuits, establish a high bar for severe or pervasive conduct under Title VII that effectively requires both frequent *and* physically threatening behavior.[83] Other circuit courts, however, set a lower bar for severe or pervasive conduct in some cases, protecting victims from broader forms of harassment that do not necessarily involve sexual misconduct.[84]

1. Eighth Circuit's Application

The Eighth Circuit sets a high bar for severe or pervasive conduct under Title VII.[85] In *Paskert v. Kemna-ASA Auto Plaza, Inc.*, Paskert testified that her supervisor told her he "never should have hired a woman," bragged openly at work about his sexual conquests, made other sexually suggestive and improper comments, and attempted to rub Paskert's shoulders uninvited.[86] Despite Paskert's allegation that her supervisor's conduct altered the conditions of her workplace, the court found that the supervisor's alleged conduct was not severe or pervasive enough to establish a hostile work environment because it

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80 *See, e.g.*, Petition for a Writ of Certiorari at 1–2, Paskert v. Kemna-ASA Auto Plaza, Inc., 141 S. Ct. 894 (2020) (mem.) (No. 20–27); *Paskert*, 141 S. Ct. 894 (mem.) (denying certiorari).

81 Olivia B. Waxman, *The Surprising Consequence of the Supreme Court Cases that Changed Sexual Harassment Law 20 Years Ago*, TIME (June 26, 2018, 9:00 AM), https://time.com/5319966/sexual-harassment-scotus-anniversary/ [https://perma.cc/4UXH-6RFP]. *See generally Faragher*, 524 U.S. 775; Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).

82 *See* SANDRA F. SPERINO & SUJA A. THOMAS, UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW 32–40 (2017).

83 *See, e.g.*, Paskert, v. Kemna-ASA Auto Plaza, Inc., 950 F.3d 535, 538 (8th Cir. 2020); Patton v. Jacobs Eng'g Grp., Inc., 863 F.3d 419, 427 (5th Cir. 2017).

84 *See, e.g.*, Passananti v. Cook County, 689 F.3d 655, 668 (7th Cir. 2012) (discussing how gender-based comments could meet the severe or pervasive standard).

85 *See, e.g.*, *Paskert*, 950 F.3d at 538.

86 *Id.* at 537.

was not nearly as severe or pervasive as behavior in other cases it dismissed.[87]

The Eighth Circuit relies more heavily than other circuit courts on past behavior it has found not to be severe or pervasive in deciding cases at the summary judgment phase.[88] For example, in *Paskert*, the court relied on its decision in *LeGrand v. Area Resources for Community and Human Services*.[89] In *LeGrand*, the harasser forcibly kissed the plaintiff on the mouth, grabbed and reached for the plaintiff's buttocks and genitals, and asked the plaintiff to watch pornographic movies with him.[90] In that case, the Eighth Circuit determined that the graphic sexual propositions and unwelcome sexual contact were not sufficiently severe or pervasive to establish a hostile work environment because they were too isolated over a certain period of time.[91] Based on its decision in *LeGrand* and subsequent cases, the Eighth Circuit in *Paskert* affirmed the district court's decision to grant the defendant's motion for summary judgment, reasoning that its "precedent sets a high bar for conduct to be sufficiently severe or pervasive."[92]

2. Other Circuit Courts' Application

The heightened application of the severe or pervasive standard is not necessarily reflected in other circuits. In *Gerald v. University of Puerto Rico*,[93] the First Circuit found the harasser's conduct to be sufficiently severe or pervasive.[94] The harasser solicited the victim for sex, touched the victim's breasts on one occasion, and asked her in front of coworkers why she would not have sex with him.[95] The court found that genuine issues of material fact as to whether the conduct was sufficiently severe or pervasive precluded summary judgment on

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87 *Id.* at 538.

88 *See* Petition for a Writ of Certiorari, *supra* note 80, at 8–13.

89 394 F.3d 1098 (8th Cir. 2005); *Paskert*, 950 F.3d at 538–39.

90 *LeGrand*, 394 F.3d at 1100.

91 *Id.* at 1102–03.

92 *Paskert*, 950 F.3d at 538. The court also relied on another case where it found that a supervisor's conduct was not sufficiently severe or pervasive. *See* Duncan v. Gen. Motors Corp., 300 F.3d 928 (8th Cir. 2002). In that case, a supervisor sexually propositioned an employee, repeatedly touched her hand, requested that she draw an image of a phallic object to demonstrate her qualifications for the position, displayed a poster portraying the plaintiff as the "president and CEO of the Man Hater's Club of America," and asked her to type a copy of a "He–Men Women Hater's Club" manifesto. *Id.* at 932.

93 707 F.3d 7 (1st Cir. 2013).

94 *Id.* at 18–19.

95 *Id.* at 18.

the victim's claim.[96] The court also found that despite only three incidents alleged, a jury could find the harasser's uninvited touching and sexual propositioning to be sufficiently severe.[97]

Other circuit courts rely on what determination a reasonable jury could make about harassment. For example, in *Passananti v. Cook County*,[98] the Seventh Circuit found that a reasonable jury could find that the frequent and hostile use of the word "bitch" constituted a hostile work environment under Title VII.[99] Passananti's supervisor called her a "bitch" on multiple occasions and even called her a "stupid bitch" sometimes.[100] Passananti testified that her supervisor's conduct toward her was demeaning and demoralizing.[101] The court provided more protection than the Eighth Circuit by not requiring overt sexual conduct or physically threatening behavior.[102] Instead, the court acknowledged that the demeaning use of the word "bitch" as a gender epithet could constitute a hostile work environment in the minds of a jury.[103]

In *Passananti*, the court centered its analysis on the modern use of the word "bitch," acknowledging that the word is sometimes used as a label by men for women who are considered to be "too aggressive or careerist."[104] The Seventh Circuit discussed that the tendency to refer to a woman as a "bitch" because she is a careerist could be acknowledged as a way of keeping a woman in her place.[105] Because the use of the word devalues her status in the workplace due to its gender-specific nature, the court found it could be actionable.[106]

Other circuit courts reference specific language in deciding sexual harassment cases as well.[107] In *Costa v. Desert Palace, Inc.*,[108] the Ninth Circuit also did not require overt sexual touching or threatening be-

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96 *Id.* at 18–20.

97 *See id.* at 18–19.

98 689 F.3d 655 (7th Cir. 2012).

99 *Id.* at 659.

100 *Id.* at 663.

101 *Id.*

102 *See id.* at 665.

103 *See id.* at 659.

104 *Id.* at 665 (quoting Galloway v. Gen. Motors Serv. Parts Operations, 78 F.3d 1164, 1168 (7th Cir. 1996)).

105 *Id.* at 665–66.

106 *Id.*

107 *See, e.g.*, Reeves v. C.H. Robinson Worldwide, Inc., 594 F.3d 798, 810–11 (11th Cir. 2010) (en banc) (holding that "when a co-worker calls a female employee a 'bitch,' the word is gender-derogatory").

108 299 F.3d 838 (9th Cir. 2002) (en banc).

havior to establish a Title VII claim.[109] In *Costa*, the plaintiff was often called a "bitch" and supervisors frequently used verbal slurs that were sex based or played on negative stereotypes of women.[110] The Ninth Circuit found that when conduct targeted at women centers on the fact they are a woman or uses a derogatory term that indicates sex-based hostility, a jury could infer discrimination.[111] Further, the court clarified that verbal language that relies on sexual epithets and offensive references to women's bodies could establish a hostile environment claim.[112]

Some circuit courts account for the victim's perception in analyzing the severity or pervasiveness of alleged harassment.[113] How different individuals, specifically men versus women, perceive harassment matters significantly under Title VII.[114] Intention behind behavior does not reduce the impact on the victim's perception of the conduct.[115] For example, men may be more likely than women to feel that sexual attention in the workplace flatters women.[116] The Ninth Circuit has held that when evaluating the severity or pervasiveness of harassment, the court's analysis should focus on the perspective of the victim.[117] The court was thus the first to adopt the reasonable woman standard, holding "that a female plaintiff states a prima facie case of hostile environment sexual harassment when she alleges conduct which a reasonable woman would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment."[118] Some circuit courts have rejected this stan-

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109 *See id.* at 861–62.

110 *Id.* at 845–46.

111 *See id.* at 861–62.

112 *See id.*

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

114 *See* PALUDI & BARICKMAN, *supra* note 54, at 127; *see also, e.g.*, Lipsett v. Univ. of P.R., 864 F.2d 881, 898 (1st Cir. 1988) ("A male supervisor might believe, for example, that it is legitimate for him to tell a female subordinate that she has a 'great figure' or 'nice legs.' The female subordinate, however, may find such comments offensive.").

115 *See* PALUDI & BARICKMAN, *supra* note 54, at 127.

116 *Ellison*, 924 F.2d at 878.

117 *Id.* ("If we only examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing level of discrimination. Harassers could continue to harass merely because a particular discriminatory practice was common, and victims of harassment would have no remedy.").

118 *Id.* at 879 (footnote omitted) (adopting the reasonable woman standard because the court "believe[s] that a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women").

dard, and the Supreme Court has not revisited the reasonable person standard since *Harris* and *Oncale*.[119]

D. Changes in State Law to the Severe or Pervasive Standard

In response to the #MeToo movement, the New York State Legislature amended the New York State Human Rights Law ("NYSHRL") to remove the severe or pervasive standard for determining whether harassment creates a hostile work environment.[120] Instead, the New York State Legislature adopted a petty slights or trivial inconveniences standard.[121]

The New York City Council was first to abandon the severe or pervasive standard.[122] In adopting a petty slights or trivial inconveniences threshold, the New York State Legislature sought to replicate how the New York City Council expected the sexual harassment provisions of the New York City Human Rights Law ("NYCHRL") would be construed.[123] The New York City Council specified that "[t]he provisions of this title shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York state civil and human rights laws, including those laws with provisions worded comparably to provisions of this title, have been so construed."[124] New York state courts have asserted that a plaintiff's burden under NYCHRL is to show that he or she was "treated less well than other employees be-

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119 *See* Anna I. Burke, Note, *"It Wasn't That Bad": The Necessity of Social Framework Evidence in Use of the Reasonable Woman Standard*, 105 IOWA L. REV. 771, 782 (2020); Nicole Newman, Book Note, *The Reasonable Woman: Has She Made a Difference?*, 27 B.C. THIRD WORLD L.J. 529, 532, 537–39 (2007) (reviewing ANN SCALES, LEGAL FEMINISM: ACTIVISM, LAWYERING AND LEGAL THEORY (2006)).

120 N.Y. EXEC. LAW § 296(1)(h) (McKinney 2021) ("It shall be an unlawful discriminatory practice . . . [f]or an employer . . . to subject any individual to harassment . . . regardless of whether such harassment would be considered severe or pervasive under precedent applied to harassment claims."); SUSAN GROSS SHOLINSKY, LAURI F. RASNICK, GENEVIEVE M. MURPHY-BRADACS, NANCY GUNZENHAUSER POPPER & CYNTHIA JOO, EPSTEIN BECKER & GREEN, P.C., NEW YORK STATE LEGISLATURE LOWERS THE STANDARDS FOR PROVING UNLAWFUL HARASSMENT, PASSES OTHER SWEEPING CHANGES TO HARASSMENT AND DISCRIMINATION LAWS 1 (2019), https://www.ebglaw.com/content/uploads/2019/06/Act-Now-Advisory_NYS-Legislature-Passes-Sweeping-Changes-to-Harassment-and-Discrimination-Laws.pdf [https://perma.cc/B2EY-M7VJ].

121 EXEC. § 296(1)(h).

122 Devjani Mishra & Emily Haigh, *New York State Significantly Expands Its Workplace Harassment Laws (Again)*, LITTLER MENDELSON P.C. (Aug. 12, 2019), https://www.littler.com/publication-press/publication/new-york-state-significantly-expands-its-workplace-harassment-laws [https://perma.cc/3L6H-VB26].

123 *See* SHOLINSKY ET AL., *supra* note 120, at 2.

124 N.Y.C., N.Y., ADMIN. CODE § 8-130(a) (2022).

cause of . . . gender."[125] Under NYSHRL, therefore, instead of showing conduct was severe or pervasive, employees must only demonstrate that they were subjected to inferior conditions of employment.[126] Further, harassment is unlawful if it rises above the level of what a reasonable victim would consider a petty slight or trivial inconvenience.[127] If conduct is nothing more than a petty slight or trivial inconvenience, an employer can assert an affirmative defense to liability under the statute.[128]

Although this standard is significantly lower than the severe or pervasive standard, it is still unclear what type of conduct will be actionable in federal courts.[129] The Second Circuit interpreted the petty slights and trivial inconveniences standard under the NYCHRL in *Mihalik v. Credit Agricole Cheuvreux North America, Inc.*[130] In *Mihalik*, the Second Circuit found that the plaintiff could establish a hostile work environment claim because comments objectifying women and exposing them to sexual ridicule, even if isolated, signal that an employer condones an office environment that degrades women.[131] There, a CEO explicitly told Mihalik that male employees should be respected because they were male and therefore more powerful than women.[132] The Second Circuit found the comments to be indicative of an environment where women are treated with less respect because of their gender.[133] As a result, the Second Circuit found that even a single comment that objectifies women—where the comment signals views about the role of women in the workplace—may be actionable under a petty slights or trivial inconveniences standard.[134] The court noted that summary judgment is appropriate only if "a reasonable jury could not find the employer liable under any theory," and that "while courts may still dismiss 'truly insubstantial cases,' even a single comment may be actionable in the proper context."[135]

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125 Williams v. N.Y.C. Hous. Auth., 872 N.Y.S.2d 27, 39 (App. Div. 2009).

126 EXEC. § 296(1)(h).

127 *Id.*

128 *Id.*

129 Nicholas P. Jacobson & Stephanie Hoppe Fedorka, *Labor & Employment Law, 2019–2020 Survey of New York Law*, 71 SYRACUSE L. REV. 257, 262 (2021).

130 715 F.3d 102 (2d Cir. 2013).

131 *See id.* at 114.

132 *Id.* at 106.

133 *See id.* at 114.

134 *Id.* at 113–15.

135 *Id.* at 113 (quoting Williams v. N.Y.C. Hous. Auth., 872 N.Y.S.2d 27, 41 & n.30 (App. Div. 2009)).

II. The Unworkability of the Severe or Pervasive Standard

Long before, and in the wake of, the #MeToo movement, there has been ongoing discussion about the inadequacies of federal sexual harassment law.[136] The reality is that the modern Title VII framework makes it difficult for victims of sexual harassment to seek relief in federal courts.[137] The severe or pervasive standard imposes a burden on plaintiffs not rooted in the language of Title VII itself and cuts against the statute's overall goal of eliminating discrimination in the workplace.[138] Inconsistent application of the severe or pervasive standard in federal circuit courts results in uncertainties about whether a plaintiff's case will be dismissed by a judge or go before a jury, disincentivizing plaintiffs from bringing lawsuits.[139] Further, the severe or pervasive standard protects and preserves "boys' club" culture in the workplace, which is out of touch with current societal norms.[140]

A. "Boys' Club" Culture's Triumph over the Severe or Pervasive Standard

The language of Title VII itself provides protection for sexual harassment in the form of derogatory comments about a person's gender, behavior that is often dismissed by courts because it does not involve sexual advances—i.e., not severe—or does not happen frequently enough—i.e., not pervasive.[141] Congress intended to eliminate discrimination from the workplace by prohibiting discrimination "with respect to" a term or condition of employment.[142] *Meritor*, how-

136 *See, e.g.*, Joanna Grossman & Deborah Brake, *An Overlooked Problem with Title VII's Protections Against Discrimination: Procedural Obstacles to Invoking the Law*, FindLaw (Sept. 4, 2007), https://supreme.findlaw.com/legal-commentary/an-overlooked-problem-with-title-viis-protections-against-discrimination-procedural-obstacles-to-invoking-the-law-1.html [https://perma.cc/R59N-NRL9].

137 *See* Kenneth R. Davis, *The "Severe and Pervers-ive" Standard of Hostile Work Environment Law: Behold the Motivating Factor Test*, 72 Rutgers U. L. Rev. 401, 425–26 (2020).

138 *Id.* at 419 n.134.

139 *See, e.g.*, Elisabeth A. Keller & Judith B. Tracy, *Hidden in Plain Sight: Achieving More Just Results in Hostile Work Environment Sexual Harassment Cases by Re-Examining Supreme Court Precedent*, 15 Duke J. Gender L. & Pol'y 247, 256–60 (2008).

140 *See* Eric Bachman, *A Movement Is Afoot to Redefine Hostile Work Environment/Harassment Laws*, Forbes (Jan. 6, 2021, 1:43 PM), https://www.forbes.com/sites/ericbachman/2021/01/06/a-movement-is-afoot-to-redefine-hostile-work-environment-harassment-laws/?sh=44e81776337f [https://perma.cc/GTK4-69MH].

141 *See* 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, 135 (2003).

142 42 U.S.C. § 2000e-2(a)(1).

ever, requires victims of harassment to prove that the conduct was severe or pervasive *and* changed the conditions of the work environment.[143] Therefore, *Meritor* requires plaintiffs to prove more than Title VII itself.[144] In her concurrence in *Harris*, Justice Ginsburg alluded to Title VII requiring more from plaintiffs than the language itself, asserting that the primary question should be whether a reasonable person would find it more difficult to do the job.[145] Further, even after the Court in *Oncale* found that harassment need not be motivated by sexual desire, the severe or pervasive standard continues to require a plaintiff to show more about the nature of the harassment rather than show that the conduct made it more difficult for a plaintiff to do her job.[146]

The evolution of the severe or pervasive standard has yielded a net of protection that is complex and difficult to apply.[147] In theory, under the standard, actionable conduct can either be one offensive instance or a series of less offensive instances that change an employee's working environment.[148] In practice, however, the standard is harder to apply because gender-based language that a court might consider "simple teasing," but still alters the conditions of employment, might not be sufficiently severe.[149] Further, gender-based language that a court might consider to be sporadic or isolated but still alters the conditions of employment might not be sufficiently pervasive.[150] The severe or pervasive standard assumes that a worker who receives unwanted gender-based attention that does not rise to the level of sexual misconduct, such as being called "bitch," and a worker who receives no unwanted gender-based conduct at all experience the same terms and conditions of employment.[151]

To say that those two workers experience the same terms and conditions of employment is wrong. For example, in *Paskert*, the supervisor's sexually suggestive comments did seem to alter the condi-

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143 *See* Davis, *supra* note 137, at 425.

144 *See id.* at 403.

145 *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring).

146 Davis, *supra* note 137, at 405, 421, 426.

147 *See* Keller & Tracy, *supra* note 139, at 249.

148 *What Employers Should Know About #MeToo Effects on Sexual Harassment Litigation*, Smithey L. Grp., LLC (Sept. 19, 2021), https://smitheylaw.com/what-employers-should-know-about-metoo-effects-on-sexual-harassment-litigation/ [https://perma.cc/SP55-F78G].

149 *See, e.g.*, Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998)).

150 *See, e.g.*, LeGrand v. Area Res. for Cmty. & Hum. Servs., 394 F.3d 1098, 1102–03 (8th Cir. 2005).

151 Williams v. N.Y.C. Hous. Auth., 872 N.Y.S.2d 27, 37–39 (App. Div. 2009).

tions of Paskert's workplace.[152] At one point, Paskert criticized the way that her supervisor treated women.[153] Further, she felt the need to report her supervisor's comments about women and his sexual conquests to her other work superiors.[154] Just because Paskert's alleged harassment did not rise to the level of unwelcome sexual conduct or appear to be more outrageous than previously dismissed cases does not mean that the harassment she endured did not alter the conditions of her employment.[155]

There is still a fundamental gap, therefore, between the requirements to establish a hostile work environment claim under Title VII and the harassment victims face in the workplace.[156] Requiring harassment to be "extreme"[157] is out of touch with current societal norms and revolves too much around the idea that the primary motivator behind sexual harassment is sexual desire.[158] The severe or pervasive standard fails to acknowledge that even isolated, gender-based incidents can significantly alter the conditions of employment.[159] Minor gender-based offenses and isolated incidents—behavior that does not always include explicit sexual contact or overt sexual advances—is often not considered severe or pervasive and thus not protected.[160] Through male-on-female harassment, whether explicitly sexual in nature or not, men devalue women's role in the workplace and attempt to keep women in their place.[161] The Eighth Circuit's application of the severe or pervasive standard to protect only against frequent and often explicit, threatening sexual misconduct fails to account for more subtle devaluations and discrimination against women in the workplace.[162] The result is courts deciding that women have not been harassed *enough* to assert a claim under Title VII.[163]

The Eighth Circuit's precedent-comparison approach, using case law decided over a decade ago, does not do enough to reflect stan-

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152 *See* Paskert v. Kemna-ASA Auto Plaza, Inc., 950 F.3d 535, 537 (8th Cir. 2020).

153 *Id.*

154 *Id.*

155 *Id.* at 538–39.

156 *See* Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1686–87 (1998).

157 Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998).

158 *See* Berdahl, *supra* note 45, at 641.

159 *See* Williams v. N.Y.C. Hous. Auth., 872 N.Y.S.2d 27, 38–39 (App. Div. 2009).

160 *See Faragher*, 524 U.S. at 788.

161 *See* Schultz, *supra* note 156, at 1686–87.

162 *See Williams*, 872 N.Y.S.2d at 38.

163 *See, e.g.*, *id.* at 39; Paskert v. Kemna-ASA Auto Plaza, Inc., 950 F.3d 535, 538–39 (8th Cir. 2020).

dards of behavior that a reasonable person may find severe or pervasive today.[164] Unlike the Eighth Circuit in *Paskert*, the Seventh Circuit in *Passananti* and the Ninth Circuit in *Costa* relied more on the context in which the word "bitch" was used rather than comparing current conduct to prior conduct that was not found to be sufficiently severe or pervasive.[165] Therefore, circuit courts have the ability to decide how much deference they give to specific facts of previous case law and how much weight they give to the surrounding context in which behavior happens as the Seventh Circuit did in *Passananti*.[166] The Eighth Circuit's focus on cases decided over a decade ago, rather than on the dispute of specific facts in the current case, reinforces old definitions of sexual harassment.[167]

Sexual harassment law requires a more workable standard that considers society's understanding of how power imbalances in the workplace allow sexual harassment to continue. The Second Circuit's holding in *Mihalik* that "[e]ven 'a single comment that objectifies women . . . where the comment . . . signal[s] views about the role of women in the workplace [may] be actionable'" under a petty slights or trivial inconveniences standard is more workable.[168] This standard gets to the root of "boys' club" culture—men devaluing women in the workplace by drawing attention to women's sexuality and through other sexist behavior in order to dominate and maintain control over them.[169] Under New York's standard, the court's analysis is not an analysis of how much someone harasses a victim but whether the conduct disparages women and marginalizes them because of their sex.[170] *Mihalik*'s holding, therefore, more effectively addresses subtle devaluations of women in the workplace.[171]

Despite the room for protection under the language of Title VII, proponents of the severe or pervasive standard may reference the Supreme Court's assertion that Title VII does not exist as a "general civility code."[172] The danger of the Supreme Court's interpretation that the severe or pervasive standard does not encompass a certain

164 *See Paskert*, 950 F.3d at 538–39.

165 *Compare id.* at 537, 539, *with* Passananti v. Cook County, 689 F.3d 655, 666–67 (7th Cir. 2012), *and* Costa v. Desert Palace, Inc., 299 F.3d 838, 861–62 (9th Cir. 2002) (en banc).

166 *See Passananti*, 689 F.3d at 665–67.

167 *See* Schultz, *supra* note 52, at 27.

168 *See* Mihalik v. Credit Agricole Cheuvreux N. Am., Inc., 715 F.3d 102, 111 (2d Cir. 2013) (last alteration in original) (quoting *Williams*, 872 N.Y.S.2d at 41 n.30).

169 *See* Paludi & Barickman, *supra* note 54, at 123–24.

170 *See* Schultz, *supra* note 52, at 33–34.

171 *See Mihalik*, 715 F.3d at 111.

172 *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998).

level of gender-related jokes or the occasional teasing is that this type of behavior is the exact type of behavior that can be indicative of a workplace culture that allows sexual harassment to continue.[173] This keeps women in gendered roles as "[m]uch of what is harmful to women in the workplace is difficult to construe as sexual in design."[174] The result is a framework of protection against sexual harassment in the workplace under Title VII that is futile, providing little protection for demeaning behavior that is meant to put women in their place and establish a man's dominance over the workplace.[175]

B. Inconsistent Outcomes for Plaintiffs Under the Current Standard

The different applications of the severe or pervasive standard in federal circuit courts creates a system where some plaintiffs survive summary judgment while plaintiffs in other jurisdictions, who face similar harassment, do not.[176] The discrepancy in application is the result of some circuit courts heavily relying on precedent in dismissing sexual harassment claims at summary judgment while other courts rely more on the broad social context of the facts at hand.[177] The Eighth Circuit's precedent-comparison approach in applying the severe or pervasive standard sets a higher bar for plaintiffs asserting claims under Title VII.[178] This application of the severe or pervasive standard strays far from Justice Ginsburg's concurrence in *Harris* later reiterated by the Supreme Court in *Oncale*.[179]

The Eighth Circuit imposes an unfair burden on plaintiffs asserting Title VII claims because it often requires that more than one *Harris* factor be present to state a claim even though the Supreme Court expressed in *Harris* that no single factor is required.[180] For example, in *Paskert*, the plaintiff experienced unwelcome physical contact and sexually suggestive comments.[181] Despite this conduct, the court seemed

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173 *See* Schultz, *supra* note 156, at 1689.

174 *Id.*

175 Only an estimated three to six percent of sexual harassment cases filed make it to trial. Yuki Noguchi, *Sexual Harassment Cases Often Rejected by Courts*, NPR (Nov. 28, 2017, 7:28 AM), https://www.npr.org/2017/11/28/565743374/sexual-harassment-cases-often-rejected-by-courts [https://perma.cc/L7XF-B8SB]; *see also* Schultz, *supra* note 52, at 33–34.

176 *See* Deepali Lal, *Labor & Employment Law*—Paskert v. Kemna-ASA Auto Plaza, Inc., *950 F.3d 535 (8th Cir. 2020)*, 43 U. Ark. Little Rock L. Rev. 595, 598 (2021).

177 *Compare* Paskert v. Kemna-ASA Auto Plaza, Inc., 950 F.3d 535, 538–39 (8th Cir. 2020), *with* Passananti v. Cook County., 689 F.3d 655, 665–67 (7th Cir. 2012).

178 Petition for a Writ of Certiorari, *supra* note 80, at 20–22.

179 *See* Johnson, *supra* note 141, at 103.

180 *See, e.g.*, *Paskert*, 950 F.3d at 538–39.

181 *Id.* at 537.

to overlook one of the factors identified in *Harris*: whether the conduct unreasonably interferes with an employee's ability to work.[182] In *Paskert*, the court found it significant that the conduct Paskert experienced was isolated and nonthreatening compared with some other claims it dismissed.[183] The court, however, did not discuss how Paskert criticized her supervisor's views toward women and felt the need to report his behavior out of concern—evidence that his unwelcome contact and sexually suggestive comments affected her ability to work.[184] The court, therefore, required much more in *Paskert* than required by *Harris* to the detriment of the plaintiff.[185]

The Eighth Circuit's precedent-comparison approach in applying the severe or pervasive standard results in inconsistent outcomes for plaintiffs depending on where they work in the country.[186] An inconsistency can be observed considering the two different outcomes in *LeGrand* and *Gerald*. In *LeGrand*, the harasser forcibly kissed the plaintiff without his permission and grabbed his buttocks unsolicited.[187] The harasser in *Gerald* touched the plaintiff's breast without her permission and solicited the plaintiff for sex.[188] Although the facts of these cases both include episodes of unwanted physical touch, the Eighth Circuit in *LeGrand* found that the conduct was not sufficiently severe or pervasive because it was too isolated over time and the conduct was not "physically violent or overtly threatening."[189] Unlike in *LeGrand*, the First Circuit in *Gerald* held that although there were only a few isolated incidents, a jury could find that the uninvited touching was severe.[190] The similar fact patterns of these cases is just one example of many in a system where the standard is not applied consistently across circuit courts.[191]

Older circuit court precedent establishes minimum thresholds for actionable conduct.[192] Lower federal courts often dismiss cases as a matter of law because federal circuit courts hold that cases with similar or more egregious conduct are not sufficiently severe or pervasive

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

183 *See Paskert*, 950 F.3d at 538–39.

184 *See id.*

185 *See id.*

186 *See id.*

187 LeGrand v. Area Res. for Cmty. & Hum. Servs., 394 F.3d 1098, 1100 (8th Cir. 2005).

188 Gerald v. Univ. of P.R., 707 F.3d 7, 18 (1st Cir. 2013).

189 *LeGrand*, 394 F.3d at 1102.

190 *Gerald*, 707 F.3d at 18.

191 *See* BACK & FREEMAN, *supra* note 10, at 3–7.

192 *Id.* at 6.

as a matter of law.[193] Lower federal courts are then bound by holdings like the Eighth Circuit's in *LeGrand*, which found that forcible kissing and unsolicited genital grabbing are not actionable harassment.[194] Because the court found that the conduct was too isolated to be sufficiently pervasive, the court's application of the severe or pervasive standard requires conduct be severe, frequent, and threatening in nature, preventing unwelcome sexual contact from being sufficient to state a claim no matter how inappropriate.[195] As a result, the limiting nature of the severe or pervasive standard lies both in the application of the standard as conjunctive rather than disjunctive—i.e., conduct must be "severe *and* pervasive" rather than "severe *or* pervasive"—and that the standard then acts as an obstacle to future plaintiffs who suffer similar egregious conduct.[196] A strict adherence to precedent like the Eighth Circuit's in *Paskert*, therefore, maintains the status quo rather than protecting women from discrimination in the workplace.[197]

New York's petty slights or trivial inconveniences standard prevents a system where alleged abusive workplace conduct goes unchecked by courts and juries because it would allow more plaintiffs to assert claims under Title VII.[198] Analyzing the facts of *Paskert* under the Second Circuit's application of the petty slights or trivial inconveniences standard would likely reverse the dismissal of Paskert's claim. In *Mihalik*, the harasser told the plaintiff that she should "'respect' the new employee because he was 'male' and 'more powerful' than she was" while also making other sexually suggestive comments.[199] The court found that because of the comments, there was "a genuine dispute as to whether [Mihalik] was treated less well than her male colleagues because of her gender."[200] The court, therefore, rejected the district court's finding that Mihalik's testimony only showed "sporadic insensitive comments."[201] Like *Mihalik*, the harasser in *Paskert* made remarks that he "never should have hired a woman" and made sexually suggestive comments toward Paskert.[202] In both cases, the comments were isolated but gender based.[203] Unlike the Second Cir-

193 *See id.*

194 *LeGrand*, 394 F.3d at 1100–03.

195 *See, e.g.*, Paskert v. Kemna-ASA Auto Plaza, Inc., 950 F.3d 535, 538–39 (8th Cir. 2020).

196 *See* Petition for a Writ of Certiorari, *supra* note 80, at 20–22.

197 *See* Bartlett, *supra* note 24, at 845.

198 *See* Bachman, *supra* note 140.

199 Mihalik v. Credit Agricole Cheuvreux N. Am., Inc., 715 F.3d 102, 106 (2d Cir. 2013).

200 *Id.* at 113.

201 *Id.* at 114.

202 Paskert v. Kemna-ASA Auto Plaza, Inc., 950 F.3d 535, 537 (8th Cir. 2020).

203 *See Mihalik*, 715 F.3d at 113; *Paskert*, 950 F.3d at 537.

cuit in *Mihalik*, however, the Eighth Circuit held that the comments were too isolated.[204]

Both *Mihalik* and *Paskert* involved comments objectifying women and comments that suggested that men are more competent or powerful than women.[205] Further, based on the nature of the supervisor's comments in *Paskert* about how he never should have hired a woman and his wondering aloud if he could make Paskert cry—comments playing on negative stereotypes of women—there was evidence that her supervisor directed these comments at her because she was a woman.[206] Under a lower standard, therefore, the Second Circuit likely would find that a reasonable jury could conclude that the behavior Paskert endured rises above what a reasonable person would consider a petty slight or trivial inconvenience, as just one comment that objectifies women and sends signals about her role in the workplace could be actionable.[207] Both Mihalik and Paskert, plaintiffs who experienced similar comments, would thus be able to continue with their claims past summary judgment under a lower standard.

Other cases show how the petty slights or trivial inconveniences standard would not be a significant departure from how some circuit courts interpret the severe or pervasive standard. For example, there is similarity between the Seventh Circuit's reasoning in *Passananti* and the Second Circuit's reasoning in *Mihalik*. In *Passananti*, the Seventh Circuit already recognizes that the use of the word "bitch" as a gender epithet could constitute a hostile work environment in the minds of a jury.[208] In *Passananti*, the use of the word was frequent, therefore the court found that it was sufficiently severe or pervasive.[209] The court also disagreed with the district court's finding that no reasonable jury could conclude that the harasser's comments were directed at Passananti because she was a woman.[210] The court found that the word "bitch" is sometimes used by men as a label for women who are considered to be "too aggressive or careerist."[211] Applying the Second Circuit's reasoning in *Mihalik* would not change the outcome of *Passananti*. The lower standard, however, would provide relief for plain-

204 *See Mihalik*, 715 F.3d at 113; *Paskert*, 950 F.3d at 538–39.

205 *See Paskert*, 950 F.3d at 537; *Mihalik*, 715 F.3d at 106.

206 *See Paskert*, 950 F.3d at 537.

207 *See Mihalik*, 715 F.3d at 114–15.

208 Passananti v. Cook County., 689 F.3d 655, 659 (7th Cir. 2012).

209 *Id.* at 668.

210 *Id.* at 659.

211 *Id.* at 665.

tiffs who experience similar forms of harassment like the use of gender epithets but do not experience it as frequently.

Other circuit courts seem to be open to protecting plaintiffs against sexual harassment that plays on negative stereotypes of women as well.[212] In *Costa*, the Ninth Circuit did not require overt sexual touching or threatening behavior to establish a Title VII claim.[213] The court focused its analysis on how language relying on sexual epithets and offensive references to women's bodies could indicate sex-based hostility.[214] The plaintiff was often called a "bitch," and supervisors used verbal slurs that were sex-based or played on negative stereotypes of women.[215] The court's discussion, therefore, centered on stereotypical views of a woman's role in the workplace.[216] *Mihalik* only goes one step further in protecting plaintiffs by not requiring that the conduct be frequent, which is consistently a barrier to women asserting claims under Title VII.[217] The similar reasoning in these cases is another example of how the lower standard is not too significant of a departure from the application of the severe or pervasive standard.

Applying the petty slights and trivial inconveniences standard in federal courts would result in more uniform outcomes across jurisdictions precisely because it centers the analysis on whether an individual has been treated worse because of their gender.[218] This is in line with Justice Ginsburg's concurrence in *Harris*.[219] Applying the Second Circuit's reasoning in *Mihalik* would remove the question of how frequently harassment happens, i.e., whether a victim has suffered *enough* harassment to establish a claim.[220] Under a lower standard, plaintiffs in cases where harassment—regardless of severity or frequency—devalues and subordinates women in the workplace because of their gender would have a greater chance of bringing their claims before a jury.[221]

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212 *See, e.g.*, Costa v. Desert Palace, Inc., 299 F.3d 838, 845–56 (9th Cir. 2002) (en banc).

213 *See id.* at 861–62.

214 *Id.*

215 *Id.* at 845–46.

216 *See id.* at 861–62.

217 *See* Waxman, *supra* note 81.

218 *See* Mihalik v. Credit Agricole Cheuvreux N. Am., Inc., 715 F.3d 102, 114 (2d Cir. 2013).

219 Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring).

220 *See, e.g.*, Paskert v. Kemna-ASA Auto Plaza, Inc., 950 F.3d 535, 538–39 (8th Cir. 2020).

221 *See, e.g.*, *Mihalik*, 715 F.3d at 113–14.

III. Lowering the Severe or Pervasive Standard

Judges in federal circuit courts like the Eighth Circuit have made it more difficult for plaintiffs to establish claims under Title VII.[222] As discussed above, inconsistent application of the severe or pervasive standard has two interconnected consequences: (1) allowing plaintiffs in some circuit courts to survive summary judgment while plaintiffs in other circuit courts do not and (2) allowing juries in some circuit courts to decide the merits of a plaintiff's claim in some cases but not others.[223] Instead of using the severe or pervasive standard, which imposes a high burden on plaintiffs asserting claims, federal courts should apply New York's petty slights or trivial inconveniences standard. Applying New York's standard would address sexual harassment that stems from sexism and stereotypical views of women's status in the workplace rather than sexual desire alone, disrupting the status quo in sexual harassment law. Further, a lowered standard would create more uniform standards for workplace harassment and allow juries—rather than judges—to decide on the merits of a plaintiff's claim.

A. Destabilizing "Boys' Club" Culture with a Lower Standard

As federal courts act as gatekeepers of the severe or pervasive standard, they send signals to employers and their employees about what sort of behavior is acceptable in the workplace.[224] Applying New York's standard would allow courts to move away from viewing gender-based teasing and offensive, isolated comments as nonactionable harassment and protect against behavior that insulates "boys' club" culture in the workplace.[225] Lowering the standard would ensure that conduct that marginalizes women on the basis of their sex will result in an actionable claim under Title VII, regardless of whether the conduct is simple teasing that degrades women or happens in isolated incidents.[226] This would support the main goal of Title VII—eliminating discrimination in the workplace.[227]

In a broad sense, abandoning the severe or pervasive standard will incentivize employers to take steps to eradicate patriarchal power

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222 *See* Petition for a Writ of Certiorari, *supra* note 80, at 21.

223 *See id.* at 17–20.

224 *See* Marshall, *supra* note 65, at 763 ("Yet when these women went to court to vindicate their individual interests, they articulated their demands to policymakers—judges—who in turn translated those demands into policy.").

225 *See generally* Schultz, *supra* note 52, at 24.

226 *See, e.g.*, *Mihalik*, 715 F.3d at 114.

227 Davis, *supra* note 137, at 453.

structures because it would make it easier for plaintiffs to establish a claim under Title VII.[228] If employers are subject to increased liability for not taking affirmative steps to eradicate sexual harassment in their workplaces, employers will likely be more vigilant about addressing sexual harassment when it happens or providing appropriate forums for victims.[229] A petty slights or trivial inconveniences standard would send a serious message to employers that even intermittent or isolated instances of harassment that stem from sexism or sexual desire, and lend to maintaining power imbalances within the workplace, will not be tolerated.[230] Employers, therefore, will likely take more proactive steps to root out sexual harassment—including gender-based teasing—or address sexual harassment once it happens immediately and effectively, so that plaintiffs do not feel that they have to go to court to address their concerns. The lower standard would also send a message that isolated harassment is no longer a basis for evading liability entirely under Title VII, instead shifting responsibility for addressing harassment to employers who fail to do so in their workplaces.[231]

B. Overcoming Summary Judgment Barriers with a Lower Standard

Federal courts should adopt New York's standard to reach more uniform outcomes for plaintiffs establishing claims under Title VII. Although time will tell how courts will interpret the petty slights or trivial inconveniences standard in the future, the lowered standard would result in more claims surviving summary judgment by broadening the type of harassment that is actionable.[232] Courts would no longer have to analyze whether a plaintiff suffered *enough* harassment because the petty slights or trivial inconveniences standard is significantly lower than the current standard.[233] As a result, Title VII would offer broader protection to those impacted by sexual harassment, power imbalances in the workplace, and risk of job loss—low-income

228 *See, e.g.*, *Mihalik*, 715 F.3d at 114 (rejecting the district court's analysis because it focused too much on how the "NYCHRL should not 'operate as a "general civility code,"'" rather than on how "even 'a single comment' may be actionable in appropriate circumstances" (quoting Williams v. N.Y.C. Hous. Auth., 872 N.Y.S.2d 27, 40–41, 41 n.30 (App. Div. 2009))).

229 *But see generally* Cunningham-Parmeter, *supra* note 15.

230 *See* Schultz, *supra* note 52, at 24.

231 *See Mihalik*, 715 F.3d at 114.

232 *See id.*

233 *Compare* Paskert v. Kemna-ASA Auto Plaza, Inc., 950 F.3d 535, 538–39 (8th Cir. 2020), *with* Williams v. N.Y.C. Hous. Auth., 872 N.Y.S.2d 27, 39 (App. Div. 2009).

and minority workers, mostly women of color, who already face other significant barriers to asserting claims.[234]

A lower standard would also prevent judges from finding that certain instances of harassment are not discrimination on the basis of sex under Title VII as a matter of law.[235] Juries, therefore, not judges, would be able to decide whether a reasonable person in the victim's shoes would find the conduct rises above a petty slight or trivial inconvenience.[236] In harassment cases like *Paskert*, where supervisors assert power, dominance, and superiority over a female employee, it is important for plaintiffs to have the opportunity to go to trial so they may obtain relief for the harassment they endure, whether it be from a settlement or awarded damages from a jury.[237]

Plaintiffs already face other barriers to finding relief under Title VII, alleviating concerns that abandoning the severe or pervasive standard would allow too many claims to survive and flood courts with litigation.[238] Plaintiffs have to overcome the *Faragher-Ellerth* affirmative defense framework, fears of reporting sexual harassment in the first place, or other traditional barriers to accessing the court system, such as costs of litigation and finding affordable representation.[239] Further, employers still can overcome sexual harassment claims by adequately addressing harassment in their workplace.

Allowing plaintiffs to have their cases be heard before a jury may be more beneficial for plaintiffs due to evolving notions of what constitutes sexual harassment in the workplace after the #MeToo move-

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234 *See* Diana Boesch, Jocelyn Frye & Kaitlin Holmes, Ctr. For Am. Progress, Driving Change in States to Combat Sexual Harassment 3 (2019) (discussing how "the highest percentage of [sexual harassment] charges occurred in industries with large numbers of low-wage workers, often working in occupations disproportionately held by women, especially women of color" where the power imbalances and risk of job loss when reporting misconduct far exceed other industries and occupations).

235 *See Mihalik*, 715 F.3d at 114; Back & Freeman, *supra* note 10, at 6.

236 *See* Beiner, *supra* note 76, at 74–75.

237 *See Paskert*, 950 F.3d at 537.

238 *See, e.g.*, Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998).

239 *See supra* note 15 (describing the *Faragher-Ellerth* framework); Claire Cain Miller, *It's Not Just Fox: Why Women Don't Report Sexual Harassment*, N.Y. Times (Apr. 10, 2017), https://www.nytimes.com/2017/04/10/upshot/its-not-just-fox-why-women-dont-report-sexual-harassment.html [https://perma.cc/UC8A-9SJR] ("[O]nly a quarter to a third of people who have been harassed at work report it to a supervisor or union representative, and 2 percent to 13 percent file a formal complaint . . . . Mostly they fear retaliation . . . ."); White House Legal Aid Interagency Roundtable, Expanding Access to Justice, Strengthening Federal Programs 9 (2016) ("[A]pproximately 50% of those seeking legal aid are turned away because of limited resources.").

ment.[240] Juries, rather than precedent steeped in archaic, male-dominated notions of appropriate workplace conduct, are better suited to decide cases of sexual harassment.[241] In determining whether a reasonable person in the victim's shoes would find the conduct rises above petty slights or trivial inconveniences, juries are able to apply both modern social context and notions of acceptable conduct in the workplace.[242] Judges tend to live in a "narrow segment of the enormously broad American socio-economic spectrum."[243] A jury, however, "made up of a cross-section of our heterogeneous communities provides the appropriate institution for deciding" sexual harassment claims.[244]

Conclusion

The current state of sexual harassment law produces a patchwork system of protection based on where a plaintiff works in the country. To create a system where plaintiffs are better able to seek relief from harassment, changes must be made to the standard for hostile work environment sexual harassment claims under Title VII. The goal of Title VII is to eliminate discrimination based on protected characteristics in the workplace. Because the severe or pervasive standard makes it more difficult for plaintiffs to find relief in federal courts, changing the standard is one step courts can take in reaching that goal. Applying New York's petty slights or trivial inconveniences standard will ensure that seemingly isolated, gender-based behavior that results from power imbalances in the workplace—behavior that also *maintains* power imbalances in the workplace—will result in an actionable claim under Title VII and juries will be able to decide the merits of a plaintiff's claims rather than a judge. The severe or pervasive standard has acted as a barrier to relief and a gatekeeper for sexual harassment in the workplace for far too long, just because a woman might not suffer *enough*. A lowered standard, therefore, should be applied by courts in sexual harassment cases until Congress establishes a lower standard by statute.

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240 *See* Beiner, *supra* note 76, at 75 (discussing whether conduct is sufficiently severe or pervasive to alter the conditions of the victim's employment "is necessarily a fact-specific inquiry based on social norms that are best assessed by a jury—not one judge sitting in isolation").

241 *See id.*; Ninth Cir. Task Force on Gender Bias, *Executive Summary of the Preliminary Report of the Ninth Circuit Task Force on Gender Bias*, 45 Stan. L. Rev. 2153, 2169–70 (1993).

242 *See* Beiner, *supra* note 76, at 75.

243 Gallagher v. Delaney, 139 F.3d 338, 342 (2d Cir. 1998).

244 *Id.*