Washington Law Review

Volume 98 | Number 1

3-1-2023

Beyond Title VII: Litigating Harassment by Nonemployees Under the ADA and ADEA

Kate Bradley
University of Washington School of Law

BEYOND TITLE VII: LITIGATING HARASSMENT BY NONEMPLOYEES UNDER THE ADA AND ADEA

Kate Bradley*

Abstract: Employees in the United States are protected from unlawful harassment that rises to the level of a "hostile work environment." Federal circuits recognize that employers could be liable under Title VII when their employees experience hostile work environments because of harassment from nonemployees. However, outside of Title VII, not all federal circuits have recognized that the Americans with Disabilities Act of 1990 (ADA) and Age Discrimination in Employment Act of 1967 (ADEA) protect employees from hostile work environments.

As a result, employees are vulnerable with respect to age and disability-based harassment. This Comment argues that all federal circuits should allow hostile work environment claims under the ADA and ADEA. The reasons to recognize hostile work claims under the ADA and ADEA are simple but powerful: to uphold uniformity in federal law, protect American workers equally from harassment based on a protected characteristic, and recognize the influence of Title VII. Additionally, this Comment argues that liability should extend under the ADA and ADEA when employees experience hostile work environments due to nonemployee harassment. Because Title VII, the ADA, and the ADEA each intend to prohibit unlawful discrimination in employment, the ADA and ADEA should be treated the same as Title VII in this context.

INTRODUCTION

A customer walks into the same bank every day and harasses an employee because of their age or disability. This repeated harassment creates a hostile work environment that interferes with the employee's ability to do their job, makes them feel unsafe when working, and eventually causes anxiety. If the bank is aware of this harassment but fails to take any action, can they be liable under the Americans with Disabilities Act (ADA) or Age Discrimination in Employment Act (ADEA)?

If this customer were harassing the employee on the basis of race or sex, then some jurisdictions will hold the employer liable under Title VII of the Civil Rights Act, provided certain criteria are met.[1] However,

* J.D. Candidate, University of Washington School of Law, Class of 2023. Special thanks to Professor Eric Schnapper for reviewing this Comment; Katrina Kelly and Sarah Tilstra for teaching me so much about employment law while at the Seattle City Attorney's Office; and the entire Notes and Comments team at *Washington Law Review* for their help in editing and shaping this Comment.

1. *See* Folkerson v. Circus Circus Enters., Inc., 107 F.3d 754, 756 (9th Cir. 1997) (holding employers may be liable under Title VII for third party sexual harassment of employees); Galdamez v. Potter, 415 F.3d 1015, 1024 (9th Cir. 2005) (finding that a reasonable jury could have found plaintiff suffered hostile work environment due to customer harassment on the basis of national origin or race under Title VII).

federal circuits have not addressed whether an employer can be liable under the ADA or ADEA when a nonemployee creates a hostile work environment for an employee based on age or disability. Because federal courts have made this decision under Title VII,[2] what makes the ADA or ADEA different? Based on similar statutory history and the availability of hostile work claims for co-employee or supervisory behavior, these statutes should *not* be treated differently.

This Comment begins by examining Title VII and employer liability under the hostile work environment claim. Next, this Comment analyzes the ADA and ADEA before arguing that employer liability should be extended in all federal circuits for hostile work environment claims based on age and disability harassment. Lastly, this Comment argues that such liability should be extended under federal law for age and disability harassment from nonemployees.

I. THE STARTING POINT: TITLE VII

Title VII is the leading statute for shaping hostile work environment claims. Therefore, this Comment looks at Title VII's history and purpose and then examines how hostile work environment claims became available under the statute. Next, this Comment reviews current requirements for hostile work claims. Finally, this Comment discusses expanding employer liability under Title VII for harassment by nonemployees.

Title VII of the Civil Rights Act of 1964 protects Americans from discrimination by certain employers due to the employee's race, color, religion, sex, or national origin.[3] Here, context is key: this legislation was shaped during the summer of 1963.[4] While the House Judiciary Subcommittee was attempting to get Title VII on the floor, the streets of Birmingham, Alabama filled with peaceful protests.[5] This peace was disrupted when Bull Connor, the Commissioner of Public Safety for Birmingham, set fire hoses and attack dogs on the protesters.[6] A sign of commitment to equality to foreign and domestic onlookers, politicians thought Title VII would be the harbinger of employment opportunity.[7] While this optimism may seem naïve today, the House Report from 1963

2. *Galdamez*, 415 F.3d at 1023.

3. 42 U.S.C. § 2000e-2.

4. Maria L. Ontiveros, *The Fundamental Nature of Title VII*, 75 OHIO ST. L.J. 1165, 1166 (2014).

5. *Id.*

6. *Id.*

7. Chuck Henson, *The Purposes of Title VII*, 33 NOTRE DAME J.L. ETHICS & PUB. POL'Y 221, 222–23 (2019).

appears to reflect this idealism.[8] Title VII's Equal Employment Opportunity Section 701 set out its purpose "to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion, or national origin."[9] In February of 1964, Title VII expanded when Representative Howard W. Smith stood up and proposed adding "sex" to the list of protected groups.[10] Ultimately, Title VII promises Americans the right to participate in the workforce free from particular discrimination.[11]

A. Hostile Work Environment Claims Originated Under Title VII

Hostile work environment claims generally surface when an individual experiences harassment that rises to such a severe level that it "alter[s] the conditions of [their] employment."[12] Protection from a hostile work environment is not explicitly within a statute. Rather, Title VII's language is broader and makes it unlawful "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."[13] Largely grounded in the intentions of Title VII, judicial interpretation created hostile work environment claims.[14]

Sexual harassment was the original catalyst for the hostile work environment claim. Before *Meritor Sav. Bank, FSB v. Vinson*,[15] the United States Supreme Court held that Title VII only prohibited quid pro quo sexual harassment.[16] Quid pro quo harassment typically means the employee feels their job is threatened if they refuse their superior's sexual propositions.[17] In *Meritor*, Ms. Vinson brought suit against her bank-employer, claiming that she had been continually sexually harassed by her supervisor, Mr. Taylor.[18] The bank argued Title VII could only redress economic loss—an interpretation that would have dramatically limited the

8. H.R. REP. NO. 88-914 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 2391, 2401.

9. *Id.*

10. Shannon Bond, *Married on Saturday and Fired on Monday:* Hively v. Ivy Tech Community College: *Resolving the Disconnect Under Title VII*, 97 NEB. L. REV. 225, 229 (2018).

11. Ontiveros, *supra* note 4, at 1167.

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

13. 42 U.S.C. § 2000e-2(a)(1).

14. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–22 (1993); *Meritor Sav. Bank*, 477 U.S. at 63–68.

15. 477 U.S. 57 (1986).

16. Casey J. Wood, *"Inviting Sexual Harassment": The Absurdity of the Welcomeness Requirement in Sexual Harassment Law*, 38 BRANDEIS L.J. 423, 425 (2000).

17. *Id.* at 424.

18. *Meritor Sav. Bank*, 477 U.S. at 59.

statute's impact.[19] In rejecting this argument, the Court saw Title VII's language referring to the "terms, conditions, or privileges of employment"[20] as evidence that Congress intended no such limitation.[21] Instead, the Court concluded hostile environments created a cause of action under Title VII.[22]

Although *Meritor* broke some barriers for sexual harassment lawsuits, the Court did so with a costly sleight of hand.[23] The statute protects against discrimination "*with respect* to . . . compensation, terms, conditions, or privileges of employment."[24] However, the Court concluded, potentially with some help from the lower courts, that not all harassing behavior "*affects* a 'term, condition, or privilege' of employment."[25] Essentially, the statute protects workers from discrimination *with respect* to employment, but the Court required that the harassment actually *affect* employment. The Court required the discrimination not only relate to employment but to also go further and affect conditions of employment. This interpretation placed higher burdens on plaintiffs to satisfy a causation element that is not mentioned in Title VII.[26]

B. Current Requirements for Title VII Hostile Work Environment Claims

Hostile work environment claims contain several demanding requirements. While jurisdictions may vary, a plaintiff must show evidence that "would allow a reasonable jury to conclude that the harassment was (1) unwelcome, (2) based on [plaintiff's] gender or race, (3) sufficiently severe or pervasive to alter the conditions of [their] employment and create an abusive atmosphere, and (4) imputable to [employer]."[27] Federal courts often grant summary judgment for defendant-employers.[28] In federal court, summary judgment should be granted only when the moving party "shows that there is no genuine

19. 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, 418 (2020).

20. 42 U.S.C. § 2000e-2(a)(1).

21. *Meritor Sav. Bank*, 477 U.S. at 64.

22. *Id.* at 73.

23. Davis, *supra* note 19, at 419.

24. 42 U.S.C. § 2000e-2(a)(1) (emphasis added).

25. Davis, *supra* note 19, at 419 (emphasis added) (quoting *Meritor*, 477 U.S. at 67).

26. *Id.*

27. Freeman v. Dal-Tile Corp., 750 F.3d 413, 420 (4th Cir. 2014) (quoting EEOC v. Cent. Wholesalers, Inc., 573 F.3d 167, 175 (4th Cir. 2009)).

28. Ann C. McGinley, *#metoo Backlash or Simply Common Sense?: It's Complicated*, 50 SETON HALL L. REV. 1397, 1420 (2020).

dispute as to any material fact and the movant is entitled to judgment as a matter of law."[29]

1. Harassment Must Be Unwelcome

It may seem relatively simple to show that prohibited harassment is "unwelcome," but this has proven unexpectedly controversial. This element is more relevant in cases alleging sexual rather than racial harassment because there is a presumption that harassment on the basis of race is unwelcome.[30] Before *Meritor*, lower courts were split as to whether the plaintiff in a sexual harassment case needed to prove unwelcomeness as part of their prima facie case.[31] While *Meritor* did require unwelcomeness, it left lower courts to generate different standards.[32] For example, the First Circuit stated unwelcomeness may be established where there is "evidence that the employee consistently demonstrated her unalterable resistance to all sexual advances"[33] by the employee's supervisor. In the Eighth Circuit, a plaintiff can establish unwelcomeness by showing that they "explicitly rebuffed the bad actor's propositions or told the harasser [they] found the conduct offensive."[34] Alternatively, the Seventh Circuit allows a plaintiff to proceed when there is "conduct demonstrating 'anti-female animus'"[35] so that the hostile environment may be "sexist rather than sexual."[36] Academics have criticized these varying approaches for focusing on the victim's behavior rather than the harasser.[37]

2. Harassment Must Be Based on the Plaintiff's Protected Characteristic

Because Title VII does not protect employees from all harassment or discrimination, a plaintiff must show that the discrimination was *because*

---

29. FED. R. CIV. P. 56(a).

30. Grace S. Ho, *Not Quite Rights: How the Unwelcomeness Element in Sexual Harassment Law Undermines Title VII's Transformative Potential*, 20 YALE J.L. & FEMINISM 131, 139 (2008).

31. *Id.* at 138 (defining prima facie as the requirement for plaintiffs to provide enough evidence supporting their cause of action).

32. *Id.* at 139.

33. Chamberlin v. 101 Realty, Inc., 915 F.2d 777, 784 (1st Cir. 1990).

34. Blake v. MJ Optical, Inc., 870 F.3d 820, 829 (8th Cir. 2017).

35. Scruggs v. Garst Seed Co., 587 F.3d 832, 840 (7th Cir. 2009) (quoting Boumehdi v. Plastag Holdings, Inc. 489 F.3d 781, 788 (7th Cir. 2007)).

36. *Id.*

37. Ho, *supra* note 30, at 140.

of a protected characteristic.[38] This analysis can be difficult as it requires discerning the motive behind the challenged harassment. This is further complicated by the courts' use, and misuse, of terms like "gender."[39] Although gender is a "broader concept," some courts use "sex" and "gender" interchangeably.[40] Others are aware gender means more than sex and deliberately use this larger meaning when deciding cases.[41]

In the sexual harassment context, the Supreme Court explained that the guiding question is whether one sex is "exposed to disadvantageous terms or conditions of employment" that the other sex is not.[42] This seemingly examines the *outcome* of the alleged discrimination more than the intent of the harasser. But what happens if the customer's motive is called into question rather than an employer or coworker? For example, what if the customer prefers to only work with men? Scholars argue that if the employer uses sex as a factor, even if that is due to customer preference, there is a discriminatory motive.[43] Alas, there is no bright-line rule.

3. Harassment Must Be Sufficiently Severe or Pervasive

Of the hostile work claim requirements, plaintiffs often struggle to satisfy the "sufficiently severe or pervasive" standard as it can require extreme harassment.[44] Fortunately, Title VII does not require an employee to experience adverse employment action, such as a demotion or termination.[45] Instead, the challenged harassment must rise to the level of altering a term, condition, or privilege of employment.[46] Plaintiffs need not demonstrate official employment action, such as losing their job, but they must show harassment that convinces the judge or jury of its severity. In *Harris v. Forklift Systems, Inc.*,[47] the Supreme Court indicated that the pervasive inquiry is two-fold with a subjective and objective component.[48] The challenged conduct must create an *objectively* hostile environment,

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

39. Wendy N. Hess, *Slut-Shaming in the Workplace: Sexual Rumors & Hostile Environment Claims*, 40 N.Y.U. REV. L. & SOC. CHANGE 581, 589 (2016).

40. *Id.*

41. *Id.*

42. *Oncale*, 523 U.S. at 80 (quoting Harris v. Forklift Sys., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

43. Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1416 (2009).

44. Davis, *supra* note 19, at 426.

45. *Id.* at 430.

46. *Id.*

47. 510 U.S. 17 (1993).

48. *Id.* at 21–22.

and the plaintiff must *subjectively* perceive the environment as abusive.[49] A plaintiff's testimony may satisfy the subjective component. For example, they could testify they were frightened by the harasser's behavior.[50]

The objective inquiry proves detrimental to many hostile work environment claims. The difficult task is discerning which harassing incidents build towards a hostile work environment. How much harassment must the plaintiff experience? Plaintiffs can point to a single incident when it is "extraordinarily severe" or multiple incidents that "were 'sufficiently continuous and concerted' to have altered the conditions of" the employee's workplace.[51] *Harris* also permits courts to look at all the circumstances and consider factors, such as the harassment's frequency, whether the harassment was "physically threatening or humiliating, or a mere offensive utterance," and whether the harassment unreasonably interfered with the plaintiff's ability to perform their job.[52] Some circuits will compare facts to previous cases as a way to examine whether this element is met.[53] Yet other circuits will separate a series of harassing incidents and examine them individually as if they are not connected.[54] In the end, there is no guaranteed blueprint for fulfilling this element.

4. There Must Be a Basis for Holding the Employer Liable

Lastly, for a plaintiff to successfully bring a hostile work environment claim, they must establish some basis for holding their employer liable.[55] This is true whether the claim is brought against a supervisor, coworker, or nonemployee.[56] Yet, distinctions in *when* liability attaches vary based on whether the harassment is by a supervisor or coworker.

When a supervisor is the bad actor, the Supreme Court turns to the principles of vicarious liability.[57] If a supervisor harasses a subordinate to

---

49. Elizabeth Monroe Shaffer, *Defining the "Environment" in Title VII Hostile Work Environment Claims: Appellate Courts, Classism, and Sexual Harassment*, 71 U. CIN. L. REV. 695, 699 (2002); *Harris*, 510 U.S. at 21–22.

50. Crowley v. L.L. Bean, Inc., 303 F.3d 387, 397 (1st Cir. 2002) (clarifying that the plaintiff "need not subjectively believe that the conduct met the legal definition of unlawful sexual harassment").

51. Alfano v. Costello, 294 F.3d 365, 374 (2d Cir. 2002) (quoting Perry v. Ethan Allen, Inc., 115 F.3d 143, 149 (2d Cir. 1997)).

52. *Harris*, 510 U.S. at 23.

53. *See* Shaver v. Indep. Stave Co., 350 F.3d 716, 721–23 (8th Cir. 2003).

54. Davis, *supra* note 19, at 428.

55. Faragher v. City of Boca Raton, 524 U.S. 775, 797–98 (1998).

56. Zatz, *supra* note 43, at 1371.

57. *Faragher*, 524 U.S. at 802.

create a hostile work environment, the employer can be vicariously liable.[58] When *Vance v. Ball State University*[59] arrived in 2013, the Court decided who could be considered a "supervisor."[60] This decision would have serious consequences for hostile work plaintiffs because, as the Court explained, "[u]nder Title VII, an employer's liability for such harassment may depend on the status of the harasser." Under *Vance*, an employee is a supervisor only if they can take tangible employment action against the plaintiff, such as hiring or firing them.[61] Plaintiffs are left to rely on the negligence approach if their harasser does not fall under that definition.[62] Under this approach, the employer is liable only when that employer was negligent in responding to the harassment.[63] This is subject to further requirements and possible defenses for the employer[64] that are outside the focus of this Comment.

If an employee experiences a hostile work environment due to harassment from a coworker, many courts use a negligence standard.[65] Thus, the employer can be liable only when they knew or should have known of the harassment and failed to act reasonably in correcting the harassment.[66] Application of this approach will be discussed throughout this Comment.

To summarize, plaintiffs are required to show (1) unwelcome harassment (2) based on membership within a Title VII protected class that was (3) sufficiently severe or pervasive to alter their employment conditions and (4) that is imputable to their employer.[67] Such extensive requirements have quashed numerous lawsuits with claims of serious harassment.[68] Despite these high dismissal rates, federal courts were willing to interpret Title VII more broadly as it related to harassment by nonemployees.

---

58. *Id.* at 807.

59. 570 U.S. 421 (2013).

60. *Id.* at 423.

61. *Id.* at 424; Jennifer A.L. Sheldon-Sherman, *The Effect of* Vance v. Ball State *in Title VII Litigation*, 2021 U. ILL. L. REV. 983, 986 (2021).

62. Zatz, *supra* note 43, at 1372–73.

63. *Id.*

64. Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).

65. Zatz, *supra* note 43, at 1372–73.

66. *Id.*

67. Freeman v. Dal-Tile Corp., 750 F.3d 413, 420 (4th Cir. 2014).

68. Davis, *supra* note 19, at 426.

C. Title VII Hostile Work Claims for Harassment by Nonemployees Are Still New

While Title VII language does not directly address nonemployee behavior, courts have interpreted Title VII to apply against employers who fail to address third-party harassment of employees.[69] This section surveys these decisions and provides an overview for how and when this liability expanded. As discussed below, the circuits appear to focus more on the employer's ability to control the work environment instead of whether a coworker or nonemployee was the harasser.[70] Yet, employers still retain control over their liability exposure based on how they choose to respond.

1. Circuit Courts Began Expanding Liability Over Twenty Years Ago

Although at least one lower court had ruled on liability for nonemployee behavior,[71] the Ninth Circuit appears to have set out the first solid articulation of the rule. *Folkerson v. Circus Circus Enterprises, Inc.*[72] arrived before the circuit in February 1997. Ms. Folkerson brought suit alleging that her employer, a casino, fired her in retaliation for rejecting a customer's sexual advances.[73] As the case name might suggest, the facts are colorful: Folkerson was a professional mime performing as a life-sized toy for casino patrons.[74] Because of her performance skills, patrons apparently had difficulty determining whether Folkerson was a real person or truly a toy.[75] This led some patrons to try to touch her to see if she was real.[76] Folkerson expressed concern over this to the casino, and the casino offered the following measures as protection: implementing a display sign instructing patrons not to touch, advising Folkerson to call security if there were problems, and allowing a large male clown performer to accompany Folkerson's performances.[77] These measures proved inadequate when a male patron touched Folkerson, despite the

69. Dallan F. Flake, *Employer Liability for Non-Employee Discrimination*, 58 B.C. L. REV. 1169, 1170–71 (2017).

70. *See* Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1073–74 (10th Cir. 1998).

71. Ann C. McGinley, *Harassing "Girls" at the Hard Rock: Masculinities in Sexualized Environments*, 2007 U. ILL. L. REV. 1229, 1268–69 (2007).

72. 107 F.3d 754 (9th Cir. 1997).

73. *Id*. at 755.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

patron being warned three times.[78]

The Ninth Circuit determined Folkerson's claims could not survive summary judgment, but then went beyond the case facts to discuss harassment by third parties.[79] The court held that an employer may be liable for harassment of employees by customers or other nonemployees when "the employer either ratifies or acquiesces in the harassment by not taking immediate and/or corrective actions when it knew or should have known of the conduct."[80] Unfortunately for Folkerson, the court found that she failed to identify evidence that the casino ratified or acquiesced to the harassment by casino patrons.[81] In the end, the court explained that the casino's protection measures were reasonable in trying to keep Folkerson safe.[82] Nonetheless, this case took an important step towards recognizing Title VII hostile work claims for harassment by nonemployees. After the Ninth Circuit decided *Folkerson*, other circuits began to agree that Title VII could be used to hold employers liable for harassment by nonemployees.

Within months of *Folkerson*, the Eighth Circuit engaged in a similar analysis in *Crist v. Focus Homes, Inc.*[83] There, employees brought suit under state law and Title VII against employer Focus Homes, a residential program for individuals with developmental disabilities.[84] Since Focus Homes maintained the environment where the harassing resident lived, the court determined Focus Homes "had the ability to alter those conditions to a substantial degree."[85] Thus, the employer could be held liable for third party behavior when the employer knew of the harassment and failed to take appropriate action.[86]

In 1998, both the First and Tenth Circuits addressed nonemployee harassment. The First Circuit extended liability for third party action in *Rodriguez-Hernandez v. Miranda-Velez*.[87] Because the employer in that case told the plaintiff to give into a customer's sexual advances, the court affirmed the jury's verdict imposing liability on the employer.[88] The Tenth Circuit also adopted a negligence-based theory for harassing behavior by

78. *Id.*
79. *Id.* at 755–56.
80. *Id.* at 756.
81. *Id.*
82. *Id.*
83. 122 F.3d 1107 (8th Cir. 1997).
84. *Id.* at 1108.
85. *Id.* at 1112.
86. *Id.* at 1110.
87. 132 F.3d 848 (1st Cir. 1998).
88. *Id.* at 854–55, 860.

customers.[89] Employers in that jurisdiction may be liable for failing to remedy a hostile work environment where employees at the management level knew or should have known of the behavior.[90]

The Seventh Circuit arrived at a similar conclusion when Judge Easterbrook engaged in colorful analysis[91] deciding *Dunn v. Washington County Hospital*.[92] There, an employee sued her hospital employer for a hostile work environment created by a supervising independent contractor.[93] Judge Easterbrook compared the situation to that of a patient and their macaw bird.[94] If the patient's macaw only attacked women, and the hospital knew this but did nothing, then the hospital was making a decision to expose female employees to unequal working conditions.[95] By comparison, it did not matter whether the supervisor intended to harm female employees, only whether the hospital "intentionally created or tolerated unequal working conditions."[96] After *Dunn*, the Seventh Circuit follows this negligence standard when employees are harassed by coworkers, independent contractors, or nonemployees.[97]

Other circuits have also assumed employers can be liable for third party behavior. The Second, Fourth, Fifth, Sixth, and Eleventh Circuits have used the negligence approach.[98] At least one unreported decision in the Third Circuit[99] has cited this negligence standard, but subsequent lower court decisions indicate the circuit has not officially decided the issue.[100] In the D.C. Circuit, district courts have followed the negligence approach, though these decisions cite to an unreported 1999 D.C. appellate case.[101]

---

89. Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1074 (10th Cir. 1998).

90. *Id.*

91. Dunn v. Wash. Cnty. Hosp., 429 F.3d 689, 691 (7th Cir. 2005); *see* Zatz, *supra* note 43, at 1360.

92. 429 F.3d 689 (7th Cir. 2005).

93. *Id.* at 690.

94. *Id.* at 691.

95. *Id.*

96. *Id.* at 692.

97. Erickson v. Wis. Dep't of Corr., 469 F.3d 600, 605 (7th Cir. 2006).

98. *E.g.*, Summa v. Hofstra Univ., 708 F.3d 115, 124 (2d Cir. 2013) (adopting EEOC guidelines that hold the employer liable when there is a negligent response); Freeman v. Dal-Tile Corp., 750 F.3d 413, 422–23 (4th Cir. 2014); Gardner v. CLC of Pascagoula, L.L.C., 915 F.3d 320, 327 (5th Cir. 2019); Slayton v. Ohio Dep't of Youth Servs., 206 F.3d 669, 677 (6th Cir. 2000); Beckford v. Dep't of Corr., 605 F.3d 951, 959 (11th Cir. 2010).

99. Johnson v. Bally's Atl. City, 147 F. App'x 284, 286 (3d Cir. 2005) (citing Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1073–74 (10th Cir. 1998)).

100. *See* Hewitt v. BS Transp. of Ill., L.L.C., 355 F. Supp. 3d 227, 236 (E.D. Pa. 2019).

101. *See, e.g.*, Thomas v. Securiguard Inc., 412 F. Supp. 3d 62, 69, 94 (D.D.C. 2019) (citing Martin v. Howard Univ., No. 99-1175, 1999 U.S. Dist. LEXIS 19516 (D.D.C. Dec. 15, 1999)) (explaining

That appellate case simply held the question of whether a nonemployee's harassment was because of gender was a question for the jury.[102]

2. Employers Can Avoid Liability for Nonemployee Behavior

Employers are not left completely vulnerable to liability when nonemployees are the cause of harassment. In *Christian v. Umpqua Bank*,[103] the Ninth Circuit provided guidance for how employers may avoid hostile work environment liability.[104] In this 2020 case, Ms. Christian brought suit against her former employer under Title VII when a bank customer stalked and sexually harassed Christian.[105] Multiple harassment incidents occurred months apart, and one manager told Christian to "just hide in the break room" if the customer came into the bank.[106] Christian informed managers that she felt unsafe and requested a no-trespassing order against the customer.[107] After some failure to take action, the bank told Christian they had asked the customer not to return, closed the customer's account, and temporarily transferred Christian to a different branch.[108]

On the question of the bank's liability, the court recited the *Folkerson* rule that employers may be liable when ratifying or acquiescing in the third party's harassment.[109] The court explained that the employer's corrective actions must be reasonably calculated to stop the harassment, and this reasonableness depends on (1) the employers' ability to end the harassment and (2) the response's timeliness.[110] The court further detailed that effectiveness is determined by the extent to which the response ends the present harassment and deters future harassment.[111] If the employer performs no remedy or the remedy is ineffectual, then liability attaches.[112]

---

that "several circuits, including our own, have concluded that an employer can be held liable for a non-employee's conduct"); Simms v. Ctr. for Corr. Health & Pol'y Stud., 794 F. Supp. 2d 173, 191 (D.D.C. 2011) (citing *Martin*, 1999 U.S. Dist. LEXIS 19516, at *7) ("To prevail on a claim of a hostile work environment created by a non-employee, a plaintiff must show that the employer knew or should have known of the existence of the hostile work environment and failed to take proper remedial action.").

102. *See Martin*, 1999 U.S. Dist. LEXIS 19516, at *7.

103. 984 F.3d 801 (9th Cir. 2020).

104. *Id.* at 811–12.

105. *Id.* at 805.

106. *Id.* at 808.

107. *Id.*

108. *Id.*

109. *Id.* at 811.

110. *Id.* at 811–12.

111. *Id.*

112. *Id.*

In Christian's case, the court decided that a jury could find the bank ratified or acquiesced in the customer's harassment.[113] Notably, the bank did not actually tell the customer not to return to the bank, nor close the bank account despite telling Christian the opposite.[114] In spite of Christian's requests, the bank took no further action such as obtaining the no-trespassing order, consulting human resources, or implementing a safety plan.[115] The court postulated that a jury might find the bank's response to the harassment unreasonable for putting the burden largely on Christian.[116] This case illustrates the importance of a prompt and effective employer response to harassment. Moreover, the remedy should focus on the harasser. Simply transferring the victim-employee to a different location may not be enough to escape liability.

II. THE JUMPING POINT: ADA AND ADEA HOSTILE WORK ENVIRONMENT CLAIMS

Because Title VII's purposes play a vital role in hostile work claims, it is necessary to review the purpose and history of the Americans with Disabilities Act (ADA) and the Age Discrimination in Employment Act (ADEA) in order to compare with Title VII. First, their purposes show clear similarities to Title VII. Second, cases recognizing hostile work claims under the ADA and ADEA explicitly rely on Title VII as a basis for liability. As a result, Title VII litigation influences hostile work claims under the ADA and ADEA.

A. The ADA Followed in Title VII's Footsteps

The ADA's purpose and the evolution of hostile work claims mirrors Title VII in many aspects. In 1990, Congress passed the Americans with Disabilities Act after recognizing that millions of "Americans have one or more physical or mental disabilities."[117] The ADA's 1990 enactment and 2008 amendments show that the ADA's purpose was in part "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[118] Similar to Title VII, the ADA prohibits discrimination "against a qualified individual on the basis of disability in regard to job application

113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.* at 813.
117. 42 U.S.C. § 12101(a)(1) (2008).
118. *Id.* § 12101(b)(1).

procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other *terms, conditions, and privileges of employment*."[119] In reality, the ADA has struggled to keep up with modern notions of what constitutes a disability, namely in regards to mental health.[120]

Like Title VII, the broad aims of the ADA were initially narrowed by judicial decisions.[121] As recently as 2006, the Tenth Circuit refused to find that cerebral palsy severely restricted a plaintiff's ability to perform manual tasks.[122] Fortunately, Congress passed the 2008 ADA amendment to counteract this trend, realign the ADA with its initial goals, and broaden the definition of "disability."[123] Congress appeared to better understand the current considerations of what constitutes a disability when passing this legislation. Moreover, in 2018, one in five Americans identified themselves as individuals with a mental illness.[124] These developments indicate ADA litigation may increase in the coming years. As a result, the ADA's failure to keep up with Title VII liability for third party behavior will become more consequential.

1. The Development of ADA Hostile Work Environment Claims

Scholars have advocated for hostile work claims under the ADA for over twenty years, but the courts have been slow to agree.[125] When circuits have recognized hostile work claims under the ADA, their decisions were directly influenced by similarities between Title VII and the ADA.[126] In discussing these cases, it is important to see Title VII's role in advancing claims under the ADA, the standards adopted by the various circuits, and the circumstances where summary judgment proves fatal.

In 2001, the Fifth Circuit was the first circuit to directly hold that

---

119. *Id.* § 12112(a) (emphasis added).

120. Kelly Kagan, *To Trigger or Not to Trigger: The Catch-22 of the Americans with Disabilities Act's Interactive Process*, 57 SAN DIEGO L. REV. 501, 507–08 (2020).

121. *Id.* at 507.

122. Holt v. Grand Lake Mental Health Ctr., Inc., 443 F.3d 762, 767 (10th Cir. 2006).

123. Wendy F. Hensel, *People with Autism Spectrum Disorder in the Workplace: An Expanding Legal Frontier*, 52 HARV. C.R.-C.L. L. REV. 73, 83 (2017).

124. Alexis D. Campbell, *Failure on the Front Line: How the Americans with Disabilities Act Should Be Interpreted to Better Protect Persons in Mental Health Crisis from Fatal Police Shootings*, 51 COLUM. HUM. RTS. L. REV. 313, 320 (2019).

125. *See* Frank S. Ravitch, *Beyond Reasonable Accommodation: The Availability and Structure of a Cause of Action for Workplace Harassment Under the Americans with Disabilities Act*, 15 CARDOZO L. REV. 1475, 1493 (1993).

126. Fox v. Gen. Motors Corp., 247 F.3d 169, 176 (4th Cir. 2001); Shaver v. Indep. Stave Co., 350 F.3d 716, 720 (8th Cir. 2003); Lanman v. Johnson Cnty., 393 F.3d 1151, 1155 (10th Cir. 2004); Fox v. Costco Wholesale Corp., 918 F.3d 65, 74 (2d Cir. 2019).

hostile work claims are cognizable under the ADA. In *Flowers v. Southern Regional Physician Services*,[127] an employee with HIV brought suit against her former employer, alleging that she experienced harassment and was terminated on the basis of her disability.[128] The Fifth Circuit determined the hostile environment cause of action was available for several reasons: (1) the similar statutory language in Title VII and the ADA, (2) the ADA's purpose of eliminating disability-based harassment in the workplace, and (3) the similar statutory purpose and remedial structures of Title VII and the ADA.[129] Having concluded that plaintiffs could bring hostile work environment claims under the ADA, the Fifth Circuit announced the standard for the cause of action.[130] To show disability harassment, the plaintiff must prove elements remarkably similar to Title VII suits:

> (1) that she belongs to a protected group; (2) that she was subjected to unwelcome harassment; (3) that the harassment complained of was based on her disability or disabilities; (4) that the harassment complained of affected a term, condition, or privilege of employment; and (5) that the employer knew or should have known of the harassment and failed to take prompt, remedial action.[131]

Within weeks of *Flowers*, the Fourth Circuit followed with *Fox v. General Motors Corp.*[132] In that case, Mr. Fox alleged that he experienced harassment from supervisors and coworkers at General Motors due to a back injury.[133] In recognizing hostile work claims under the ADA, the court noted "we can presume that Congress was aware of the [Supreme] Court's interpretation of 'terms, conditions, or privileges of employment' when it chose to use parallel language in the ADA."[134] The court was referring to the fact that the Supreme Court had recognized in the 1970s that this language made hostile work environments unlawful under Title VII.[135] The Fourth Circuit held that an ADA plaintiff could bring hostile work environment claims under a modified Title VII standard.[136]

The Eighth Circuit similarly found hostile work claims were available

127. 247 F.3d 229 (5th Cir. 2001).

128. *Id.* at 231–32.

129. *Id.* at 233–35.

130. *Id.* at 235.

131. *Id.* at 235–36 (quoting Rio v. Runyon, 972 F. Supp. 1446, 1459 (S.D. Fla. 1997)).

132. 247 F.3d 169 (4th Cir. 2001).

133. *Id.* at 175, 179.

134. *Id.* at 175–76.

135. *See id.*

136. *Id.* at 176–77.

under the ADA in *Shaver v. Independent Stave Co.*[137] There, plaintiff Mr. Shaver brought suit against his employer alleging that he was harassed in violation of the ADA and the Missouri Human Rights Act because of his nocturnal epilepsy and cranial surgery.[138] The Eighth Circuit concluded these claims were available under the ADA because "when Congress included the phrase 'terms, conditions, and privileges of employment' in the ADA, it was using a legal term of art that prohibited a broad range of employment practices, including workplace harassment."[139] However, the court held that Shaver's hostile work claims were insufficient to survive summary judgment.[140] First, the court found a jury could determine Shaver was disabled in part because some of his coworkers *regarded* him as disabled.[141] Second, the court concluded with relative ease that a jury could find Shaver had been subjected to harassment given substantial evidence in the record, such as coworkers often calling him "platehead."[142] On the question of subjective hostility, the court determined a jury could find Shaver felt the harassment was hostile or abusive.[143] The fatal question was whether the harassment was objectively offensive.[144] The record showed that both coworkers and supervisors called Shaver "platehead" over a period of two years.[145] Interestingly, the court noted that the fact nicknames were common at this workplace might "reduce its offensiveness."[146]

Overall, the Eighth Circuit stated that these verbal harassment incidents did not align with previous cases granting relief, meaning Shaver's harassment claim could not survive summary judgment.[147] Although the court acknowledged a plaintiff need not show "some tangible psychological condition," it was a fact to be considered.[148] Shaver was upset about the workplace harassment, but it was not severe enough to necessitate psychological treatment.[149] The court compared the claims to

137. 350 F.3d 716 (8th Cir. 2003).

138. *Id.* at 719.

139. *Id.* at 720 (citing Cannon v. Univ. of Chi., 441 U.S. 677, 696–98 (1979)).

140. *Id.* at 721–23.

141. *Id.* at 720–21.

142. *Id.* at 721.

143. *Id.*

144. *See id.*

145. *Id.*

146. *Id.*

147. *Id.* at 721–23.

148. *Id.* at 722.

149. *Id.*

former cases, one involving death threats[150] and two others involving physical harassment.[151] Thus, Shaver's case fell short of the high bar for severe or pervasive harassment.[152]

The Tenth Circuit also held hostile work environment claims are cognizable under the ADA in *Lanman v. Johnson County*.[153] In that case, Ms. Lanman brought suit against the County after experiencing harassment in her position as a deputy sheriff.[154] The Tenth Circuit noted that "[a]fter reviewing the similarities between Title VII and the ADA, nothing indicates that Congress intended disability-based employment discrimination to be treated any less expansively."[155] Unfortunately for Lanman, her suit died at the first question: whether she was a qualified individual with a disability.[156] Lanman attempted to argue she satisfied the requirement because, although she did not have a diagnosed disability, the County regarded her as an individual with a disability.[157] In her deposition, Lanman testified that her coworkers treated her as though she was mentally unwell and called her "nuts" or "crazy."[158] However, this meant Lanman would have to further show "whether the County (1) mistakenly perceived her as being impaired, and (2) mistakenly believed the perceived impairment substantially limited at least one major life activity."[159] Because Lanman could not establish either, the suit ended at summary judgment.[160]

The Second Circuit recently joined other circuits in finding these claims available under the ADA. In the 2019 case *Fox v. Costco Wholesale Corp.*,[161] the court relied on the relationship between Title VII and the ADA to hold that plaintiffs could bring hostile work environment claims under the ADA.[162] First, the court noted Congress borrowed the "terms, conditions, and privileges of employment" language from

150. *Id.* (citing Reedy v. Quebecor Printing Eagle, Inc., 333 F.3d 906, 909–10 (8th Cir. 2003)).

151. *Id.* (first citing Breeding v. Arthur J. Gallagher & Co., 164 F.3d 1151, 1159 (8th Cir. 1999); and then citing Rorie v. United Parcel Serv., Inc., 151 F.3d 757, 761–62 (8th Cir. 1998)).

152. *Id.* at 721–22.

153. 393 F.3d 1151 (10th Cir. 2004).

154. *Id.* at 1153.

155. *Id.* at 1156.

156. *Id.* at 1158.

157. *Id.* at 1156.

158. *Id.* at 1153.

159. *Id.* at 1156–57.

160. *Id.* at 1157–58.

161. 918 F.3d 65 (2d Cir. 2019).

162. *Id.* at 74.

Title VII when enacting the ADA.[163] Second, when Congress enacted the ADA, the Supreme Court had already allowed hostile work claims under Title VII.[164] Third, the court found this borrowing of language indicated that Congress "intended for the ADA to be coextensive, at least in this respect, with Title VII."[165]

In 2019, the Seventh Circuit engaged in a similar analysis comparing Title VII to the ADA.[166] The court held for the first time that these claims were available under the ADA for a simple reason: "Congress wrote the ADA using the language of Title VII, and Title VII recognizes hostile work environment claims."[167]

Perhaps the broadest interpretation is found in the Sixth Circuit. Reported decisions within this jurisdiction have not formally announced the ADA provides a cause of action for hostile work environments. However, back in 1996, the circuit found the ADEA does allow such claims and that "[t]he elements and burden of proof are the same, *regardless of the discrimination context in which the claim arises*."[168] As will be discussed in section II.B.1, this case largely hinged on comparisons to Title VII. Unreported decisions have subsequently cited this proposition showing that plaintiffs may bring ADA hostile work environment claims in this circuit.[169]

2. Other Circuits Have Not Officially Decided ADA Hostile Work Claims

Several circuits addressed hostile work claims in the ADA context without going as far as holding the ADA provides for such claims. Because Title VII has been so central to the expansion of hostile environment claims under the ADA, it is puzzling that courts have not addressed third party discrimination in the ADA context. It is likely only a matter of time until the federal circuits will need to decide if the ADA's

163. *Id.*

164. *Id.*

165. *Id.* (citing *Lanman*, 393 F.3d at 1155–56).

166. Ford v. Marion Cnty. Sheriff's Off., 942 F.3d 839, 851–52 (7th Cir. 2019).

167. *Id.* at 852 (citing *Costco Wholesale Corp.*, 918 F.3d at 74).

168. Crawford v. Medina Gen. Hosp., 96 F.3d 830, 834 (6th Cir. 1996) (emphasis added).

169. *See, e.g.*, Trepka v. Bd. of Educ., 28 F. App'x 455, 461 (6th Cir. 2002) (citing *Crawford* for the proposition that "hostile work environment claim[s] are the same across discrimination contexts"); Coulson v. The Goodyear Tire & Rubber Co., 31 F. App'x 851, 858 (6th Cir. 2002) ("The standard for ADA hostile work environment claims tracks that used for hostile work environment sexual harassment claims."); Waltherr-Willard v. Mariemont City Sch., 601 F. App'x 385, 388 (6th Cir. 2015) (explaining that because the plaintiff brought a hostile work claim under "the ADA and ADEA," she "must also show that any intimidation, ridicule and insult occurred because of her age or disability").

similarity to Title VII supports employer liability for third party creation of hostile work environments on the basis of disability.

In 1999, the Third Circuit assumed hostile work environment claims were available, but did not officially hold so.[170] There, the court explained prior cases have acknowledged "[i]n the context of employment discrimination, the ADA, ADEA and Title VII all serve the same purpose—to prohibit discrimination in employment against members of certain classes."[171] Although *Walton v. Mental Health Ass'n of Southeast Pennsylvania*[172] specifically stated the Third Circuit had not decided if the claims were available under the ADA, later case law cites to it when outlining the legal standard for ADA hostile work claims.[173] One possible reason the Third Circuit has not affirmatively stated the claims are available under the ADA is that these cases involved plaintiffs who failed to establish a claim.[174]

Some circuits implied that the ADA prohibits hostile work environments. The Ninth Circuit has not specifically resolved the question. But the circuit indicated it might in at least one majority opinion.[175] In 2020, the Ninth Circuit recognized that all other circuits to decide the issue have allowed the claims.[176] Although it ultimately remanded the case for further decision, it seems unlikely the court would rule against allowing hostile work claims under the ADA.[177] Similarly, the First Circuit has not held that these claims are available under the ADA.[178] In 2016, the court analyzed a plaintiff's hostile work environment claim under the ADA but found the plaintiff only pointed to "minor instances of employment skirmishes."[179] Like the Ninth Circuit, First Circuit case law may indicate a willingness to recognize such claims under the ADA.

170. Walton v. Mental Health Ass'n of Se. Pa., 168 F.3d 661, 666–67 (3d Cir. 1999).

171. *Id.* at 666 (quoting Newman v. GHS Osteopathic, Inc., 60 F.3d 153, 157 (3d Cir. 1995)).

172. 168 F.3d 661 (3d Cir. 1999).

173. *See, e.g.*, Hatch v. Franklin Cnty., 755 F. App'x 194, 201–02 (3d Cir. 2018) (citing *Walton* to list the elements of a hostile work environment claim under the ADA).

174. *E.g.*, *id.*; *Walton*, 168 F.3d at 666–67 ("[W]e will assume this cause of action without confirming it because Walton did not show that she can state a claim.").

175. McIntyre v. Eugene Sch. Dist. 4J, 976 F.3d 902, 916 (9th Cir. 2020) ("We need not resolve that question here, but the weight of authority supports the conclusion that a hypothetical plaintiff could bring essentially the same claim in different circumstances.").

176. *Id.*

177. *Id.* at 918.

178. *See* Murray v. Warren Pumps, L.L.C., 821 F.3d 77, 86 n.1 (1st Cir. 2016).

179. *Id.* at 87.

Finally, neither the Eleventh Circuit[180] nor the D.C. Circuit[181] has affirmatively recognized hostile work claims under the ADA.

B. The ADEA Is Another Title VII Successor

Like the ADA, the ADEA's purpose and hostile work environment litigation has followed in the footsteps of Title VII. In 1967, soon after enacting Title VII, Congress passed the Age Discrimination in Employment Act.[182] Upon finding that older workers faced many disadvantages, Congress enacted the ADEA "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment."[183] Section 623 of the ADEA makes clear that it is unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, *terms, conditions, or privileges of employment*, because of such individual's age."[184] Congress evidently intended the ADEA to prohibit employment discrimination on the basis of age.[185]

As with the ADA, the ADEA will likely continue to gain importance as the number of older workers increases.[186] There are several reasons for the rise in elderly workers: aging Baby Boomers, advances in healthcare leading to longer life expectancies, increasing worker education, and responses to retirement planning.[187] It is unlikely that hostile work claims for age-based harassment will decrease. This section will detail the development of hostile work claims for age-based harassment.

1. History of ADEA Hostile Work Environment Claims

Several circuits have recognized hostile work claims under the ADEA.

---

180. *See* Barneman v. Int'l Longshoreman Ass'n Loc. 1423, 840 F. App'x 468, 4881 n.6 (11th Cir. 2021).

181. *See* Hill v. Assocs. for Renewal in Educ., Inc., 897 F.3d 232, 236–37 (D.C. Cir. 2018) (assuming the ADA allowed recovery for hostile work environment claims but affirming dismissal of plaintiff's claim).

182. Lindsey A. Viscomi, *"Over-the-Hill" Yet Still Fighting Uphill Battles to Find Jobs: The Plight of Older Job Applicants Under the ADEA*, 52 CONN. L. REV. 505, 508 (2020).

183. 29 U.S.C. § 621(b).

184. *Id.* § 623(a)(1) (emphasis added).

185. *See* Samantha Pitsch, *Quick, Stop Hiring Old People! How the Eleventh Circuit Opened the Door for Discriminatory Hiring Practices Under the ADEA*, 92 WASH. L. REV. 1605, 1610 (2017).

186. Viscomi, *supra* note 182, at 509.

187. William Hrabe, *Will You Still Need Me, Will You Still Hire Me, When I'm Sixty-Four: Disparate Impact Claims and Job Applicants Under the ADEA*, 26 ELDER L.J. 395, 399–400 (2019).

This section discusses the courts' comparisons to Title VII, requirements for plaintiffs to move beyond summary judgment, and evolutions in recognizing this issue. One important difference between Title VII, the ADA, and the ADEA is that the ADEA does not allow recovery of compensatory damages for the suffering experienced working in a hostile work environment.[188]

With the 1996 case *Crawford v. Medina General Hospital*,[189] the Sixth Circuit became the first circuit to formally recognize a hostile work environment claim under the ADEA.[190] Ms. Crawford sued her employer, alleging a hostile work environment due to age discrimination.[191] Specifically, one of Crawford's supervisors made several comments such as "[o]ld people should be seen and not heard."[192] The court explained that the ADEA can provide relief for hostile work claims because of the ADEA's "terms, conditions, or privileges of employment" language.[193] Further, the Sixth Circuit found additional support in the "broad application of the hostile-environment doctrine in the Title VII context; the general similarity of purpose shared by Title VII and the ADEA; and the fact that the Title VII rationale for the doctrine is of equal force in the ADEA context."[194] The court allowed a plaintiff to bring a hostile work environment claim under the ADEA upon a showing that: (1) they are "40 years old or older"; (2) they were "subjected to harassment, either through words or actions, based on age"; (3) the "harassment had the effect of unreasonably interfering with" their "work performance and creating an objectively intimidating, hostile, or offensive work environment"; and (4) there exists some basis for liability on the employer's part.[195] In Crawford's case, the court found little evidence of age-based harassment and concluded there was not a sufficient showing that the environment was objectively hostile.[196] *Crawford* thus aligns with ADA and Title VII hostile work claims in requiring plaintiffs to show severe harassment.

While the *Crawford* court was the first to apply the ADEA to a hostile

188. Collazo v. Nicholson, 535 F.3d 41, 44 (1st Cir. 2008) (citing Comm'r v. Schleier, 515 U.S. 323, 326 (1995) (noting that the circuits are unanimous on this holding)).

189. 96 F.3d 830 (6th Cir. 1996).

190. *Id.* at 834. But the Ninth Circuit appears to be the first circuit to suggest hostile work environment claims are *possible* under the ADEA. *See* Sischo-Nownejad v. Merced Cmty. Coll. Dist., 934 F.2d 1104, 1109–10 (9th Cir. 1991) (discussing hostile work environment claims under ADEA but proceeding under disparate treatment).

191. *Crawford*, 96 F.3d at 832.

192. *Id.*

193. *Id.* at 834.

194. *Id.*

195. *Id.* at 834–35.

196. *Id.* at 836.

work environment claim, the Ninth Circuit was the first to state that such claims were possible under the ADEA.[197] In 1991, the Ninth Circuit announced that a plaintiff can show violations of *either* Title VII or the ADEA by establishing that a hostile work environment exists.[198] Because the plaintiff in that case was only alleging disparate treatment, the court did not need to apply hostile work environment law to the case.[199] As this case demonstrates, the Ninth Circuit has recognized that hostile work environment claims have been available under the ADEA for over thirty years.

After *Crawford*, comparisons to Title VII were critical in shaping hostile environment law under the ADEA.[200] The Fifth Circuit explicitly followed *Crawford* in 2011 when deciding *Dediol v. Best Chevrolet, Inc.*[201] In that case, Mr. Dediol brought suit against his former employer, Best Chevrolet, for constructive discharge and a hostile work environment.[202] Specifically, Dediol alleged that his supervisor repeatedly made comments relating to Dediol's age and religion.[203] In recognizing that hostile work environment claims were available under the ADEA, the Fifth Circuit cited the *Crawford* court's comparisons between the ADEA and Title VII.[204] Ultimately, the Fifth Circuit found the "common substantive features" and "common purpose" between Title VII and the ADEA persuasive.[205] The court found triable issues of fact prevented summary judgment where Dediol "endured a pattern of name-calling of a half-dozen times daily" that "may have interfered with his pecuniary interests."[206]

Similarly, the Second Circuit cited *Crawford* when deciding *Brennan v. Metropolitan Opera Ass'n, Inc.*[207] This case arrived before the court in 1999, only three years after *Crawford*.[208] In discussing the hostile work claim, the court stated, "[t]he analysis of the hostile working environment

197. *Id.* at 834 (citing Sischo-Nownejad v. Merced Cmty. Coll. Dist., 934 F.2d 1104, 1109 (9th Cir. 1991)).

198. *Sischo-Nownejad*, 934 F.2d at 1109, *superseded on other grounds by* Dominguez-Curry v. Nev. Transp. Dep't, 424 F.3d 1027, 1041 (9th Cir. 2005).

199. *Id.*

200. Dediol v. Best Chevrolet, Inc., 655 F.3d 435, 443 (5th Cir. 2011); Brennan v. Metro. Opera Ass'n, Inc., 192 F.3d 310, 318 (2d Cir. 1999).

201. 655 F.3d 435 (5th Cir. 2011); *id.* at 441.

202. *Id.* at 439.

203. *Id.*

204. *Id.* at 440–41.

205. *Id.* at 440.

206. *Id.* at 443.

207. 192 F.3d 310 (2d Cir. 1999); *id.* at 318.

208. *Id.*

theory of discrimination is the same under the ADEA as it is under Title VII."[209] Because there was no evidence the supervisor knew Ms. Brennan's age, nor evidence that the hostility was related to age, the court affirmed summary judgment dismissing the claim.[210]

The First Circuit has also held age-based discrimination that causes a hostile work environment is unlawful under the ADEA.[211] In a 2018 case, this circuit unambiguously stated that the ADEA prohibits hostile work environments.[212] While this circuit seems to have done so back in 2001, that case does not actually reference the ADEA.[213] Nonetheless, the First Circuit now allows hostile work claims under the ADEA.

The Eighth Circuit's hostile work environment case law is similar to the First Circuit's jurisprudence in its lack of specific statements relating to the ADEA. In *Rickard v. Swedish Match North America*,[214] the court announced what a plaintiff must show in bringing a hostile work environment claim "whether based on age or sex."[215] In support for this standard, the Eighth Circuit cites to a 2005 case[216] that then cites to another 2005 case that does not mention the ADEA at all.[217] While this rabbit hole is undoubtedly confusing, a more recent case can help. In 2018, the Eighth Circuit explained in *Moses v. Dassault Falcon Jet-Wilmington Corp*.[218] that hostile work environment claims require a plaintiff to show they are a member of a statute-protected class.[219] In support for this statement, the court cites to *Rickard* with the following parenthetical: "ADEA hostile work environment."[220] Even though the circuit did not precisely announce that the ADEA forbids a hostile work environment for age-based harassment, that is the current rule.[221]

In the D.C. Circuit, the appellate court has not yet formally held that the ADEA provides for hostile work claims. Despite this, at least two

---

209. *Id.* at 318 (citing Crawford v. Medina Gen. Hosp., 96 F.3d 830, 834 (6th Cir. 1996)).

210. *Id.*

211. Rivera-Rivera v. Medina & Medina, Inc., 898 F.3d 77, 91 (1st Cir. 2018) (citing Rivera-Rodríguez v. Frito Lay Snacks Caribbean, a Div. of Pepsico Puerto Rico, Inc., 265 F.3d 15, 24 (1st Cir. 2001), *abrogated on other grounds by* Crowley v. L.L. Bean, Inc., 303 F.3d 387 (1st Cir. 2002)).

212. *Id.*

213. *Rivera-Rodriguez*, 265 F.3d at 15.

214. 773 F.3d 181 (8th Cir. 2014).

215. *Id.* at 184.

216. Peterson v. Scott Cnty., 406 F.3d 515, 523–24 (8th Cir. 2005), *abrogated on other grounds by* Torgerson v. City of Rochester, 643 F.3d 1031 (8th Cir. 2011).

217. Okruhlik v. Univ. of Ark., 395 F.3d 872 (8th Cir. 2005).

218. 894 F.3d 911 (8th Cir. 2018).

219. *Id.* at 921–22.

220. *Id.* at 922.

221. *Id.*

reported cases have involved age-based hostile work environments.[222] The earlier case affirmed summary judgment against the plaintiff where he did not identify language or actions specifically aimed at his age.[223] By contrast, the D.C. Circuit reversed summary judgment in a 2018 case because the record contained hostile age comments.[224] Moreover, this plaintiff's employer terminated him and replaced him with a younger worker.[225] Thus, the D.C. Circuit has permitted ADEA hostile work claims.

2. Other Circuits Have Assumed Availability Without Deciding

Although the Sixth Circuit decided *Crawford* more than twenty years ago, many circuits have not affirmatively recognized the availability of hostile work environment claims under the ADEA. Common themes to look for include the prevalence of summary judgment and the relation between the ADEA and Title VII.

In 2012, the Third Circuit assumed, without actually deciding, that hostile work environment claims were available under the ADEA.[226] The court cited *Crawford* and *Brennan* to say that these claims under the ADEA are analyzed under the "same standards" as Title VII.[227] Again in 2018, the Third Circuit assumed the ADEA allowed for hostile work environment claims.[228] Like many prior cases, the plaintiff in that case could not raise a triable issue of fact and the claim died at summary judgment.[229] Interestingly, a 2019 decision found that a plaintiff had adequately alleged an age-based hostile work environment[230] indicating that the circuit will permit these claims.

The Fourth Circuit has similarly analyzed cases without deciding the issue. Back in 1999, the Fourth Circuit declined to recognize the availability of such claims under the ADEA, yet it still announced the requirements for litigation at the district courts.[231] As recently as 2017, the Fourth Circuit heard an ADEA hostile work environment claim in an

---

222. Baloch v. Kempthorne, 550 F.3d 1191 (D.C. Cir. 2008); Steele v. Mattis, 899 F.3d 943 (D.C. Cir. 2018).

223. *Baloch*, 550 F.3d at 1201.

224. *Mattis*, 899 F.3d at 943, 952.

225. *Id.*

226. Slater v. Susquehanna Cnty., 465 F. App'x 132, 138 (3d Cir. 2012).

227. *Id.* (first citing Brennan v. Metro. Opera Ass'n, Inc., 192 F.3d 310, 318 (2d Cir. 1999); and then citing Crawford v. Medina Gen. Hosp., 96 F.3d 830, 834 (6th Cir. 1996)).

228. Howell v. Millersville Univ. of Pa., 749 F. App'x 130, 135 (3d Cir. 2018).

229. *Id.*

230. Hildebrand v. Allegheny Cnty., 923 F.3d 128, 137 (3d Cir. 2019).

231. Burns v. AAF-McQuay, Inc., 166 F.3d 292, 294 (4th Cir. 1999).

unreported case.[232] However, the plaintiff could not establish the prima facie case and the court dismissed without reference to whether the ADEA provides for a hostile work environment claim.[233] Regardless, this court accepted jurisdiction in a 2022 appeal involving an age-based hostile work environment claim.[234]

In 2020, the Seventh Circuit determined that the issue can "wait for another day"[235] when deciding *Tyburski v. City of Chicago*.[236] The plaintiff failed to show why liability should attach to the employer.[237] Mr. Tyburski claimed a coworker made unlawful comments, but the court noted that the City acted without negligence in taking prompt action and reassigning the coworker.[238] Moreover, the claim failed on the merits because Tyburski could not demonstrate comments by subordinates were sufficiently severe or pervasive.[239] Without a successful case, the Seventh Circuit saw no reason to recognize hostile work environment claims under the ADEA.[240]

The Tenth Circuit appears not to formally recognize these claims under the ADEA, but it has cited the elements as if it is possible.[241] In 1998, the court dismissed a plaintiff's age-based hostile work environment claim without addressing whether the ADEA provides this cause of action.[242] In a later unreported case, the Tenth Circuit commented it would assume without deciding that a plaintiff could bring hostile work environment claims under the ADEA.[243] Cases that the court has heard regarding such claims under the ADEA often cite to the 2005 case of *MacKenzie v. City and County of Denver*.[244] Confusingly, that case does not state whether ADEA provides for hostile work claims, but instead cites to a Title VII

232. Dufau v. Price, 703 F. App'x 164 (4th Cir. 2017).

233. *Id.* at 166–67.

234. Britt v. DeJoy, 45 F.4th 790, 798 (4th Cir. 2022).

235. Tyburski v. City of Chicago, 964 F.3d 590, 600 (7th Cir. 2020).

236. 964 F.3d 590 (7th Cir. 2020).

237. *Id.* at 602.

238. *Id.*

239. *Id.*

240. *Id.* at 601–02.

241. Howell v. N.M. Dep't of Aging & Long Term Servs., 398 F. App'x 355, 359 (10th Cir. 2010).

242. McKnight v. Kimberly Clark Corp., 149 F.3d 1125, 1129 (10th Cir. 1998) (dismissing the hostile work claim where "[t]he age related comments plaintiff [alleged] merely [amounted] to 'stray remarks'").

243. Holmes v. Regents of Univ. of Colo., No. 98-1172, 1999 WL 285826, at *9 n.6 (10th Cir. May 7, 1999).

244. 414 F.3d 1266 (10th Cir. 2005), *abrogated by* Lincoln v. BNSF Ry. Co., 900 F.3d 1166 (10th Cir. 2018); *Howell*, 398 F. App'x at 359; DeWalt v. Meredith Corp., 288 F. App'x 484, 495 (10th Cir. 2008).

case.[245] Regardless, the Tenth Circuit has not barred plaintiffs from bringing these claims under the ADEA.

The Eleventh Circuit is more straightforward about its indecision. Just last year, buried in a footnote from an unreported case, the court acknowledged that it has not spoken as to whether the ADEA provides for hostile work environment claims.[246] In a familiar pattern, this circuit has assumed claims are possible under the ADEA, but has not decided because claims have failed as a matter of law.[247]

III. HOSTILE WORK ENVIRONMENT CLAIMS SHOULD BE AVAILABLE UNDER THE ADA AND ADEA IN ALL CIRCUITS

Given the relative uniformity across federal circuits in recognizing hostile work environment claims under the ADA and ADEA, the undecided jurisdictions should follow their sister circuits. To review, six circuits have affirmatively recognized hostile work environments are available under the ADA: the Fourth Circuit did so in 2001,[248] the Fifth Circuit also in 2001,[249] the Eighth Circuit in 2003,[250] the Tenth Circuit in 2004,[251] the Second Circuit in 2019,[252] and the Seventh Circuit also in 2019.[253] The Sixth Circuit appears in the middle by indicating these claims are available under the ADA in an unreported 2002 case,[254] but published opinions explain the standards are analogous across discrimination contexts.[255] Meanwhile, the First,[256] Third,[257] Ninth,[258] Eleventh,[259] and

245. *MacKenzie*, 414 F.3d at 1280.

246. Barneman v. Int'l Longshoreman Ass'n Loc. 1423, 840 F. App'x 468, 480–81 (11th Cir. 2021).

247. *Id.*; Thomas v. Seminole Elec. Coop. Inc., 775 F. App'x 651, 655–56 (11th Cir. 2019).

248. Fox v. Gen. Motors Corp., 247 F.3d 169, 176–77 (4th Cir. 2001).

249. Flowers v. S. Reg'l Physician Servs. Inc., 247 F.3d 229, 232 (5th Cir. 2001).

250. Shaver v. Indep. Stave Co., 350 F.3d 716, 719 (8th Cir. 2003).

251. Lanman v. Johnson Cnty., 393 F.3d 1151, 1156 (10th Cir. 2004).

252. Fox v. Costco Wholesale Corp., 918 F.3d 65, 73 (2d Cir. 2019).

253. Ford v. Marion Cnty. Sheriff's Off., 942 F.3d 839, 851 (7th Cir. 2019).

254. Trepka v. Bd. of Educ., 28 F. App'x 455, 460–61 (6th Cir. 2002).

255. *See* Hafford v. Seidner, 183 F.3d 506, 512 (6th Cir. 1999) (citing Crawford v. Medina Gen. Hosp., 96 F.3d 830, 834 (6th Cir. 1996)).

256. Murray v. Warren Pumps, L.L.C., 821 F.3d 77, 86 (1st Cir. 2016).

257. Walton v. Mental Health Ass'n of Se. Pa., 168 F.3d 661, 666–67 (3d Cir. 1999).

258. McIntyre v. Eugene Sch. Dist. 4J, 976 F.3d 902, 916 (9th Cir. 2020).

259. Barneman v. Int'l Longshoreman Ass'n Loc. 1423, 840 F. App'x 468, 480–81 (11th Cir. 2021).

D.C.[260] circuits have not yet recognized ADA hostile work environment claims. Overall, the circuits appear almost evenly split.

In regard to the ADEA, six circuits have held that hostile work environment claims are possible: the Ninth Circuit in 1991,[261] Sixth Circuit in 1996,[262] Second Circuit in 1999,[263] First Circuit in 2001,[264] the Eighth Circuit in 2005,[265] and the Fifth Circuit in 2011.[266] Without expressly explaining the ADEA protects against hostile work environments, the D.C. Circuit has allowed such claims to proceed.[267] Yet, five circuits have not done so: the Third Circuit,[268] Fourth Circuit,[269] Seventh Circuit,[270] Tenth Circuit,[271] and Eleventh Circuit.[272]

This section explains why the holdout circuits should acknowledge such claims, examines possible reasons some circuits have not recognized ADA and ADEA hostile work claims, and finally suggests what plaintiffs must show to outlive summary judgment.

A. Circuits Should Recognize Availability of Claims Under the ADA and ADEA to Uniformly Protect Against Harassment

The reasons to recognize hostile work claims under the ADA and ADEA are simple but powerful: to uphold uniformity in federal law, protect American workers equally from harassment based on a protected characteristic, and recognize the influence of Title VII.

First, every circuit to decide whether hostile work claims are available

---

260. Hill v. Assocs. for Renewal in Educ., Inc., 897 F.3d 232, 236 (D.C. Cir. 2018).

261. Sischo-Nownejad v. Merced Comm. Coll. Dist., 934 F.2d 1104, 1109 (9th Cir. 1991), *superseded on other grounds as recognized by* Dominguez-Curry v. Nev. Transp. Dep't, 424 F.3d 1027, 1041 (9th Cir. 2005).

262. Crawford v. Medina Gen. Hosp., 96 F.3d 830, 834 (6th Cir. 1996).

263. Brennan v. Metro. Opera Ass'n, Inc., 192 F.3d 310, 318 (2d Cir. 1999).

264. Rivera-Rivera v. Medina & Medina, Inc., 898 F.3d 77, 91 (1st Cir. 2018) (citing Rivera–Rodríguez v. Frito Lay Snacks Caribbean, 265 F.3d 15, 24 (1st Cir. 2001)).

265. *See* Rickard v. Swedish Match N. Am., Inc., 773 F.3d 181, 184–85 (8th Cir. 2014) (citing Peterson v. Scott Cnty., 406 F.3d 515, 523–24 (8th Cir. 2005)).

266. Dediol v. Best Chevrolet, Inc., 655 F.3d 435, 440 (5th Cir. 2011).

267. Steele v. Mattis, 899 F.3d 943 (D.C. Cir. 2018).

268. *See* Howell v. Millersville Univ. of Pa., 749 F. App'x 130, 135 (3d Cir. 2018).

269. Burns v. AAF-McQuay, Inc., 166 F.3d 292, 294 (4th Cir. 1999).

270. Tyburski v. City of Chicago, 964 F.3d 590, 600–01 (7th Cir. 2020).

271. *See* Holmes v. Regents of Univ. of Colo., No. 98-1172, 1999 WL 285826, at *9 n.6 (10th Cir. May 7, 1999).

272. Barneman v. Int'l Longshoreman Ass'n Loc. 1423, 840 F. App'x 468, 480–81 (11th Cir. 2021).

under the ADA[273] or ADEA[274] has answered yes. Even those that have not actually decided whether hostile work claims are available are willing to assume that the claims are available when deciding cases.[275] To provide Americans with equal protection from workplace harassment on the basis of disability and age, federal circuits should uniformly recognize hostile work claims under the ADA and ADEA. Circuit splits present many problems: unpredictability, forum shopping, and uneven recognition of federal rights.[276] Employees should be protected from unlawful age and disability harassment regardless of the circuit where they bring suit.

Second, the circuits that permit ADA or ADEA hostile work claims have advanced compelling arguments that the undecided courts should adopt. Circuits deciding the issue under the ADA directly based their decisions upon the relationship between Title VII and the ADA. Congress took the "terms, conditions, and privileges of employment" language from Title VII and planted it into the ADA.[277] Additionally, the Supreme Court held as far back as 1971 that this language allows for hostile work claims under Title VII.[278] It follows that when Congress placed this phrase into the ADA in 1991, it intended the ADA to prohibit hostile work environments.

Third, and more broadly, Title VII and the ADA both exist with the purpose of prohibiting "illegal discrimination in employment."[279] ADEA hostile work claims have also built directly off Title VII. The ADEA likewise contains the "terms, conditions, or privileges" language.[280] Congress enacted both Title VII and the ADEA to eliminate discrimination in employment based on a protected characteristic.[281] Because these statutes contain the same language aimed at fulfilling a similar purpose, refusing to protect workers from age-based workplace

---

273. *See supra* section II.A.1.

274. *See supra* section II.B.1.

275. *See supra* sections II.A.2, II.B.2.

276. Jonathan M. Cohen & Daniel S. Cohen, Iron-*Ing Out Circuit Splits: A Proposal for the Use of the* Irons *Procedure to Prevent and Resolve Circuit Splits Among United States Courts of Appeals*, 108 CALIF. L. REV. 989, 990–98 (2020); *Forum-Shopping*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining forum shopping as "[t]he practice of choosing the most favorable jurisdiction or court in which a claim might be heard"); *Forum-Shopping*, BLACK'S LAW DICTIONARY (5th ed. 1979) (explaining that forum shopping "occurs when a party attempts to have [their] action tried in a particular court or jurisdiction where [they] feels [they] will receive the most favorable judgment or verdict").

277. Fox v. Costco Wholesale Corp., 918 F.3d 65, 74 (2d Cir. 2019).

278. Shaver v. Indep. Stave Co., 350 F.3d 716, 720 (8th Cir. 2003).

279. Fox v. Gen. Motors Corp., 247 F.3d 169, 176 (4th Cir. 2001).

280. 29 U.S.C. § 623(a)(1).

281. Crawford v. Medina Gen. Hosp., 96 F.3d 830, 834 (6th Cir. 1996).

harassment is contradictory.

This Comment is not asking federal circuits to create a cause of action for a hostile work environment under the ADA and ADEA. Instead, statutory analysis leads to one conclusion: the "terms, conditions, or privileges of employment" phrase in the ADA and ADEA already allows hostile work environment claims.

B. Procedural Hurdles, Judicial Skepticism, and Pleading Requirements Have Hindered ADA and ADEA Hostile Work Claims

No federal circuit has prohibited ADA or ADEA hostile work claims,[282] but the general difficulty in establishing these claims, navigating procedural roadblocks, and surviving summary judgment all may be pushing the breaks. If most cases are stunted early in litigation, then hostile work environment law under both statutes will remain at a standstill.

Skeptical federal judges and the increasing number of discrimination claims might be raising the bar for how egregious a situation must be to warrant relief.[283] Even outside of hostile work law, some scholars have critiqued federal judges for skepticism towards civil rights and employment discrimination claims.[284] The higher proportion of federal conservative judges, and the correlation between heavy caseloads and rate of dismissal, mean that plaintiffs face an uphill battle when bringing employment claims.[285] Hostile work claims fall under the harassment umbrella, and harassment comprised around 10% of charges filed with the Equal Employment Opportunity Commission (EEOC) in 2019.[286] Accordingly, it might be that a hostile work environment is a needle in the haystack of problematic work cases. Some have suggested federal judges are increasingly "numb" to employment discrimination claims.[287] Perhaps this is why hostile work plaintiffs often fail to meet the sufficiently severe

---

282. *See supra* sections II.A.2, II.B.2.

283. Michael O'Neil, Twombly *and* Iqbal*: Effects on Hostile Work Environment Claims*, 32 B.C. J.L. & SOC. JUST. 151, 166–70 (2012).

284. Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 564 (2010).

285. O'Neil, *supra* note 283, at 167–68.

286. 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=4741d14e337f [https://perma.cc/24BV-84YW].

287. O'Neil, *supra* note 283, at 167.

or pervasive standard despite disturbing case facts.[288]

For example, the Eighth Circuit compares a plaintiff's current claim to prior cases, raising the bar for severity even higher.[289] In a 2020 case, *Paskert v. Kemna-ASA Auto Plaza, Inc.*,[290] that circuit found the alleged harassment was not severe enough even when the harasser touched the plaintiff, said he could "have [her]," and made statements about wanting to make her cry.[291] The court based this determination on prior cases where even worse harassment failed, in the court's eyes, to rise to the sufficiently severe or pervasive standard.[292] That court had already seen harassers sexually proposition plaintiffs or require them to draw phallic objects, so expressing a desire to make someone cry paled in comparison.[293]

Advancing ADA and ADEA protection may also be hindered by heightened Title VII hostile work environment pleading requirements. As mentioned above in section I.B.3, hostile work plaintiffs must show both a subjectively and objectively hostile work environment.[294] Combined with the other necessary hostile work elements, this means that plaintiffs are required to establish more than just a single violation.[295] Given the increased importance of pleading requirements post–*Twombly* and *Iqbal*,[296] hostile work plaintiffs may lose a strong case at the pleading stage for lack of factual specificity.[297]

The nature of hostile work claims makes it exceedingly difficult for plaintiffs to prevail. Even if a plaintiff can put forth a sufficient pleading, summary judgment has halted many cases.[298] The undecided ADA or ADEA hostile work circuits may prolong deciding for so long partially

---

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

289. *See* Paskert v. Kemna-ASA Auto Plaza, Inc., 950 F.3d 535, 538 (8th Cir.), *cert. denied*, __ U.S. __, 141 S. Ct. 894 (2020).

290. *Id*. at 535.

291. *Id.* at 538.

292. *Id.*

293. *Id.*

294. Shaffer, *supra* note 49, at 699; Harris v. Forklift Sys., Inc., 510 U.S. 17, 21–22 (1993).

295. O'Neil, *supra* note 283, at 171.

296. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2009).

297. O'Neil, *supra* note 283, at 171. The Court interpreted F.R.C.P. 8(b) to require more factual basis in the pleadings before a claim could move to discovery.

298. *See, e.g.*, Thompson v. Microsoft Corp., 2 F.4th 460, 471 (5th Cir. 2021) (affirming summary judgment against plaintiff for only identifying a "few harsh words" where his manager told him to "seek a different career" and removed him from a senior position pool after learning the plaintiff had autism); Jessup v. Barnes Grp., Inc., 23 F.4th 360, 368–70 (4th Cir. 2022) (affirming summary judgment and finding plaintiff failed to satisfy the severe and pervasive standard even where supervisor comments showed they did not want the plaintiff to work there since the plaintiff did not know of all the comments).

because few cases outlast summary judgment.[299] The Eighth Circuit's *Shaver* case discussed in section II.A.1 illustrates how challenging it is to establish a hostile work environment claim even with a deeply problematic workplace. Recall that the plaintiff in this case was repeatedly called "platehead" by coworkers and supervisors over a two-year span.[300] Because successful hostile work claims in that circuit had involved death threats[301] or physical harassment,[302] verbal degradation apparently failed to compare. Although *Shaver* was an ADA case, its lessons can be applied to hostile work claims generally. Requiring employees to show harassment that rises to the level of physical harm or threats to life leaves the workforce vulnerable to harassment that is nonetheless damaging.

Another related problem is that hostile work claims are so factually anchored that similar harassment may lead to different outcomes. For example, while repeated name calling over two years in *Shaver* failed to get past summary judgment, name calling half a dozen times daily was enough to get to the jury in *Dediol*.[303] Does a plaintiff need to be insulted every day? Every week? And for how many years? More importantly, allowing a judge to determine when insults are severe or pervasive enough to interfere with job performance may hinge on that particular judge's tolerance for harassment. Such a factually specific determination may be better placed in the jury's hands.

C. Demanding Hostile Work Environment Standards Often Compel Summary Judgment and Limit Protection from Harassment

Since summary judgment prevents many hostile work claims from moving forward, the cases discussed in this Comment shed light on potential tactics plaintiffs can utilize to get their case to a jury. When plaintiffs provide as much factual evidence as possible for each of the hostile work elements and focus on the severe and pervasive standard, they can make a huge difference in their case.

1. Providing Evidence on an Employer's Decision-Making and Effects on Employment Conditions May Help Defeat Summary Judgment in ADA Cases

A plaintiff bringing an ADA hostile work environment claim should

299. *See* Shaver v. Indep. Stave Co., 350 F.3d 716, 723 (8th Cir. 2003).

300. *Id.* at 721.

301. *Id.* at 722 (citing Reedy v. Quebecor Printing Eagle, Inc., 333 F.3d 909–10 (8th Cir. 2003)).

302. *Id.* (first citing Breeding v. Arthur J. Gallagher & Co., 164 F.3d 1151, 1159 (8th Cir. 1999); and then citing Rorie v. United Parcel Serv., Inc., 151 F.3d 757, 761–62 (8th Cir. 1998)).

303. Dediol v. Best Chevrolet, Inc., 655 F.3d 435, 443 (5th Cir. 2011).

focus on several elements to avoid summary judgment. First, if a plaintiff is attempting to proceed on a theory that they are disabled under the ADA because their employer *regarded* the plaintiff as having a disability, they will have additional requirements.[304] This would be a situation where the employer considered the plaintiff disabled—regardless of whether the plaintiff actually had a disability. In *Lanman*, the Tenth Circuit explained that the plaintiff needs to create a factual issue as to whether (1) their employer mistakenly believed the plaintiff was impaired and (2) mistakenly believed the supposed impairment was a substantial limitation on a major life activity.[305] Comments about the plaintiff's mental health do not support a showing that the employer mistakenly saw the plaintiff as having a mental impairment.[306] To show an employer mistakenly believed the impairment substantially limited a major life activity, the plaintiff needs to show the employer *believed* the impairment substantially limited such activity.[307] A plaintiff may support their claim by providing evidence that their employer thinks the plaintiff cannot perform a certain class of jobs.[308] In the face of these strict requirements, plaintiffs would benefit from presenting a strong factual record rather than relying on a chain of inferences.

Second, as this Comment emphasizes, the plaintiff must show the challenged harassment was sufficiently severe or pervasive to alter a term, condition, or privilege of employment and create an abusive environment.[309] The real challenge lays in the objective requirement: a reasonable person needs to perceive the workplace as hostile.[310] A plaintiff will have more success on verbal name-calling when it is frequent.[311] Plaintiffs can boost their case under the objective requirement if they can show their employer forced them to perform jobs that aggravated their injury or disability.[312] If a supervisor suddenly and negatively changes behavior towards the plaintiff after learning of the plaintiff's disability, this too can support the plaintiff's case.[313] Ultimately, a plaintiff should point to as many harassing incidents as

304. *See* Lanman v. Johnson Cnty., 393 F.3d 1151, 1156–57 (10th Cir. 2004).

305. *Id.*

306. *Id.* at 1157.

307. *Id.*

308. *Id.*

309. Fox v. Costco Wholesale Corp., 918 F.3d 65, 74 (2d Cir. 2019).

310. Fox v. Gen. Motors Corp., 247 F.3d 169, 178 (4th Cir. 2001).

311. *See* Shaver v. Indep. Stave Co., 350 F.3d 716, 721 (8th Cir. 2003); Dediol v. Best Chevrolet, Inc., 655 F.3d 435, 443 (5th Cir. 2011).

312. *Gen. Motors Corp.*, 247 F.3d at 179.

313. Flowers v. S. Reg'l Physician Serv. Inc., 247 F.3d 229, 236–37 (5th Cir. 2001).

possible in the record.

2. *Showing Knowledge of the Plaintiff's Age and Evidence of Multiple Age-Based Behaviors Will Help Defeat Summary Judgment in ADEA Cases*

ADEA hostile work claims similarly require plaintiffs to present a compelling record of the harassment. The lessons for surviving summary judgment are similar to the ADA cases.

First, the plaintiff must show that the challenged conduct was because of the plaintiff's age, which may mean showing that the harasser knew the plaintiff's age.[314] Otherwise, a court might conclude offensive conduct is due to personality clashes rather than unlawful discrimination.[315] When the plaintiff works in a generally harsh atmosphere, such as a workplace with multiple hostile relationships, then the workplace's atmosphere may weigh against an inference that the harassment is due to age discrimination. To combat this, plaintiffs should provide evidence that the harasser was aware of their age.

Second, the severe and pervasive standard appears just as difficult in the ADEA context as in ADA cases. Federal courts seem to require that more than a couple statements made by the harasser in the record are directly related to the plaintiff's age. For example, in *Crawford*, the plaintiff failed at summary judgment and only provided two statements related to their age.[316] Alternatively, the plaintiff in *Dediol* had more success after showing they were called names repeatedly on a daily basis.[317] The court in *Dediol* explained that when the challenged conduct is more severe, the need for frequency declines.[318] Conversely, if the conduct is not particularly severe, it must be frequent.[319] Plaintiffs should look at severity of the conduct to assess whether they need to place more incidents in the record. Plaintiffs may also show their supervisors channeled work away from the plaintiff towards younger workers to support finding the harassment interfered with their ability to work.[320] Ultimately, hostile work claims involve extensive reliance on evidence in the record. The more discriminatory incidents a plaintiff can show, the more support they give to their claims.

---

314. *See* Brennan v. Metro. Opera Ass'n, Inc., 192 F.3d 310, 318 (2d Cir. 1999).

315. Crawford v. Medina Gen. Hosp., 96 F.3d 830, 836 (6th Cir. 1996).

316. *Id.*

317. Dediol v. Best Chevrolet, Inc., 655 F.3d 435, 443 (5th Cir. 2011).

318. *Id.* at 442.

319. *Id.*

320. *Id.* at 443.

IV. THE NEXT STEP: EMPLOYER LIABILITY SHOULD BE EXTENDED UNDER THE ADA AND ADEA FOR HARASSMENT BY NONEMPLOYEES

Federal circuit courts should extend liability for harassment by nonemployees under the ADA and ADEA because these statutes parallel Title VII's hostile work protection and this change would not subject employers to unlimited liability. Extending liability under the ADA and ADEA for harassment by nonemployees has remained undecided for several possible reasons. First, circuits have been slow to develop Title VII liability for harassment by nonemployees. For example, the Ninth Circuit did so in 1997 while the Fourth Circuit waited until a published opinion in 2014.[321] Additionally, this development may be stunted by the high rates of summary judgment on these types of claims. Since Title VII suits for nonemployee conduct are only a recent focus of litigation, it is easy to see why the ADA and ADEA are lagging.

This Part explores arguments for extending liability for harassment by nonemployees and emphasizes the need for uniform law. Specifically, this Part lists standards for plaintiffs relying on the ADA and ADEA in lawsuits against their employer. Finally, this Part returns to the Introduction's hypothetical and focus on similarities between all three statutes.

A. Case Law Already Lays the Groundwork for Determining Liability

Federal circuits would not need to dramatically modify case law to recognize employer liability for nonemployee harassment of employees based on age or disability. In the context of an ADA claim, the Fourth Circuit's rule from *Fox v. General Motors Corp.* would not require any editing; a plaintiff would still need to show:

> (1) he is a qualified individual with a disability; (2) he was subjected to unwelcome harassment; (3) the harassment was based on his disability; (4) the harassment was sufficiently severe or pervasive to alter a term, condition, or privilege of employment; and (5) some factual basis exists to impute liability for the harassment to the employer.[322]

This expansion would simply fall under the fifth element. Thus, a plaintiff could inform their employer of disability-based harassment by a nonemployee, and if that employer fails to act, then there is a basis to impute liability. Applications of this principle could rely on Title VII case

321. Freeman v. Dal-Tile Corp., 750 F.3d 413, 422 (4th Cir. 2014).

322. Fox v. Gen. Motors Corp., 247 F.3d 169, 177 (4th Cir. 2001).

law holding employers liable for nonemployee harassment to fill in any gaps.

Likewise, under the ADEA, the Sixth Circuit rule from *Crawford* could remain unedited and a plaintiff would need to establish:

> (1) they are 40 years old or older; (2) they were subjected to harassment, either through words or actions, based on age; (3) the harassment had the effect of unreasonably interfering with their work performance and creating an objectively intimidating, hostile, or offensive work environment; and (4) there exists some basis for liability on the employer's part.[323]

Again, liability would attach to the employer where they knew or should have known of the harassment but failed to act.

B. Comparing Title VII to the ADA and ADEA Reveals No Reason to Treat the Statutes Differently in Relation to Hostile Work Environments

As this Comment has underlined, similarities between Title VII, the ADA, and the ADEA provide an important argument for extending liability for harassment by nonemployees. Each statute contains the "terms, conditions, and privileges" language and is aimed at preventing discrimination in the workplace.[324] So, the question becomes, do the statutes diverge on *who* must be the discriminator for harassment to be unlawful? Does only Title VII forbid harassment from nonemployees? Examining case law on liability for nonemployee action under Title VII is a helpful starting point.

In *Lockard*, the Tenth Circuit explained that the controlling question in hostile work cases is whether "discriminatory intimidation, ridicule, and insult" permeates the workplace.[325] This court reasoned when an employer allows the creation of a hostile work environment, they must be liable regardless of whether it was an employee or nonemployee who created the hostility.[326] This is because the employer is the ultimate controller of workplace conditions.[327] The question does not hinge on whether the discrimination is based on sex, age, or disability.

Why should an employer avoid liability for workplace conditions within their control simply because the harassment was based on a different characteristic? If Title VII cases only extended liability for

---

323. Crawford v. Medina Gen. Hosp., 96 F.3d 830, 834–35 (6th Cir. 1996).

324. 42 U.S.C. §§ 12112(a), 12101; 29 U.S.C. §§ 623(a)(1), 621(b).

325. Lockard v. Pizza Hut, Inc., 162 F.3d 1062, 1073 (10th Cir. 1998).

326. *Id.* at 1073–74.

327. *Id.*

hostile work claims when the nonemployee was sexually attracted to the employee, one might argue that there is a critical difference between Title VII and the ADA and ADEA. For example, a heterosexual male customer non-consensually grabbing a female employee would be harassment because of the employee's sex. The argument might be that the physical component is evidence that the nonemployee was motivated by the employee's sex because he is attracted to her. It may be somewhat difficult to analogize this hypothetical to a customer physically assaulting an employee because of their age or disability. That is, what would the comparable motivation be? It isn't sexual attraction, so it is difficult to identify what it is about an employee's age or disability that would compel a customer to harass them. Fortunately, this argument can be quickly dispensed. The Supreme Court has explained, "because of sex" does not mean that the harasser is motivated by sexual desire in order for the discrimination to be because of the employee's sex.[328] Consequently, sexual desire cannot be the reason that courts extended liability to actions by nonemployees. Sexual attraction is simply a way to show that the harassment was because of sex.

The hypothetical posed in the beginning of this Comment shows why the ADA and ADEA should not be treated differently than Title VII. First, tweaking the hypothetical, imagine a customer verbally harasses a bank teller every day for months. Imagine the harassment involves statements where the customer refuses to have a female bank teller help him because he misogynistically believes she is incapable of handling his account. Next, this customer is so frustrated by the bank teller's attempts to work on his account that he physically threatens to harm her if she does not let a male teller take the account. If the bank refused to close the account, allowed the customer to continue threatening the female employee, and started giving male customers to tellers other than this female employee, it seems obvious that the bank should be liable for a hostile work environment. What would be the "because of sex" component here? It is the fact the customer believes women are unable to handle his money. The "severe and pervasive" standard could be satisfied by the frequency of the harassment, physical threats, and inability of the female employee to work on accounts. The bank could be liable because it knew of the harassment and arguably acquiesced in the customer's harassment by switching his account to a male teller. Under the Ninth Circuit's approach in *Christian*, this case could go to a jury.

Now, let's change this hypothetical. This time, a customer verbally harasses a bank teller every day for months because the customer believes

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

the teller cannot handle the account due to their old age. Alternatively, the customer could believe that the teller cannot handle the account because they appear disabled due to a speech impediment. The rest of the facts do not significantly change: the customer threatens physical harm if this teller tries to work on the account and the bank gives the account to a younger teller or one without a speech impediment. Why should the bank avoid liability because the harassment was age or disability based? As the Sixth Circuit discussed in *Crawford*, the ADA, ADEA, and Title VII are pieces "of a wider statutory scheme to protect employees in the workplace nationwide."[329] The ADA and ADEA should not protect employees less from hostile work environments than Title VII.

CONCLUSION

Currently, the circuits are split on whether hostile work claims are possible under the ADA and ADEA. Considering the similar intention across Title VII, the ADA, and ADEA to prevent unlawful discrimination in the workplace, hostile work environment claims should be available under all three statutes. All contain the "terms, conditions, and privileges of employment" language which supports protecting workers from harassment that affects employment—regardless of whether the harassment is on the basis of gender, race, disability, or age. Federal circuits have interpreted Title VII as extending liability to employers for unlawful harassment by nonemployees when the employer negligently responds to such harassment. This extension of liability is similarly appropriate under the ADA and ADEA. If this change is not adopted, then the employee from the hypothetical cannot pursue a hostile work environment claim based on the customer's age or disability-based harassment. There is no compelling reason to leave employees vulnerable to such discriminatory harassment.

329. Crawford v. Medina Gen. Hosp., 96 F.3d 830, 834 (6th Cir. 1996).