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A HOSTILE ENVIRONMENT: HOW THE “SEVERE OR PERVASIVE” REQUIREMENT AND THE EMPLOYER’S AFFIRMATIVE DEFENSE TRAP SEXUAL HARASSMENT PLAINTIFFS IN A CATCH-22

Abstract: This Note argues that the combination of the “severe or pervasive” requirement and the employer’s affirmative defense, as applied in lower federal courts, makes it very difficult for a hostile work environment sexual harassment plaintiff to prevail against his or her employer. Courts require actionable harassment to consist of one extremely severe incident or to continue long enough to become cumulatively severe or pervasive. But once the harassment has gone on long enough to become severe or pervasive, the employer’s affirmative defense is increasingly likely to bar the plaintiff’s prima facie case. The result is that as the plaintiff’s prima facie case grows stronger, the probability that the employer will prevail on its affirmative defense also increases. This Note argues that such a contradictory approach is unfair to plaintiffs and proposes a more equitable standard that would place plaintiffs and employers on equal footing.

INTRODUCTION

Hostile work environment sexual harassment cases have troubled lower federal courts since the cause of action was first recognized by the U.S. Supreme Court in 1986.¹ Two of the major issues have been (1) articulating the criteria for evaluating prima facie sexual harassment claims and identifying the appropriate threshold for an actionable environment, and (2) determining when to impute liability to an employer for the conduct of its supervisory employees.² Courts have struggled with these issues and with achieving the goal of equal opportunities in the workplace for men and women—a goal that underlies Title VII of the Civil Rights Act of 1964.³

¹ See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66–67 (1986); *infra* notes 55–212 and accompanying text.

² See *infra* notes 55–79 and accompanying text.

³ See Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2000); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993); *infra* notes 55–212 and accompanying text.

As the Supreme Court stated in its first hostile work environment sexual harassment case, conduct must be "severe or pervasive" to be actionable.⁴ The Court later clarified that the harassing conduct had to "create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive."⁵ This broad language and the lack of a clear definition of "severe or pervasive" led lower federal courts to require varying degrees of abusiveness and persistence to find a hostile work environment.⁶

The Supreme Court hoped to effectuate Title VII's primary objective of preventing workplace discrimination by granting employers an affirmative defense to liability for the conduct of supervisory employees.⁷ The affirmative defense was designed to encourage employers to implement effective complaint mechanisms and grievance procedures.⁸ It requires an employer to prove that (1) the employer exercised reasonable care to prevent and correct workplace harassment, and (2) the victim unreasonably failed to take advantage of the preventive and corrective mechanisms established by the employer.⁹

Lower federal courts have interpreted these requirements loosely.¹⁰ For the first prong, many courts require employers to show little more than promulgation of an anti-harassment policy that addresses sexual harassment and a grievance procedure that allows an employee to bypass a harassing supervisor.¹¹ Some courts find that an employer has satisfied this requirement even when the employer's response to the complaint fails to stop the harassment.¹² Because many courts find that the existence of such a policy and procedure satisfies the duty of reasonable

⁴ *Meritor*, 477 U.S. at 67.

⁵ *Harris*, 510 U.S. at 21.

⁶ See *infra* notes 80–158 and accompanying text.

⁷ *Faragher v. City of Boca Raton*, 524 U.S. 775, 805–06 (1998).

⁸ See *id.*

⁹ *Id.* at 807; *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

¹⁰ See *infra* notes 160–212 and accompanying text.

¹¹ See, e.g., *Faragher*, 524 U.S. at 807–08 (finding against employer only because it failed to disseminate its policy against sexual harassment among employees, even though the policy did not include any assurance that a complainant could bypass the harassing supervisor, and also stating that demonstration that the plaintiff unreasonably failed to use any adequate complaint procedure provided by the employer will normally suffice to satisfy the employer's burden); *Madray v. Publix Supermarkets, Inc.*, 208 F.3d 1290, 1300 (11th Cir. 2000) (noting that, once an employer has promulgated an effective anti-harassment policy, it is incumbent upon the employees to utilize the procedural mechanisms established by the company).

¹² See *Crenshaw v. Delray Farms, Inc.*, 968 F. Supp. 1300, 1306–07 (N.D. Ill. 1997) (finding no evidence that employer should have been aware after the first of three incidents that a warning and reprimand would not sufficiently deter harasser).

care to prevent and correct harassment under the first prong, an employee's failure to use that policy and procedure is usually found to be unreasonable under the second prong.¹³ This is true even if the employee merely delays a few weeks in reporting the harassment.¹⁴

These cases place an early burden on victims of sexual harassment to determine whether the conduct in question is serious enough to justify or require a complaint to their employer.¹⁵ An employee who is subjected to an isolated incident of trivial or low-level harassment may prefer to resolve the situation herself or simply look past it, rather than endure the complications and acrimony that often accompany the filing of a formal complaint.¹⁶ Such an employee does so at her own risk, however.¹⁷ If she does not report the incident, or merely delays in reporting it, and is later subjected to further harassment, many courts may bar her from asserting a cause of action because they will find that her failure to complain promptly following the first incident was unreasonable.¹⁸ In many cases, however, the same courts will also find that the initial incident was insufficiently severe to be actionable, thereby precluding her from establishing a cause of action even if she does report the incident.¹⁹ Therefore,

¹³ See, e.g., *Faragher*, 524 U.S. at 807-08 (stating that demonstration that plaintiff unreasonably failed to use any complaint procedure provided by the employer will normally suffice to satisfy the employer's burden); *Ellerth*, 524 U.S. at 765 (same); *Madray*, 208 F.3d at 1300.

¹⁴ See *Thompson v. Naphcare, Inc.*, 117 F. App'x 317, 324 (5th Cir. 2004) (finding delay of almost two months unreasonable); *Conatzer v. Med. Prof'l Bldg. Servs. Corp.*, 95 F. App'x 276, 281 (10th Cir. 2004) (finding delay of two and a half weeks unreasonable); *Hanes v. Mobile Infirmary Med. Ctr.*, No. Civ.A.04-0365-BH-C, 2005 WL 1840236, at *12 (S.D. Ala. Aug. 2, 2005) (finding delay of two months unreasonable); *Olsen v. H.E.B. Pantry Foods*, 196 F. Supp. 2d 436, 440 (E.D. Tex. 2002) (finding delay of two months unreasonable).

¹⁵ See *Faragher*, 524 U.S. at 807-08; *Ellerth*, 524 U.S. at 765; *Madray*, 208 F.3d at 1300.

¹⁶ See, e.g., *Matvia v. Bald Head Island Mgmt., Inc.*, 259 F.3d 261, 270 (4th Cir. 2001) (noting that plaintiff claimed she reasonably feared retaliation by co-workers if she reported the harassment); *Hanna v. Boys & Girls Home & Family Servs., Inc.*, 212 F. Supp. 2d 1049, 1069 (N.D. Iowa 2002) (finding a factual issue whether plaintiff was terminated in retaliation for complaining of sexual harassment); *McGraw v. Wyeth-Ayerst Labs., Inc.*, No. CIV. A. 96-5780, 1997 WL 799437, at *8 (E.D. Pa. Dec. 30, 1997) (same); *Pereira v. Schlage Elecs.*, 902 F. Supp. 1095, 1099, 1100-01 (N.D. Cal. 1995) (noting that after plaintiff's complaint about harassment, co-workers threatened to kill her, burn down her house, and kidnap her and leave her where she would be raped and killed).

¹⁷ See *Faragher*, 524 U.S. at 807-08; *Ellerth*, 524 U.S. at 765; *Madray*, 208 F.3d at 1300.

¹⁸ See *Faragher*, 524 U.S. at 807-08; *Ellerth*, 524 U.S. at 765; *Madray*, 208 F.3d at 1300.

¹⁹ See, e.g., *Faragher*, 524 U.S. at 788 (stating that isolated incidents, unless extremely severe, will not create an actionable environment); *Alfano v. Costello*, 294 F.3d 365, 374 (2d Cir. 2002) (stating that a plaintiff must demonstrate either that a single incident was extraordinarily severe, or that a series of incidents was sufficiently continuous and con-

these courts require a plaintiff to report incidents of harassment that are likely not actionable and also find that such a plaintiff will have no cause of action even if she reports the harassment the moment it becomes actionable.²⁰

This Note analyzes the relationship between the "severe or pervasive" standard in hostile work environment sexual harassment cases and the employer's affirmative defense.²¹ Part I of this Note demonstrates how the combination of the "severe or pervasive" requirement and the employer's affirmative defense makes it difficult for victims to successfully assert a cause of action.²² Section A of Part I reviews the Supreme Court's decisions articulating the hostile work environment sexual harassment cause of action under Title VII of the Civil Rights Act of 1964 that established the "severe or pervasive" standard for an actionable environment and the affirmative defense to employer liability.²³ Section B of Part I then examines lower federal courts' interpretation and application of these precedents.²⁴ This Section reviews cases finding that: (1) the plaintiff failed to allege severe or pervasive harassment sufficiently; (2) the harassment was sufficiently severe or pervasive; (3) the plaintiff's failure to report the harassment promptly was unreasonable, in contravention of the affirmative defense's mandate; and (4) although the plaintiff reported the harassment to the employer and no action was taken in response, the employer nevertheless can prevail on a motion for summary judgment.²⁵

Part II analyzes the tendency of many lower federal courts to hold plaintiffs to a strict standard while granting leniency to employers.²⁶ This Part also addresses how courts place an unfair burden on sexual harassment victims to make an early prediction of whether ad-

certed); *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 264 (5th Cir. 1999) (stating that actionable cases have involved patterns or allegations of extensive, long-lasting, unredressed, and uninhibited sexual threats or conduct that permeated the plaintiffs' work environment); *McGraw*, 1997 WL 799437, at *5 (stating that courts have required plaintiffs to show they have been subjected to continued explicit propositions, sexual epithets, or persistent offensive touchings).

²⁰ See *Faragher*, 524 U.S. at 807 (stating that an employer will be subject to vicarious liability for an "actionable" hostile environment); *Phillips v. Taco Bell Corp.*, 83 F. Supp. 2d 1029, 1033-34 (E.D. Mo. 2000) (granting summary judgment to employer where victim did not report an isolated incident that occurred three months prior to the majority of the harassment, but did promptly report the subsequent incidents).

²¹ See *infra* notes 29-353 and accompanying text.

²² See *infra* notes 29-54 and accompanying text.

²³ See *infra* notes 55-79 and accompanying text.

²⁴ See *infra* notes 80-212 and accompanying text.

²⁵ See *infra* notes 80-212 and accompanying text.

²⁶ See *infra* notes 213-325 and accompanying text.

ditional harassment will occur in order to preserve a cause of action.²⁷ Part II concludes by proposing a standard that would balance the obligations of employees and employers in sexual harassment hostile work environment cases.²⁸

I. HOW THE "SEVERE OR PERVASIVE" REQUIREMENT AND THE EMPLOYER'S AFFIRMATIVE DEFENSE TRAP PLAINTIFFS IN A CATCH-22

The dilemma that plaintiffs face is most apparent in cases in which an employee initially experiences low-level or isolated harassment that subsequently develops into more severe harassment.²⁹ Such a victim's predicament can be demonstrated by the following hypothetical. In an initial act of harassment, a female employee's supervisor makes a lewd comment or touches her inappropriately.³⁰ No further incidents occur for a few weeks or even months.³¹ Then, after an extended incident-free period, her supervisor resumes the inappropriate conduct. This time, the harassing behavior is more severe or frequent. The victim may decide that this conduct is too offensive to tolerate and report the harassment to her employer. As will be demonstrated, however, at this point she may already have forfeited any

²⁷ See *infra* notes 213-325 and accompanying text.

²⁸ See *infra* notes 326-353 and accompanying text.

²⁹ See *infra* notes 30-54 and accompanying text.

³⁰ Isolated or trivial incidents will almost categorically fail to constitute an actionable hostile work environment. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (stating that isolated incidents, unless extremely severe, will not create an actionable environment); *Alfano v. Costello*, 294 F.3d 365, 374 (2d Cir. 2002) (stating that a plaintiff must demonstrate either that a single incident was extraordinarily severe or that a series of incidents was sufficiently continuous and concerted); *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 264 (5th Cir. 1999) (stating that actionable cases have involved patterns or allegations of extensive, long-lasting, unredressed, and uninhibited sexual threats or conduct that permeated the plaintiffs' work environment); *McGraw v. Wyeth-Ayerst Labs., Inc.*, No. CIV. A. 96-5780, 1997 WL 799437, at *5 (E.D. Pa. Dec. 30, 1997) (stating that courts have required plaintiffs to show they have been subjected to continued explicit propositions, sexual epithets, or persistent offensive touchings).

³¹ Many courts will evaluate the initial incident in conjunction with any future incidents even if they are separated by a significant time interval. See, e.g., *Conatzer v. Med. Profl Bldg. Servs. Corp.*, 95 F. App'x 276, 278 (10th Cir. 2004) (finding unreasonable delay in reporting harassment where victim did not report an incident where supervisor leaned up against her and rubbed against her side, but did report the incident seventeen days later promptly following a second, more serious incident); *Phillips v. Taco Bell Corp.*, 83 F. Supp. 2d 1029, 1033-34 (E.D. Mo. 2000) (finding delay unreasonable where there were three months between the initial and subsequent incidents, even though all harassment was promptly reported following the subsequent incidents).

potential legal action because she failed to report the initial incident promptly.³²

Following the initial incident, the victim must decide how to respond. She must determine whether the conduct was severe or pervasive, as well as predict whether additional harassment will occur.³³ This preliminary response to the single incident is crucial to the victim's future legal standing.³⁴ Thus, the victim's options are to report the conduct to her employer after the incident, attempt to resolve the situation on her own, or simply look past the incident, as courts may, as an isolated incident, in an effort to avoid the controversy likely to arise if she does report it.³⁵

There are five common scenarios that follow from this situation:

1. Even if the victim reports the incident to her employer, at this point, the employer has no apparent legal obligation to take action in response.³⁶ An employer will only be subject to vicarious liability for an actionable hostile work environment.³⁷ To be actionable, the harassment must be severe or pervasive.³⁸
2. If the harassment stops after this incident, the employer will not be liable regardless of its response.³⁹ Assuming the initial

³² See *infra* notes 33–47 and accompanying text.

³³ See *Faragher*, 524 U.S. at 807 (stating that an employer will be subject to vicarious liability for an "actionable" hostile environment); *Phillips*, 83 F. Supp. 2d at 1033–34 (granting summary judgment to employer where victim did not report an isolated incident that occurred three months prior to the majority of the harassment, but did promptly report the subsequent incidents).

³⁴ See *Conatzer*, 95 F. App'x at 278, 281 (finding delay unreasonable where victim did not report an incident where supervisor leaned up against her and rubbed against her side, but did report the incident seventeen days later promptly following a second incident where he placed her in a headlock with his thighs); *Phillips*, 83 F. Supp. 2d at 1033–34.

³⁵ See *Faragher*, 524 U.S. at 788; *Alfano*, 294 F.3d at 374; *Indest*, 164 F.3d at 264; *McGraw*, 1997 WL 799437, at *5.

³⁶ See *Faragher*, 524 U.S. at 807; *Saidu-Kamara v. Parkway Corp.*, 155 F. Supp. 2d 436, 438, 440 (E.D. Pa. 2001) (granting summary judgment to employer where plaintiff's supervisor, among other things, touched her breasts and buttocks, and employer took no action even though plaintiff repeatedly reported these incidents).

³⁷ *Faragher*, 524 U.S. at 807; see *Saidu-Kamara*, 155 F. Supp. 2d at 438, 440.

³⁸ *Faragher*, 524 U.S. at 807; see *Saidu-Kamara*, 155 F. Supp. 2d at 438, 440.

³⁹ See *Faragher*, 524 U.S. at 807; *Brooks v. City of San Mateo*, 229 F.3d 917, 921, 926 (9th Cir. 2000) (finding work environment non-actionable where co-worker touched plaintiff's stomach and then breast under her sweater); *Simmons v. Mobile Infirmary Med. Ctr.*, 391 F. Supp. 2d 1124, 1133 (S.D. Ala. 2005) (finding work environment non-actionable where supervisor touched plaintiff's breast four to five times, put his hands on her hips once, and brushed her leg once); *Schaber-Goa v. Dep't of Rehab. & Corr.*, No. 3:03CV7524, 2005 WL 1223891, at *5 (N.D. Ohio May 23, 2005) (finding work environment non-actionable

incident was insufficiently severe to be actionable, the employer is insulated from vicarious liability because the environment was never actionable.⁴⁰

3. If the harassment continues, but never becomes severe or pervasive, the employer will not be liable regardless of its response.⁴¹ As in the second scenario, the employer cannot be liable because the victim cannot make out a prima facie case.⁴²
4. If the harassment continues and eventually becomes severe or pervasive, the employer will not be liable if the victim failed to report the conduct promptly following the first incident.⁴³ This is true even if she reported the conduct once it became severe or pervasive.⁴⁴ The employer will succeed on the affirmative defense because the victim failed to report the harassment promptly—that is, promptly following the first incident, no matter how trivial or long ago.⁴⁵
5. If the harassment continues and eventually becomes severe or pervasive, the employer *may* be liable if the victim reported the conduct within a reasonable time of the first incident *and* within a reasonable time following subsequent incidents.⁴⁶ The employer, however, will only be liable if it

where plaintiff's co-worker touched her crotch and grabbed her breast because the two incidents were "situationally isolated" and, therefore, not "sufficiently pervasive"; *Saidu-Kamara*, 155 F. Supp. 2d at 438, 440 (finding work environment non-actionable where plaintiff's supervisor touched her breasts and buttocks).

⁴⁰ See *Faragher*, 524 U.S. at 807; *Saidu-Kamara*, 155 F. Supp. 2d at 438, 440.

⁴¹ See *Faragher*, 524 U.S. at 807; *Brooks*, 229 F.3d at 921, 926; *Simmons*, 391 F. Supp. 2d at 1133; *Schaber-Goa*, 2005 WL 1223891, at *5; *Saidu-Kamara*, 155 F. Supp. 2d at 438, 440.

⁴² See *Faragher*, 524 U.S. at 807; *Saidu-Kamara*, 155 F. Supp. 2d at 438, 440.

⁴³ See *Thompson v. Naphcare, Inc.*, 117 F. App'x 317, 324 (5th Cir. 2004) (finding delay of almost two months unreasonable); *Conatzer*, 95 F. App'x at 281 (finding delay of two and a half weeks unreasonable); *Hanes v. Mobile Infirmary Med. Ctr.*, No. Civ.A.04-0365-BH-C, 2005 WL 1840236, at *12 (S.D. Ala. Aug. 2, 2005) (finding delay of two months unreasonable); *Olsen v. H.E.B. Pantry Foods*, 196 F. Supp. 2d 436, 440 (E.D. Tex. 2002) (finding delay of two months unreasonable).

⁴⁴ See *Phillips*, 83 F. Supp. 2d at 1033-34.

⁴⁵ See *Conatzer*, 95 F. App'x at 278 (finding delay unreasonable where victim did not report an incident where supervisor leaned up against her and rubbed against her side); *Phillips*, 83 F. Supp. 2d at 1033-34 (finding delay unreasonable where victim did not report incident that occurred three months prior to the majority of the harassment).

⁴⁶ See *Wyatt v. Hunt Plywood Co.*, 297 F.3d 405, 413-14 (5th Cir. 2002) (affirming partial summary judgment to employer where plaintiff complained promptly of supervisor's conduct to a superior, but when the superior then began to harass plaintiff, she failed to complain promptly); *Phillips*, 83 F. Supp. 2d at 1033-34 (granting summary judgment to employer where victim did not report an isolated incident that occurred three months

failed to exercise reasonable care to prevent and promptly correct the harassment after it was reported.⁴⁷

In order to establish a *prima facie* case, the harassment must either consist of an extremely severe incident or continue long enough to become severe or pervasive.⁴⁸ Once the conduct becomes severe or pervasive, the employer's affirmative defense still may serve to bar the plaintiff's *prima facie* case.⁴⁹ One isolated incident is not likely to be actionable, so a plaintiff could not assert a claim of severe or pervasive harassment.⁵⁰ If, however, further incidents occur, sufficient to make the harassment actionable, then the plaintiff still may not prevail on her claim because the employer may succeed on its affirmative defense.⁵¹ Such an employee finds herself in a difficult situation.⁵² If she complains, she will only have a cause of action if the conduct is severe or pervasive.⁵³ But if she does not complain, she will have no cause of action if the conduct eventually becomes severe or pervasive.⁵⁴

A. *Supreme Court Decisions: Creation of the Hostile Work Environment Cause of Action and the Employer's Affirmative Defense*

In 1986, in *Meritor Savings Bank v. Vinson*, the U.S. Supreme Court first recognized hostile work environment sexual harassment as a type

prior to the majority of the harassment, but did report promptly following the subsequent incidents).

⁴⁷ See *Cadena v. Pacesetter Corp.*, 224 F.3d 1203, 1209 (10th Cir. 2000) (affirming finding that employer could not satisfy affirmative defense where evidence showed less than reasonable efforts to remedy the harassment and the investigation was inadequate, if not a "complete sham"); *White v. N.H. Dep't of Corr.*, 221 F.3d 254, 261-62 (1st Cir. 2000) (affirming finding that employer could not satisfy affirmative defense where it did not handle the investigation properly or timely, and allowed the conduct to continue); *Crenshaw v. Delray Farms, Inc.*, 968 F. Supp. 1300, 1306-07 (N.D. Ill. 1997) (finding no evidence that employer should have been aware after the first of three incidents that a warning and reprimand would not sufficiently deter harasser, when it took three separate warnings to end the harassment).

⁴⁸ See, e.g., *Faragher*, 524 U.S. at 788; *Alfano*, 294 F.3d at 374; *Indest*, 164 F.3d at 264.

⁴⁹ See *Matvia v. Bald Head Island Mgmt., Inc.*, 259 F.3d 261, 269-70 (4th Cir. 2001) (rejecting plaintiff's argument that she needed time to collect evidence against her supervisor so company officials would believe her, and rejecting argument that it was proper to refrain from reporting her supervisor so she could determine whether he was a "predator" or merely an "interested man" who could be politely rebuffed); *Phillips*, 83 F. Supp. 2d at 1033-34.

⁵⁰ See, e.g., *Faragher*, 524 U.S. at 788; *Alfano*, 294 F.3d at 374; *Indest*, 164 F.3d at 264.

⁵¹ See *Matvia*, 259 F.3d at 269-70; *Phillips*, 83 F. Supp. 2d at 1033-34.

⁵² See *Alfano*, 294 F.3d at 374; *Phillips*, 83 F. Supp. 2d at 1033-34.

⁵³ See *Alfano*, 294 F.3d at 374; *Phillips*, 83 F. Supp. 2d at 1033-34.

⁵⁴ See *Alfano*, 294 F.3d at 374; *Phillips*, 83 F. Supp. 2d at 1033-34.

of discrimination based on sex.⁵⁵ The Court found that the phrase “terms, conditions, or privileges of employment” in Title VII of the Civil Rights Act of 1964 “evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment.”⁵⁶ To be actionable, the Court held, the harassment must be sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.⁵⁷

The Court next addressed a hostile work environment claim in 1993, in *Harris v. Forklift Systems, Inc.*⁵⁸ The Court stated that an employer violates Title VII when the workplace permeates with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.⁵⁹ The Court held that the harassment must create an objectively hostile or abusive work environment—one that a reasonable person would find hostile or abusive, although the victim need not suffer physical or psychological harm.⁶⁰ The Court instructed lower courts to look at the totality of the circumstances in determining whether a hostile work environment exists.⁶¹ The Court provided a list of factors to consider, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.⁶² The Court further indicated that no single factor is required to create a hostile work environment.⁶³

Following *Meritor* and *Harris*, there was a general consensus among lower federal courts that with regard to harassment by co-workers, an employer would be vicariously liable if the employer knew or should have known of the harassment and failed to take prompt and effective remedial action.⁶⁴ The standard for employer liability with respect to the conduct of supervisory employees, however, was

⁵⁵ See 477 U.S. 57, 66–67 (1986).

⁵⁶ *Id.* at 64 (quoting *L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 (1978)).

⁵⁷ *Id.* at 67.

⁵⁸ See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–23 (1993).

⁵⁹ *Id.* at 21.

⁶⁰ *Id.* at 21–22.

⁶¹ *Id.* at 23.

⁶² *Id.*

⁶³ *Harris*, 510 U.S. at 23.

⁶⁴ See, e.g., *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 759 (1998); *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 621 (6th Cir. 1986).

less clear.⁶⁵ Employers were not automatically liable for the conduct of supervisory employees.⁶⁶ However, the mere existence of a grievance procedure and a policy against discrimination, coupled with the plaintiff's failure to invoke that procedure, did not alone insulate an employer.⁶⁷

In 1998, in the companion cases of *Faragher v. City of Boca Raton* and *Burlington Industries, Inc. v. Ellerth*, the U.S. Supreme Court addressed the issue of employer liability for the conduct of supervisory employees.⁶⁸ For any harassment not resulting in a tangible employment action—such as firing, demotion, or unfavorable reassignment—the plaintiff must prove that the conduct was sufficiently severe or pervasive to create an actionable environment.⁶⁹ And when the victim suffers no tangible employment action an employer may raise an affirmative defense to liability for sexual harassment by supervisory employees.⁷⁰

To assert the affirmative defense, an employer must prove by a preponderance of the evidence that (1) the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and (2) the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.⁷¹ The Court stated that, although the existence of an anti-harassment policy with a complaint procedure is not necessary in every instance as a matter of law, the need for such mechanisms may appropriately be considered when analyzing the steps taken by the employer to prevent and correct sexual harassment.⁷² And although proof that an employee failed to exert reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second prong.⁷³ The Court in *Faragher* found that the employer failed to exercise reasonable care be-

⁶⁵ See *Faragher*, 524 U.S. at 785.

⁶⁶ *Meritor*, 477 U.S. at 72.

⁶⁷ *Id.*

⁶⁸ *Faragher*, 524 U.S. at 775–811; *Ellerth*, 524 U.S. at 742–74.

⁶⁹ *Faragher*, 524 U.S. at 786; see *Ellerth*, 524 U.S. at 761 (defining a tangible employment action as “a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits”).

⁷⁰ *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

⁷¹ *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

⁷² *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

⁷³ *Faragher*, 524 U.S. at 807–08; *Ellerth*, 524 U.S. at 765.

cause it had failed to disseminate its policy to employees and the policy did not ensure that the harassing supervisor could be bypassed when employees registered complaints.⁷⁴

The *Faragher* Court also discussed what types of conduct create a hostile work environment.⁷⁵ The Court stated that the standards for judging hostility ensure that Title VII does not become a general civility code for the workplace and that, properly applied, these standards will filter out complaints attacking the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing.⁷⁶ Therefore, simple teasing, offhand comments, and isolated incidents—unless extremely serious—will not create an actionable environment.⁷⁷ In a later case, the Court added that hostile work environment claims are not based on discrete acts, but rather, on incidents that occur over a series of days or perhaps years.⁷⁸ Such claims are based on the cumulative effect of individual acts.⁷⁹

B. Lower Federal Court Decisions: Defining the Actionable "Severe or Pervasive" Threshold and When the Affirmative Defense Is Satisfied

1. Cases Finding Conduct Insufficiently Severe or Pervasive to Constitute a Hostile Work Environment

Despite the seemingly reasonable threshold alluded to by the Supreme Court in *Harris*—severe or pervasive harassment by a reasonable person's standards—many lower federal courts began requiring an arguably higher threshold than what a reasonable person would find hostile or abusive.⁸⁰ In 1997, in *Crenshaw v. Delray Farms, Inc.*, the U.S. District Court for the Northern District of Illinois held the harassing conduct at issue to be insufficiently severe or pervasive to be actionable.⁸¹ In this case, a co-worker grabbed the plaintiff's breast.⁸² A week later, he told her he "needed somebody small like her to pick up in the air and have sex with."⁸³ Shortly thereafter, he grabbed and squeezed

⁷⁴ *Faragher*, 524 U.S. at 808.

⁷⁵ *See id.* at 788.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115 (2002).

⁷⁹ *Id.*

⁸⁰ *See Harris*, 510 U.S. at 21; *infra* notes 81–117 and accompanying text.

⁸¹ *See* 968 F. Supp. at 1306.

⁸² *Id.* at 1302.

⁸³ *Id.*

her buttocks for several seconds and called her an "ignorant ass bitch."⁸⁴ Two months later, another co-worker came up behind her, rubbed his penis on her back and said "Oh, mamasita."⁸⁵ Two months after this incident, another co-worker asked the plaintiff if she cheated on her husband and told her that he would pay her to "be with him."⁸⁶ A few days later, the same co-worker grabbed her and attempted to kiss her.⁸⁷ The next week, the plaintiff was in the women's bathroom with the door locked when the same co-worker popped the lock open and entered.⁸⁸ He attempted to grab the plaintiff, but she escaped.⁸⁹ Two months after these incidents, another co-worker told the plaintiff that her pants "made his groins growl" and that he wanted to take her to a hotel.⁹⁰ He told the plaintiff that he wanted to "eat [her] out" and "do all types of tricks with [her]."⁹¹ Finally, a month later, the plaintiff was surrounded by two supervisors and two managers all of whom yelled at her and threatened her job.⁹²

The court stated that the plaintiff must establish not only that *she* was adversely affected by the conduct, but also that a *reasonable* person would have been adversely affected.⁹³ The court concluded that isolated instances of inappropriate conduct do not constitute sexual harassment and found that the offensive conduct at issue did not constitute a hostile work environment because it was not persistent.⁹⁴ The court also found that the employer appropriately dealt with the perpetrators, even though the plaintiff was harassed by at least six different co-workers and supervisors on several occasions.⁹⁵ In one instance, it took two warnings for a co-worker to stop harassing her, and in another case, it took three warnings to end the harassment.⁹⁶

In 1996, in *Hannigan-Haas v. Bankers Life & Casualty Co.*, the U.S. District Court for the Northern District of Illinois found that a serious physical assault was insufficient as a matter of law to create a hostile

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Crenshaw*, 968 F. Supp. at 1302.

⁸⁷ *Id.*

⁸⁸ *Id.* at 1303.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Crenshaw*, 968 F. Supp. at 1303.

⁹² *Id.*

⁹³ *Id.* at 1305-06.

⁹⁴ *Id.* at 1306.

⁹⁵ *Id.* at 1301-03.

⁹⁶ *Crenshaw*, 968 F. Supp. at 1306.

work environment because it was only one incident.⁹⁷ One of the plaintiff's supervisors, a senior vice president of the company, approached her and asked her to accompany him into an office.⁹⁸ Once there, he closed the door and, unbeknownst to the plaintiff, locked it.⁹⁹ When she attempted to leave the room, he stood up, pushed her against a wall, leaned his chest against hers, and said "open your mouth" as he attempted to kiss her with an open mouth.¹⁰⁰ She turned her head to avoid the kiss.¹⁰¹ He then tried to touch her breasts and to place his hands under her pantyhose.¹⁰² The plaintiff was able to break free and ran from the room.¹⁰³ Despite the serious nature of the assault, the court found that it was insufficiently severe or pervasive to be actionable because it was only a single incident.¹⁰⁴

In 1999, in *Blough v. Hawkins Market, Inc.*, another case involving serious physical contact, the U.S. District Court for the Northern District of Ohio found the challenged conduct insufficiently severe or pervasive to establish a hostile work environment.¹⁰⁵ The plaintiff's co-worker patted her on the buttocks and, several months later, grabbed her crotch.¹⁰⁶ Another co-worker attempted to kiss her and apparently engaged in self-stimulation while she was looking.¹⁰⁷ The court concluded that a hostile environment requires more than a few isolated incidents of offensive conduct.¹⁰⁸

In 1995, in *Blankenship v. Parke Care Centers, Inc.*, the U.S. District Court for the Southern District of Ohio found the following harassment to be insufficiently severe or pervasive to be actionable.¹⁰⁹ Two seventeen-year-old female employees were harassed by a forty-year-old male co-worker.¹¹⁰ During a six-day period, the first plaintiff endured the co-worker blowing kisses at her, licking his lips, and smiling at her seductively or perversely on several occasions; making obscene gestures toward his crotch on one occasion; touching her chest above her

⁹⁷ See No. 95 C 7408, 1996 WL 650419, at *5 (N.D. Ill. Nov. 6, 1996).

⁹⁸ *Id.* at *1.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Hannigan-Haas*, 1996 WL 650419, at *1.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at *5.

¹⁰⁵ See 51 F. Supp. 2d 858, 864 (N.D. Ohio 1999).

¹⁰⁶ *Id.* at 862.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ See 913 F. Supp. 1045, 1055 (S.D. Ohio 1995).

¹¹⁰ *Id.*

breast with his finger on one occasion; and making vulgar sexual remarks in her presence about another female co-worker on one occasion.¹¹¹ The second plaintiff endured similar harassment.¹¹² The co-worker once suggested that he was “falling in love” with her, tickled her on another occasion, and kissed her on the cheek or hugged her on four occasions.¹¹³ On yet another occasion, he approached her from behind and lifted her breasts.¹¹⁴ He also repeatedly asked her to go on a date.¹¹⁵

The court reasoned that although the facts suggested that these particular plaintiffs subjectively perceived this conduct to affect the conditions of their employment, the likely reaction of a “hypothetical reasonable person” was less clear.¹¹⁶ The court went on to conclude that neither of the plaintiffs’ contentions definitively met the “severe or pervasive” standard, and thus neither was actionable.¹¹⁷

2. Cases Finding That Conduct Was Sufficiently Severe or Pervasive to Create a Hostile Work Environment

Two cases from the U.S. Court of Appeals for the Seventh Circuit illustrate the magnitude of harassment required by some courts to establish that conduct was sufficiently severe or pervasive to be actionable.¹¹⁸ In 2004, in *McPherson v. City of Waukegan*, the Seventh Circuit held that the two most severe incidents of the following conduct were sufficient to create a hostile work environment.¹¹⁹ The plaintiff stated that her supervisor asked her what color bra she was wearing a “handful” of times.¹²⁰ Once, when the plaintiff called in sick, her supervisor responded by suggestively asking if he could “make a house call.”¹²¹ He asked the same question two or three more times during the course of her employment.¹²² On another occasion, at a time when they were unobserved by others, he asked her what color bra she was wearing and then pulled back her tank top to see for him-

¹¹¹ *Id.* at 1053.

¹¹² *Id.* at 1053–54.

¹¹³ *Id.* at 1054.

¹¹⁴ *Blankenship*, 913 F. Supp. at 1054.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 1055.

¹¹⁷ *Id.*

¹¹⁸ See *infra* notes 119–158 and accompanying text.

¹¹⁹ See 379 F.3d 430, 439 (7th Cir. 2004).

¹²⁰ *Id.* at 434.

¹²¹ *Id.* at 435.

¹²² *Id.*

self.¹²³ About a month later, he called the plaintiff into his office.¹²⁴ As they were discussing a work document, he slid his hand under her shirt and felt her breasts.¹²⁵ Five days later, he called her into his office again and asked her to shut the door.¹²⁶ When she turned to leave, he approached her and slid his hand under her shirt, touching her breasts.¹²⁷ The plaintiff asked him to stop, but he pushed her toward the wall behind his office door.¹²⁸ He then put his hand down her pants and inserted his finger into her vagina.¹²⁹

The court found that all of the conduct prior to the two physical assaults was merely boorish behavior that was not severe or pervasive.¹³⁰ The court concluded that the earlier behavior was "lamentably inappropriate," but insufficient due to its limited nature and infrequency.¹³¹ The court did find, however, that the two instances of physical assault were sufficient to constitute a hostile work environment.¹³²

Similarly, in 1999, in *Wilson v. Chrysler Corp.*, the Seventh Circuit held the following harassment to create an actionable work environment.¹³³ The plaintiff worked on the assembly line at an automobile plant.¹³⁴ Over the course of approximately eight years, she endured repeated acts of harassment involving improper touching, verbal abuse, and the display of offensive objects, cartoons, and pictures.¹³⁵ Several of the plaintiff's complaints involved the use or display of fake rubber penises.¹³⁶ At least twice a week, for the duration of her employment, these fake penises were sent down the assembly line past her work station.¹³⁷ On one occasion, a co-worker brandished a fake penis between his legs and yelled at the plaintiff, "Look what I got for you; bet you can't handle this."¹³⁸ Three other times, fake penises were left on a car in her work area.¹³⁹ She also related two instances of offensive touch-

¹²³ *Id.*

¹²⁴ *McPherson*, 379 F.3d at 435.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *McPherson*, 379 F.3d at 435.

¹³⁰ *Id.* at 439.

¹³¹ *Id.*

¹³² *Id.*

¹³³ See 172 F.3d 500, 511 (7th Cir. 1999).

¹³⁴ *Id.* at 507.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Wilson*, 172 F.3d at 507.

¹³⁹ *Id.*

ing.¹⁴⁰ A co-worker would regularly stand close to her, look at her breasts, and say "umm."¹⁴¹ He would deliberately position his hand so that it would come into contact with her breasts when she bent down.¹⁴² Another co-worker flicked his finger on her breast.¹⁴³ She also cited several humiliating exchanges involving verbal abuse.¹⁴⁴ One co-worker addressed her by saying "Hi, ho," meaning "whore."¹⁴⁵ Another accused her of "sucking a white boy's dick on the roof."¹⁴⁶ Another commented, "I can make your pussy bloom."¹⁴⁷ Yet another co-worker told her that white men only spoke to her because they "wanted her tu-tu."¹⁴⁸

More frequently, the plaintiff was taunted with offensive literature.¹⁴⁹ A co-worker handed her a paper that pontificated on why beer is better than women.¹⁵⁰ Another co-worker showed her a picture of a nude woman and stated, "Too bad you don't have a body like this."¹⁵¹ On another occasion, a photograph of a nude man was taped to the hood of a car on which she was working.¹⁵² She also found an offensive cartoon taped to her work station.¹⁵³ Sexually explicit cartoons were handed to her or displayed in her work area.¹⁵⁴ Finally, while on medical leave, she received a lewd greeting card that had been signed by approximately thirty-eight employees at the plant including a supervisor and three foremen.¹⁵⁵

The court noted the multifaceted nature of the harassment, its frequent and at times routine character, and the participation of so many members of the workforce.¹⁵⁶ Considering the cumulative effect of the harassment, the court noted that the plaintiff depicted a workplace in which harassment rose almost to the level of an institutional

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Wilson*, 172 F.3d at 507.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Wilson*, 172 F.3d at 507.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 508.

¹⁵² *Id.*

¹⁵³ *Wilson*, 172 F.3d at 508.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 511.

norm.¹⁵⁷ The court concluded that the plaintiff had stated an actionable claim for an objectively hostile work environment.¹⁵⁸

3. Cases Finding the Plaintiff's Failure to Report Unreasonable

In addition to holding plaintiffs to a high threshold for satisfying the "severe or pervasive" standard, many courts also dismiss plaintiffs' cases for failure to report trivial or isolated incidents through the employer's affirmative defense.¹⁵⁹ In 2000, in *Phillips v. Taco Bell Corp.*, the U.S. District Court for the Eastern District of Missouri granted the employer's motion for summary judgment in a case in which the plaintiff was initially subjected to one isolated incident of offensive conduct by her supervisor.¹⁶⁰ No other incidents of harassment occurred until three months later, when she was subjected to four incidents in a seven-day period.¹⁶¹ The initial incident involved the supervisor squeezing the plaintiff's breasts.¹⁶² Three months later, he grabbed the front of her pants; the next day, he grabbed her hand and placed it on the front of his pants; four days later, he rubbed his hands across her buttocks; and the next day, he rubbed his hands across and down her back.¹⁶³ Two days after this final incident, the plaintiff reported the offensive conduct to her employer.¹⁶⁴

The court found that, by not reporting the offensive conduct until two days after the final incident, the plaintiff had unreasonably failed to take advantage of any preventive or corrective opportunities provided by her employer.¹⁶⁵ The court considered all five incidents together and found that the plaintiff had waited over three months to report the harassment.¹⁶⁶ The court concluded that, although the five incidents were sufficiently severe or pervasive, the employer had successfully proven its affirmative defense to liability and was entitled to summary judgment.¹⁶⁷

Similarly, in 2004, in *Conatzer v. Medical Professional Building Services Corp.*, the Tenth Circuit affirmed a grant of summary judgment

¹⁵⁷ *Id.*

¹⁵⁸ *Wilson*, 172 F.3d at 511.

¹⁵⁹ See *infra* notes 160–191 and accompanying text.

¹⁶⁰ 83 F. Supp. 2d at 1033–34.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 1033.

¹⁶⁵ *Phillips*, 83 F. Supp. 2d at 1034.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 1033–34.

for the employer in a case in which the plaintiff alleged that her supervisor had sexually harassed her on two occasions.¹⁶⁸ The first incident involved physical contact between the plaintiff and her supervisor, described by the shift supervisor as the plaintiff's supervisor stepping up to the plaintiff, leaning against her, and rubbing against the side of her chest.¹⁶⁹ Two weeks later, as the plaintiff bent over to pick something up, her supervisor briefly placed her in a headlock with his thighs.¹⁷⁰ The plaintiff registered a complaint four or five days after the second incident, or seventeen days after the first incident.¹⁷¹

The court concluded that, absent an adequate explanation for this delay, the plaintiff had acted unreasonably.¹⁷² Furthermore, the court rejected the argument that because the shift supervisor witnessed the first incident, the employer was obligated to respond prior to the plaintiff's formal complaint.¹⁷³ The court also stated that there was no indication that the shift supervisor observed anything other than an isolated incident.¹⁷⁴

Similarly, in 2001, in *Matvia v. Bald Head Island Management, Inc.*, the Fourth Circuit affirmed an employer's motion for summary judgment.¹⁷⁵ Beginning in September 1997, the plaintiff's supervisor approached her, said he needed a hug, and proceeded to hug her.¹⁷⁶ He told the plaintiff, after she had just dyed her hair brown, that he would now have to fantasize about a brunette rather than a blond.¹⁷⁷ He informed her that he no longer had sexual relations with his wife.¹⁷⁸ He placed a pornographic picture on her desk.¹⁷⁹ He told her she looked good enough to eat.¹⁸⁰ He frequently placed his arm around her and massaged her shoulder.¹⁸¹ He also repeatedly told her that he loved her and had a crush on her.¹⁸² In December 1997, he told her that he dreamt that she sued him for sexual harassment and

¹⁶⁸ 95 F. App'x at 278, 281.

¹⁶⁹ *Id.* at 278.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.* at 281.

¹⁷³ *Conatzer*, 95 F. App'x at 281.

¹⁷⁴ *Id.*

¹⁷⁵ 259 F.3d at 270.

¹⁷⁶ *Id.* at 265.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Matvia*, 259 F.3d at 265.

¹⁸¹ *Id.*

¹⁸² *Id.*

warned her that if she did bring suit, she would be in big trouble.¹⁸³ Five days after recounting his dream, he pulled her close to him, tried to kiss her, and struggled with her until she was able to escape.¹⁸⁴ The plaintiff's employer learned of the harassment the following day.¹⁸⁵

The court rejected the plaintiff's argument that she needed time to collect evidence against her supervisor so that company officials would believe her.¹⁸⁶ The court also rejected her argument that it was proper for her to refrain from reporting her supervisor so she could determine whether he was a "predator" or merely an "interested man" who could be politely rebuffed.¹⁸⁷ The court stated that case law makes no distinction between "predators" and "interested men," and the label given to the harasser is immaterial.¹⁸⁸ The court concluded that the gravity and frequency of the incidents made it clear that the supervisor was not merely an interested man who could be politely rebuffed.¹⁸⁹ Although the plaintiff explained that she did not report the earlier conduct because she was not sure if she was being sexually harassed and whether the company would believe her, the court affirmed the employer's motion for summary judgment.¹⁹⁰ The court, with the benefit of hindsight, concluded that the plaintiff should have found the earlier conduct sexually harassing and reported it.¹⁹¹

4. Cases Dismissing Plaintiff's Claim Despite Complaint Made to Employer and Employer's Refusal to Take Action in Response

In addition to granting employers' motions for summary judgment when the plaintiff failed to report or delayed in reporting harassment, some courts granted these motions even when the plaintiff did complain and the employer ignored it.¹⁹² In 2002, in *Wyatt v. Hunt Plywood Co.*, the Fifth Circuit affirmed the employer's motion for summary judgment for the majority of the following harassment.¹⁹³ In this case, the plaintiff was sexually harassed both by her immediate

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Matvia*, 259 F.3d at 270. The opinion does not state how the employer came to learn of the harassment. *See id.* at 261-73.

¹⁸⁶ *Id.* at 269.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 270.

¹⁹⁰ *Matvia*, 259 F.3d at 269-70.

¹⁹¹ *See id.*

¹⁹² *See infra* notes 193-212 and accompanying text.

¹⁹³ *See* 297 F.3d 405, 414 (5th Cir. 2002).

supervisor and the supervisor to whom she complained.¹⁹⁴ The plaintiff's immediate supervisor began harassing her sexually, referring to her in vulgar terms and continually asking her to have sex with him.¹⁹⁵ She promptly complained of this harassment to her supervisor's superior, but despite her complaints, the harassment persisted.¹⁹⁶ Instead of remedying the problem, eventually the superior himself subjected the plaintiff to sexual advances and harassment.¹⁹⁷ The plaintiff conceded, however, that she never reported this conduct to anyone higher up in the management chain.¹⁹⁸ The original supervisor's harassment reached its peak when he snuck up behind her and pulled down her sweat pants in the plain view of other employees.¹⁹⁹ She immediately complained to the superior again, who agreed to write an incident report.²⁰⁰ In an attempt to downplay the harassment, however, he omitted the incident where the plaintiff's pants were pulled down.²⁰¹

The court found that once it became clear not only that the superior was ineffective in dealing with the harassment, but also that he himself was a sexual harasser, the plaintiff's failure to report either harasser's behavior to a different supervisor was unreasonable.²⁰² Furthermore, the court held that the plaintiff's reliance on the superior's admonitions not to "go over his head" did not excuse her failure to disclose the harassment to a higher authority.²⁰³ The court found the employer's sexual harassment policy and its implementation of the policy "more than adequate," and did not consider that the most serious incident was intentionally omitted from the formal report in an effort to downplay the harassment.²⁰⁴

The only portion of the harassment for which the employer could not assert the affirmative defense was the brief period that began with the plaintiff's first report to the superior and ended when he himself began harassing her.²⁰⁵ The court affirmed the employer's

¹⁹⁴ *Id.* at 407.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Wyatt*, 297 F.3d at 407.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.* at 407-08.

²⁰² *Id.* at 413.

²⁰³ *Wyatt*, 297 F.3d at 413.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 414.

motion for summary judgment regarding all other incidents of harassment.²⁰⁶

In 2001, in *Saidu-Kamara v. Parkway Corp.*, the U.S. District Court for the Eastern District of Pennsylvania granted an employer's motion for summary judgment in a case in which the plaintiff alleged that she was subjected to various forms of discrimination and harassment throughout her employment.²⁰⁷ Her supervisor asked her out on dates on several occasions, directed sexual innuendos towards her, and, on at least one occasion, touched her breasts and buttocks.²⁰⁸ The plaintiff repeatedly reported these incidents to the facility manager, but no action was taken.²⁰⁹ The court stated that, considering the totality of the circumstances, the plaintiff had failed to demonstrate sufficiently severe or pervasive discrimination.²¹⁰ Therefore, the court concluded, the plaintiff had not satisfied a necessary element of her hostile work environment claim and it granted the employer's motion for summary judgment.²¹¹ In reaching its conclusion, the court did not address the fact that the plaintiff had repeatedly reported these incidents and that no action had been taken in response.²¹²

II. ANALYSIS OF LOWER FEDERAL COURT PRACTICES AND A PROPOSAL FOR A MORE EQUITABLE AND CONSISTENT STANDARD

As the foregoing cases illustrate, the legal standard applied to hostile work environment sexual harassment cases is inconsistent and self-contradictory.²¹³ As demonstrated, the "severe or pervasive" stan-

²⁰⁶ *Id.*

²⁰⁷ 155 F. Supp. 2d 436, 438 (E.D. Pa. 2001).

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.* at 440.

²¹¹ *Id.*

²¹² See *Saidu-Kamara*, 155 F. Supp. 2d at 439-40.

²¹³ See *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (stating that isolated incidents, unless extremely severe, will not create an actionable environment); *Alfano v. Costello*, 294 F.3d 365, 374 (2d Cir. 2002) (stating that a plaintiff must demonstrate either that a single incident was extraordinarily severe, or that a series of incidents was sufficiently continuous and concerted); *Matvia v. Bald Head Island Mgmt., Inc.*, 259 F.3d 261, 269-70 (4th Cir. 2001) (rejecting plaintiff's argument that she needed time to collect evidence against her supervisor so company officials would believe her, and rejecting argument that it was proper to refrain from reporting her supervisor so she could determine whether he was a "predator" or merely an "interested man" who could be politely rebuffed); *Phillips v. Taco Bell Corp.*, 83 F. Supp. 2d 1029, 1033-34 (E.D. Mo. 2000) (granting summary judgment to employer where victim did not report incident that occurred three months prior to the majority of the harassment, but did report promptly following the subsequent incidents); *supra* notes 80-212 and accompanying text.

dard is a very high threshold in many jurisdictions.²¹⁴ A plaintiff can theoretically meet this threshold by showing one extremely severe incident or a pattern of extensive, continuous, and long-lasting harassment.²¹⁵ Because most plaintiffs fail to show that one incident was sufficiently severe to satisfy the standard, they ordinarily must present a case involving several incidents occurring within a concentrated period of time.²¹⁶

A plaintiff who is able to establish a prima facie case must then get past the obstacle of the employer's affirmative defense.²¹⁷ The paradox, however, is that as the plaintiff's prima facie case grows stronger, the probability that the employer will prevail on its affirmative defense also increases.²¹⁸ Thus, by the time the harassment becomes severe or pervasive, the plaintiff has likely waited too long to complain.²¹⁹ If the plaintiff was subjected to sufficiently severe or pervasive harassment, then the court looks to whether she filed formal complaints following each incident.²²⁰ If she has not, the employer

²¹⁴ See *supra* notes 80–158 and accompanying text.

²¹⁵ See *Faragher*, 524 U.S. at 788; *Alfano*, 294 F.3d at 374; *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 264 (5th Cir. 1999) (stating that actionable cases have involved patterns or allegations of extensive, long-lasting, unredressed, and uninhibited sexual threats or conduct that permeated the plaintiffs' work environment).

²¹⁶ See, e.g., *Alfano*, 294 F.3d at 374; *Indest*, 164 F.3d at 264; *McGraw v. Wyeth-Ayerst Labs., Inc.*, No. CIV. A. 96-5780, 1997 WL 799437, at *5 (E.D. Pa. Dec. 30, 1997) (stating that courts have required plaintiff to show she has been subjected to continued explicit propositions or sexual epithets or persistent offensive touchings).

²¹⁷ See *Faragher*, 524 U.S. at 807; *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998).

²¹⁸ See *Faragher*, 524 U.S. at 788 (stating that isolated incidents, unless extremely severe, will not create an actionable environment); *Conatzer v. Med. Prof'l Bldg. Servs. Corp.*, 95 F. App'x 276, 278 (10th Cir. 2004) (finding delay unreasonable where victim did not report an isolated incident where supervisor leaned up against her and rubbed against her side, but did report the incident seventeen days later promptly following a second, more serious incident); *Alfano*, 294 F.3d at 374 (stating that a plaintiff must demonstrate either that a single incident was extraordinarily severe, or that a series of incidents was sufficiently continuous and concerted); *Indest*, 164 F.3d at 264 (stating that actionable cases have involved patterns or allegations of extensive, long-lasting, unredressed, and uninhibited sexual threats or conduct that permeated the plaintiffs' work environment); *Phillips*, 83 F. Supp. 2d at 1033–34 (finding an unreasonable delay where victim did not report an isolated incident that occurred three months prior to the majority of the harassment, but did report promptly following the subsequent incidents).

²¹⁹ See *Faragher*, 524 U.S. at 788; *Conatzer*, 95 F. App'x at 278; *Alfano*, 294 F.3d at 374; *Indest*, 164 F.3d at 264; *Phillips*, 83 F. Supp. 2d at 1033–34.

²²⁰ See *Conatzer*, 95 F. App'x at 278 (finding delay unreasonable where victim did not report initial incident, but did report promptly following a second incident); *Wyatt v. Hunt Plywood Co.*, 297 F.3d 405, 413–14 (5th Cir. 2002) (affirming partial summary judgment for employer where plaintiff complained promptly of harassing supervisor's conduct to his

will likely be able to assert the affirmative defense on the grounds that the plaintiff failed to report the harassment promptly.²²¹ Essentially, a victim of sexual harassment can be stripped of her ability to assert a cause of action even before she has an actionable claim.²²²

A. Lower Federal Courts Interpret the Same Conduct Differently When Evaluating the Plaintiff's Prima Facie Case and the Employer's Affirmative Defense

Many lower federal courts have set the "severe or pervasive" threshold for establishing a hostile work environment far too high.²²³ The Supreme Court stated that to meet the standard, the harassing conduct must "create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive."²²⁴ A reasonable person would likely feel sexually harassed in some of the "nonactionable" cases set out above, many of which involved lewd comments and physical touching of intimate body parts.²²⁵ When analyzing a plaintiff's prima facie case, however, many courts tend to downplay the severity of the harassment and the impact it would have on a reasonable person.²²⁶

Conversely, when analyzing the employer's affirmative defense, courts characterize trivial harassment as significant, concluding that

superior, but then failed to complain when the superior himself began to harass her); *Phillips*, 83 F. Supp. 2d at 1033-34.

²²¹ See *Conatzer*, 95 F. App'x at 278; *Phillips*, 83 F. Supp. 2d at 1033-34.

²²² See *Faragher*, 524 U.S. at 788; *Conatzer*, 95 F. App'x at 278; *Phillips*, 83 F. Supp. 2d at 1033-34.

²²³ See *supra* notes 80-158 and accompanying text.

²²⁴ *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

²²⁵ See *supra* notes 80-117 and accompanying text.

²²⁶ See *DeAngelis v. El Paso Mun. Police Officers Assoc.*, 51 F.3d 591, 593 (5th Cir. 1995) (stating that the actionable standard requires "conduct so egregious as to alter the conditions of employment and destroy [women's] equal opportunity in the workplace"); *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 430-31 (7th Cir. 1995) (stating that the concept of sexual harassment is designed to protect women from the kind of behavior that can make the workplace "hellish" for women, and concluding that "only a woman of Victorian delicacy—a woman mysteriously aloof from contemporary American popular culture in all its sex-saturated vulgarity"—would find the complained-of behavior distressing); *Hosey v. McDonald's Corp.*, Civ. No. AW-95-196, 1996 WL 414057, at *1-2 (D. Md. May 17, 1996) (describing several unwelcome sexual advances, obscene comments, and approximately ten incidents of offensive touching as "teenagers . . . asking each other for dates"); *supra* notes 80-117 and accompanying text. The court in *DeAngelis* reasoned that "a less onerous standard of liability would attempt to insulate women from everyday insults as if they remained models of Victorian reticence," and that "[a] lesser standard of liability would mandate not equality but preference for women." 51 F.3d at 593.

the plaintiff acted unreasonably by not taking the conduct more seriously and filing a complaint with her employer.²²⁷ This not only makes it more difficult for a plaintiff to establish severe or pervasive harassment, but it also makes it more difficult to defeat the employer's affirmative defense.²²⁸

Furthermore, this approach forces an employee who is subjected to one isolated incident of trivial harassment to treat the incident as if it were much more serious.²²⁹ Although such an incident may be a minor factor in the courts' prima facie case analysis, it could play a decisive role in the affirmative defense analysis if a court finds that this incident was the first episode in a pattern of harassment that the plaintiff unreasonably failed to report promptly.²³⁰ This is true even if the incident was of negligible significance or was the only offensive act to occur for months.²³¹

Hence, when many courts look at a plaintiff's prima facie case they ordinarily declare that incidents of harassment occurring weeks apart were too isolated to be actionable.²³² These courts are willing to conclude that multiple incidents were merely "isolated," and therefore non-actionable, even when the conduct involved was reasonably severe.²³³ When evaluating the employer's affirmative defense, however, the courts do not discuss isolated incidents or whether every incident mentioned in the plaintiff's complaint should be part of the

²²⁷ See *supra* notes 160–191 and accompanying text.

²²⁸ See *supra* notes 80–117, 160–191 and accompanying text.

²²⁹ See *Conatzer*, 95 F. App'x at 278; *Phillips*, 83 F. Supp. 2d at 1033–34; *supra* notes 160–191 and accompanying text.

²³⁰ See *Conatzer*, 95 F. App'x at 278; *Phillips*, 83 F. Supp. 2d at 1033–34; *supra* notes 80–117, 160–191 and accompanying text.

²³¹ See *Conatzer*, 95 F. App'x at 278; *Phillips*, 83 F. Supp. 2d at 1033–34; *supra* notes 80–117, 160–191 and accompanying text.

²³² See, e.g., *Schaber-Goa v. Dep't of Rehab. & Corr.*, No. 3:03CV7524, 2005 WL 1223891, at *5 (N.D. Ohio May 23, 2005) (finding work environment non-actionable where plaintiff's co-worker touched her crotch and grabbed her breast because the two incidents were "situationally isolated" and, therefore, not "sufficiently pervasive"); *Blough v. Hawkins Mkt., Inc.*, 51 F. Supp. 2d 858, 862, 864 (N.D. Ohio 1999) (finding work environment non-actionable where one co-worker patted the plaintiff on the buttocks and grabbed her crotch, while another co-worker attempted to kiss her and apparently engaged in self-stimulation while she was looking, because the court concluded these were merely isolated incidents of offensive conduct); *Crenshaw v. Delray Farms, Inc.*, 968 F. Supp. 1300, 1301–03, 1306 (N.D. Ill. 1997) (finding work environment non-actionable where plaintiff was harassed by at least six different co-workers and supervisors on at least ten different occasions because these were merely isolated incidents that were not persistent); *supra* notes 80–117 and accompanying text.

²³³ See, e.g., *Schaber-Goa*, 2005 WL 1223891, at *5; *Blough*, 51 F. Supp. 2d at 862, 864; *Crenshaw*, 968 F. Supp. at 1301–03, 1306; *supra* notes 80–117 and accompanying text.

same analysis.²³⁴ Rather, in determining whether the plaintiff acted reasonably, many courts look only at the interval between the first incident mentioned in the complaint and the date she reported the harassment.²³⁵

This creates a substantial problem for a plaintiff who suffered sufficiently severe or pervasive harassment, but was also subjected to a trivial or isolated incident occurring much earlier.²³⁶ Although the initial incident would be too isolated to support a prima facie case, courts routinely use this same incident to find that the plaintiff unreasonably failed to report the harassment promptly and thereby allow the employer to assert the affirmative defense.²³⁷ These courts treat the same incidents and the same time interval differently when analyzing the prima facie case and the affirmative defense.²³⁸ The usual result of this practice is a grant of summary judgment for the employer.²³⁹

If the plaintiff was harassed by multiple co-workers or supervisors, courts ordinarily require that the victim report each succeeding incident of harassment and each succeeding harasser.²⁴⁰ Employers are only required to respond to the incidents of harassment that are reported.²⁴¹ They are not required to end the harassment, either by the

²³⁴ See, e.g., *Conatzer*, 95 F. App'x at 281; *Phillips*, 83 F. Supp. 2d at 1034; *supra* notes 160–191 and accompanying text.

²³⁵ See, e.g., *Conatzer*, 95 F. App'x at 281; *Phillips*, 83 F. Supp. 2d at 1034; *supra* notes 160–191 and accompanying text.

²³⁶ See, e.g., *Conatzer*, 95 F. App'x at 281; *Phillips*, 83 F. Supp. 2d at 1034; *supra* notes 80–117, 160–191 and accompanying text.

²³⁷ See, e.g., *Conatzer*, 95 F. App'x at 281; *Schaber-Goa*, 2005 WL 1223891, at *5; *Phillips*, 83 F. Supp. 2d at 1034; *Blough*, 51 F. Supp. 2d at 862, 864; *Crenshaw*, 968 F. Supp. at 1301–03, 1306; *supra* notes 80–117, 160–191 and accompanying text.

²³⁸ See, e.g., *Conatzer*, 95 F. App'x at 281; *Schaber-Goa*, 2005 WL 1223891, at *5; *Phillips*, 83 F. Supp. 2d at 1034; *Blough*, 51 F. Supp. 2d at 862, 864; *Crenshaw*, 968 F. Supp. at 1301–03, 1306; *supra* notes 80–117, 160–191 and accompanying text.

²³⁹ See, e.g., *Conatzer*, 95 F. App'x at 281 (granting employer's motion for summary judgment because plaintiff failed to report harassment promptly); *Schaber-Goa*, 2005 WL 1223891, at *5 (granting employer's motion for summary judgment because incidents were isolated); *Phillips*, 83 F. Supp. 2d at 1034 (granting employer's motion for summary judgment because plaintiff failed to report harassment promptly); *Blough*, 51 F. Supp. 2d at 864 (granting employer's motion for summary judgment because incidents were isolated); *Crenshaw*, 968 F. Supp. at 1306 (same); *supra* notes 80–117, 160–191 and accompanying text.

²⁴⁰ See *Wyatt*, 297 F.3d at 413; *Blough*, 51 F. Supp. 2d at 862, 864; *Crenshaw*, 968 F. Supp. at 1301–03, 1306; *supra* notes 80–117, 160–191 and accompanying text.

²⁴¹ See *Crenshaw*, 968 F. Supp. at 1306.

harasser who is reported or by subsequent harassers.²⁴² This low expectation for employers does a disservice to the Supreme Court's language in *Faragher v. City of Boca Raton* and *Burlington Industries, Inc. v. Ellerth* that employers must exercise "reasonable care to prevent and correct promptly any sexually harassing behavior."²⁴³

B. Plaintiffs Are Forced to Make an Early Prediction of Whether an Incident of Harassment Is an Isolated Incident or the First in a Chain of Harassment

Although the Supreme Court stated that lower federal courts should look to the cumulative effect of the harassment to judge its severity and pervasiveness, it gave no guidance to victims as to what types of conduct they must report to preserve a future cause of action.²⁴⁴ The Court stated that hostile work environment claims are not based on discrete acts, but rather on incidents that occur over a series of days, months, or perhaps years.²⁴⁵ Although courts have the luxury of viewing the whole record of harassment, victims cannot predict what the cumulative effect of the harassment will be after only experiencing the first of what could develop into a series of incidents.²⁴⁶ Furthermore, many sexual harassment victims do not possess the legal expertise to know what types of harassment are serious enough to warrant or require a formal complaint.²⁴⁷

There is a general consensus among lower federal courts that only extremely severe harassment creates a cause of action based on one incident.²⁴⁸ Therefore, the majority of claims are based on the accumulation of incidents.²⁴⁹ Victims of harassment, however, are not able to judge what the cumulative effect of the harassment will be.²⁵⁰ After being subjected to one incident of harassment, a victim must decide how to react based on that single incident.²⁵¹ Presumably, if a

²⁴² See *Llewellyn v. Celanese Corp.*, 693 F. Supp. 369, 377 (W.D.N.C. 1988) (stating that employers are only required to take remedial action "reasonably calculated to end the harassment").

²⁴³ See *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765; *supra* notes 160–191 and accompanying text.

²⁴⁴ See *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115 (2002).

²⁴⁵ *Id.*

²⁴⁶ See *id.*; *supra* notes 80–117, 160–191 and accompanying text.

²⁴⁷ See *supra* notes 80–117, 160–191 and accompanying text.

²⁴⁸ See, e.g., *Faragher*, 524 U.S. at 788; *Alfano*, 294 F.3d at 374; *supra* notes 80–158 and accompanying text.

²⁴⁹ See, e.g., *Morgan*, 536 U.S. at 115; *Alfano*, 294 F.3d at 374; *Indest*, 164 F.3d at 264; *supra* notes 80–158 and accompanying text.

²⁵⁰ See *Morgan*, 536 U.S. at 115; *supra* notes 80–212 and accompanying text.

²⁵¹ See *Faragher*, 524 U.S. at 788; *supra* notes 80–212 and accompanying text.

woman knew that she would be harassed further or more severely in the future, she would have a much stronger reaction to the single incident.²⁵² If, however, she knew that she would not be subjected to any future incidents, she may be more inclined to ignore the isolated incident.²⁵³

Filing a formal complaint not only causes an inconvenience for the victim, but it may create more aggravation than the offensive incident itself.²⁵⁴ After complaining of sexual harassment, women have been ostracized, threatened, and even terminated from their employment.²⁵⁵ Aside from fear of possible retaliation, many other concerns may influence a victim's decision not to report harassment.²⁵⁶ Victims of sexual harassment are often young women who are being harassed by older men or by direct supervisors who have authority over them.²⁵⁷ They may be new employees or may simply have a general hesitation to create tension or acrimony with co-workers and supervisors, or they may be ashamed or embarrassed about the event.²⁵⁸ Some victims might feel uneasy with confrontational situations, making it difficult to face the harasser or to complain about the conduct.²⁵⁹ These concerns, among others, may simply outweigh the seriousness of the initial conduct, leading a victim of harassment to conclude that she would rather not file a formal complaint.²⁶⁰ Faced with the possibility of retaliation or ostracism by co-workers for report-

²⁵² See *Morgan*, 536 U.S. at 115; *supra* notes 80–212 and accompanying text.

²⁵³ See *Faragher*, 524 U.S. at 788; *supra* notes 80–212 and accompanying text.

²⁵⁴ See, e.g., *Noviello v. City of Boston*, 398 F.3d 76, 82, 98 (1st Cir. 2005) (finding that after reporting incident of sexual harassment, plaintiff was retaliated against and ostracized by her co-workers); *Hanna v. Boys & Girls Home & Family Servs., Inc.*, 212 F. Supp. 2d 1049, 1069 (N.D. Iowa 2002) (finding a factual issue whether plaintiff was terminated in retaliation for complaining of sexual harassment); *Pereira v. Schlage Elecs.*, 902 F. Supp. 1095, 1099, 1100–01 (N.D. Cal. 1995) (describing how after plaintiff complained of harassment, co-workers threatened to kill her, burn down her house, and kidnap her and leave her where she would be raped and killed, as well as finding a factual issue whether plaintiff was terminated in retaliation for complaining of sexual harassment).

²⁵⁵ See, e.g., *Noviello*, 398 F.3d at 82, 98; *Hanna*, 212 F. Supp. 2d at 1069; *Pereira*, 902 F. Supp. at 1099, 1100–01.

²⁵⁶ See *Noviello*, 398 F.3d at 82, 98; *Hanna*, 212 F. Supp. 2d at 1069; *Pereira*, 902 F. Supp. at 1099, 1100–01.

²⁵⁷ See *supra* notes 80–212 and accompanying text.

²⁵⁸ See *supra* notes 80–212 and accompanying text.

²⁵⁹ See *supra* notes 80–212 and accompanying text.

²⁶⁰ See *supra* notes 80–212 and accompanying text.

ing harassment, it is no surprise that many victims choose to ignore trivial or isolated incidents.²⁶¹

As the standard is applied in many lower federal courts, however, the victim must report the first incident or she will be barred from asserting a cause of action in the future if the harassment continues or escalates.²⁶² Such a requirement is difficult to meet without the benefit of being able to predict what will happen in the future.²⁶³ For example, in *Conatzer v. Medical Professional Building Services Corp.*, the Tenth Circuit barred the plaintiff's claim due to the employer's affirmative defense.²⁶⁴ The court found it unreasonable that the plaintiff did not report the first of two incidents, described as her supervisor stepping up to her, leaning against her, and rubbing against the side of her chest.²⁶⁵ It hardly seems unreasonable that a woman would choose not to report one such ambiguous occurrence, especially when there was no indication at that time that any additional offenses would occur.²⁶⁶ The court concluded that the reasonable and expected response to such an incident would be to file a formal sexual harassment complaint with the employer.²⁶⁷ Under the circumstances, this may have been a fairly drastic response to what at the time seemed an innocuous and ambiguous act.²⁶⁸

The second incident occurred two weeks later.²⁶⁹ When the plaintiff bent over to pick something up, her supervisor briefly placed her in a headlock with his thighs.²⁷⁰ First, this incident was much more offensive than the previous one.²⁷¹ For a woman's supervisor to place her head between his legs is much more objectionable than his merely rubbing against the side of her chest.²⁷² Second, this incident was more significant because it was the second time in two weeks that

²⁶¹ See *Conatzer*, 95 F. App'x at 278; *Phillips*, 83 F. Supp. 2d at 1033-34; *supra* notes 80-212 and accompanying text.

²⁶² See *Conatzer*, 95 F. App'x at 278 (finding delay unreasonable where victim did not report an incident where supervisor leaned up against her and rubbed against her side); *Phillips*, 83 F. Supp. 2d at 1033-34; *supra* notes 80-117, 160-191 and accompanying text.

²⁶³ See, e.g., *Faragher*, 524 U.S. at 807-08; *Ellerth*, 524 U.S. at 765; *Conatzer*, 95 F. App'x at 281; *Phillips*, 83 F. Supp. 2d at 1034; *supra* notes 80-117, 160-191 and accompanying text.

²⁶⁴ 95 F. App'x at 281.

²⁶⁵ *Id.* at 278, 281.

²⁶⁶ See *Conatzer*, 95 F. App'x at 281; *supra* notes 168-174 and accompanying text.

²⁶⁷ See *Conatzer*, 95 F. App'x at 281.

²⁶⁸ See *id.* at 278, 281.

²⁶⁹ *Id.* at 278.

²⁷⁰ *Id.*

²⁷¹ See *id.*

²⁷² See *Conatzer*, 95 F. App'x at 278.

her supervisor had physically touched her in an inappropriate manner.²⁷³ In light of the first incident, the victim was then able to evaluate whether this was developing into a pattern of harassment rather than a trivial and isolated incident.²⁷⁴ Although the first incident may have annoyed her, it was reasonably perceived as inconsequential enough to ignore.²⁷⁵ It should at least have been reasonable for the victim to decide that it did not mandate a formal complaint.²⁷⁶ In conjunction with the second incident, however, the initial conduct took on greater significance.²⁷⁷ The victim now could reasonably conclude that the first incident was more than an isolated occurrence of annoying behavior.²⁷⁸ In fact, the victim in *Conatzer* appeared to reach this conclusion because she reported both incidents promptly following the second incident.²⁷⁹

Sexual harassment victims as potential plaintiffs must benefit from a view of the whole picture, as do the courts and employers.²⁸⁰ Considering the first incident described in *Conatzer* in isolation, it would have been a bold, and likely fruitless, step for the victim to file a complaint against her supervisor.²⁸¹ Once she realized, however, that the supervisor's conduct would persist, she filed a complaint within four or five days.²⁸² When the court in *Conatzer* was presented with the facts of this case, it had the full record to evaluate.²⁸³ To the court, the plaintiff acted unreasonably because she failed to report the first incident after it happened.²⁸⁴ This was, of course, with the knowledge that the second incident would later occur.²⁸⁵

This analysis forces an employee to file a formal complaint every time any ambiguous conduct occurs.²⁸⁶ Thus, it contradicts the Supreme Court's admonition that Title VII is not meant to be a general

²⁷³ See *id.*

²⁷⁴ See *id.*

²⁷⁵ See *id.*

²⁷⁶ See *id.*

²⁷⁷ See *Conatzer*, 95 F. App'x at 278.

²⁷⁸ See *id.*

²⁷⁹ See *id.*

²⁸⁰ See *Morgan*, 536 U.S. at 115; *Alfano*, 294 F.3d at 374; *Indest*, 164 F.3d at 264; *supra* notes 80–117, 160–191 and accompanying text.

²⁸¹ See *Conatzer*, 95 F. App'x at 278.

²⁸² See *id.*

²⁸³ See *Morgan*, 536 U.S. at 115; *Conatzer*, 95 F. App'x at 278; *supra* notes 168–174 and accompanying text.

²⁸⁴ See *Conatzer*, 95 F. App'x at 281.

²⁸⁵ See *id.*

²⁸⁶ See *id.* at 278, 281; *supra* notes 80–117, 160–191 and accompanying text.

civility code for the workplace.²⁸⁷ Although it seems reasonable not to file a sexual harassment complaint for insignificant occurrences, many courts evaluating the affirmative defense find that such incidents do constitute acts of sexual harassment, at least when followed by further incidents in the future.²⁸⁸

The U.S. District Court for the Eastern District of Missouri, in *Phillips v. Taco Bell Corp.*, engaged in a similar analysis, although in this case the initial incident was more serious than in *Conatzer*.²⁸⁹ In *Phillips*, the first incident occurred when the supervisor squeezed the plaintiff's breasts.²⁹⁰ Three months later, and within a seven-day period, he subjected her to four more incidents of harassment.²⁹¹ Two days after the fourth incident, the plaintiff reported the conduct to her employer.²⁹² Although the initial incident was serious, the victim had no reason to suspect that the conduct would be repeated.²⁹³ She may have had a multitude of reasons for deciding not to file a formal complaint in response.²⁹⁴ For three months, it would have appeared that the first incident was nothing more than an isolated occurrence.²⁹⁵

Then, three months later, the harassment resurfaced when the supervisor subjected the victim to four incidents of harassment in a seven-day period.²⁹⁶ She reported the conduct to her employer two days after the last incident.²⁹⁷ The court looked at the date of the initial incident and the date the plaintiff made the report and concluded that a delay of over three months was unreasonable.²⁹⁸ In making this calculation, the court presupposed that the initial incident and the four incidents occurring three months later were all part of the same pattern of harassment.²⁹⁹ What if the first incident had occurred one year earlier? Or five years?

²⁸⁷ See *Faragher*, 524 U.S. at 808; *supra* notes 80–117, 160–191 and accompanying text.

²⁸⁸ See *Conatzer*, 95 F. App'x at 278; *Phillips*, 83 F. Supp. 2d at 1033–34; *supra* notes 80–117, 160–191 and accompanying text.

²⁸⁹ See *Conatzer*, 95 F. App'x at 278; *Phillips*, 83 F. Supp. 2d at 1033; *supra* notes 160–174 and accompanying text.

²⁹⁰ 83 F. Supp. 2d at 1033.

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ See *id.*

²⁹⁴ See, e.g., *Noviello*, 398 F.3d at 82, 98; *Hanna*, 212 F. Supp. 2d at 1069; *Pereira*, 902 F. Supp. at 1099, 1100–01; *supra* notes 160–167 and accompanying text.

²⁹⁵ See *Phillips*, 83 F. Supp. 2d at 1033.

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ See *id.* at 1034.

²⁹⁹ See *id.* at 1033–34.

C. *Although Courts Are Unduly Strict When Dealing with Plaintiffs,
They Show Leniency to Employers*

Lower federal courts hold sexual harassment victims and employers to different standards of "reasonableness."³⁰⁰ When analyzing the affirmative defense, courts hold plaintiffs to a strict standard of reasonable conduct while allowing employers to engage in quite unreasonable practices.³⁰¹ In fact, many courts imply that the plaintiff has the burden to refute a presumption in favor of the employer when evaluating the employer's affirmative defense.³⁰²

In *Wyatt v. Hunt Plywood Co.*, the court effectively found the plaintiff at fault for the employer's unsatisfactory response.³⁰³ After the plaintiff's immediate supervisor began harassing her, she promptly complained to the supervisor's superior, but despite her complaints, the harassment persisted.³⁰⁴ Instead of remedying the problem, the superior himself eventually subjected the plaintiff to sexual advances and harassment.³⁰⁵ The court found that the plaintiff's failure to report either harasser's behavior to an additional supervisor was unreasonable.³⁰⁶ Even though the plaintiff reported the first supervisor's conduct to an appropriate person within the company, the court found that she needed to report it again because the person to whom she complained was ineffective in remedying the problem.³⁰⁷ The court concluded that any harassment occurring after the victim realized the superior was ineffective in dealing with the complaint could not survive a motion for summary judgment because the plaintiff had

³⁰⁰ See *supra* notes 80-117, 160-212 and accompanying text.

³⁰¹ See *supra* notes 160-212 and accompanying text.

³⁰² See, e.g., *Faragher*, 524 U.S. at 807-08; *Ellerth*, 524 U.S. at 765 (stating that the existence of an anti-harassment policy with a complaint procedure is not necessary in every instance as a matter of law, and proof that an employee failed to use any complaint procedure provided by the employer will normally suffice to satisfy the employer's burden to show that an employee failed to fulfill the obligation of reasonable care to avoid harm); *Wyatt*, 297 F.3d at 407-08, 413 (finding that once it became clear that the supervisor was ineffective in dealing with the harassment, the plaintiff's failure to report the harassment to a different supervisor was unreasonable); *supra* notes 160-212 and accompanying text. The *Wyatt* court also found that the employer's sexual harassment policy and its implementation were more than adequate, even though the plaintiff had to report the harassment multiple times, was sexually harassed by the supervisor to whom she complained, and the employer intentionally omitted the most serious incident to downplay the harassment when a formal report was finally completed. 297 F.3d at 407-08, 413.

³⁰³ See 297 F.3d at 413.

³⁰⁴ See *id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.*

³⁰⁷ *Id.*

acted unreasonably.³⁰⁸ Instead of holding the employer liable for creating an ineffective complaint procedure, the court found that the victim had a responsibility to keep reporting the harassment until she could find someone who would take her complaint seriously.³⁰⁹ Although the victim promptly reported the harassment, only to be sexually harassed by the person to whom she had complained, the court found that *she* had acted unreasonably, not the employer.³¹⁰

Conversely, courts hold employers to a low standard of reasonableness, even when they act quite unreasonably.³¹¹ In *Saidu-Kamara v. Parkway Corp.*, the plaintiff experienced various forms of harassment throughout her employment.³¹² Although she repeatedly reported these incidents, her employer took no action in response.³¹³ The court stated that the plaintiff had failed to demonstrate sufficiently severe or pervasive harassment, and granted the employer's motion for summary judgment.³¹⁴ In a case such as this, a victim could only force the employer to act if the harassment finally became severe or pervasive.³¹⁵ Only then would the court potentially grant relief.³¹⁶ Otherwise, she must either accept the harassment and the fact that her employer has no duty to end it, or quit her job.³¹⁷ Allowing employers to ignore reports of harassment like this sets a troubling precedent.³¹⁸ The courts are conveying the message that employers have no obligation to respond to complaints of harassment unless the harassment is of the magnitude found in the actionable cases set out above—that is, a high level of severity or pervasiveness, and, in some

³⁰⁸ *Wyatt*, 297 F.3d at 413.

³⁰⁹ *See id.*

³¹⁰ *See id.*

³¹¹ *See Saidu-Kamara*, 155 F. Supp. 2d at 438; *supra* notes 193–212 and accompanying text.

³¹² 155 F. Supp. 2d at 438.

³¹³ *Id.*

³¹⁴ *Id.* at 440.

³¹⁵ *See Faragher*, 524 U.S. at 807; *Saidu-Kamara*, 155 F. Supp. 2d at 440; *supra* notes 80–212 and accompanying text.

³¹⁶ *See Faragher*, 524 U.S. at 807; *Saidu-Kamara*, 155 F. Supp. 2d at 440; *supra* notes 80–212 and accompanying text.

³¹⁷ *See Faragher*, 524 U.S. at 807; *Saidu-Kamara*, 155 F. Supp. 2d at 440; *supra* notes 80–212 and accompanying text.

³¹⁸ *See Faragher*, 524 U.S. at 807; *Saidu-Kamara*, 155 F. Supp. 2d at 440; *supra* notes 193–212 and accompanying text.

cases, more abusive than physical groping of intimate body parts and sexual assaults.³¹⁹

Admittedly, it is not desirable to have courts require employers to respond to complaints of truly trivial harassment or, in the words of the Supreme Court, "the ordinary tribulations of the workplace, such as the sporadic use of abusive language, gender-related jokes, and occasional teasing."³²⁰ It should be just as undesirable to require victims to report these incidents.³²¹ If employers are only required to respond to actionable harassment, employees should be held to the same standard.³²² An employee must report every instance of harassment to preserve a cause of action, while the employer need not respond.³²³ The legal obligations of employees and employers should be placed on equal footing.³²⁴ If an employer is only required to respond to an actionable environment, then an employee should only be required to report actionable harassment.³²⁵

D. *Leveling the Field: Placing Equal Obligations on Employees and Employers*

Courts should require hostile work environment victims to report sexual harassment only once it becomes severe or pervasive.³²⁶ This

³¹⁹ See *Faragher*, 524 U.S. at 807; *McPherson v. City of Waukegan*, 379 F.3d 430, 439 (7th Cir. 2004); *Wilson v. Chrysler Corp.*, 172 F.3d 500, 511 (7th Cir. 1999); *Saidu-Kamara*, 155 F. Supp. 2d at 440; *supra* notes 80–212 and accompanying text.

³²⁰ See *Faragher*, 524 U.S. at 788 (quoting BARBARA LINDEMANN & DAVID KADUE, *SEXUAL HARASSMENT IN EMPLOYMENT LAW* 175 (1992)); *supra* notes 55–212 and accompanying text.

³²¹ See *Faragher*, 524 U.S. at 788; *supra* notes 55–212 and accompanying text.

³²² See *Faragher*, 524 U.S. at 807; *Conatzer*, 95 F. App'x at 281 (finding that the harassment was comprised of isolated incidents and, therefore, was non-actionable, but also finding that the plaintiff unreasonably failed to report the conduct); *Slay v. Glickman*, 137 F. Supp. 2d 743, 751–52 (S.D. Miss. 2001) (finding that plaintiff unreasonably failed to report the harassment, but also finding that a reasonable person would not conclude that the complained-of harassment would constitute a hostile work environment); *supra* notes 55–212 and accompanying text.

³²³ See *Faragher*, 524 U.S. at 807; *Conatzer*, 95 F. App'x at 281; *Saidu-Kamara*, 155 F. Supp. 2d at 438, 440; *Slay*, 137 F. Supp. 2d at 751–52; *supra* notes 55–212 and accompanying text.

³²⁴ See *Faragher*, 524 U.S. at 807; *Conatzer*, 95 F. App'x at 281; *Saidu-Kamara*, 155 F. Supp. 2d at 438, 440; *Slay*, 137 F. Supp. 2d at 751–52; *supra* notes 55–212 and accompanying text.

³²⁵ See *Faragher*, 524 U.S. at 807; *Conatzer*, 95 F. App'x at 281; *Saidu-Kamara*, 155 F. Supp. 2d at 438, 440; *Slay*, 137 F. Supp. 2d at 751–52; *supra* notes 55–212 and accompanying text.

³²⁶ See *Faragher*, 524 U.S. at 807–08 (stating that demonstration that the plaintiff unreasonably failed to use any complaint procedure provided by the employer will normally suffice to satisfy the employer's burden, but that an employer will be subject to vicarious liability for an "actionable" hostile environment); *Ellerth*, 524 U.S. at 765 (stating that demonstration that the plaintiff unreasonably failed to use any complaint procedure provided by the employer will normally suffice to satisfy the employer's burden); *Madray v.*

rule serves three purposes.³²⁷ First, the victim is not required to report harassment if it is not truly serious enough to upset her.³²⁸ She would only need to file a report when a severe incident occurs or minor incidents go on so long as to become sufficiently pervasive.³²⁹ Second, this standard would be truer to the requirements of the affirmative defense.³³⁰ The employer would still avoid liability if it took appropriate action to prevent and correct promptly any sexually harassing behavior of which it was aware.³³¹ Under this proposed standard, the employer could better judge the necessity for a response because the reported behavior would be more serious.³³² The employer would still only be required to act once it had notice of the harassment.³³³ Third, this standard would place the plaintiff's prima facie case and the employer's affirmative defense on equal footing.³³⁴ Under this approach, the plaintiff would have an actionable claim, and the employer would have an affirmative defense.³³⁵

Publix Supermarkets, Inc., 208 F.3d 1290, 1300 (11th Cir. 2000) (noting that, once an employer has promulgated an effective anti-harassment policy, it is then incumbent upon the employees to utilize the procedural mechanisms established); *supra* notes 55–212 and accompanying text.

³²⁷ See *infra* notes 328–335 and accompanying text.

³²⁸ See *Faragher*, 524 U.S. at 807–08; *Ellerth*, 524 U.S. at 765; *Madray*, 208 F.3d at 1300; *supra* notes 55–212 and accompanying text.

³²⁹ See *Faragher*, 524 U.S. at 807–08; *Ellerth*, 524 U.S. at 765; *Alfano*, 294 F.3d at 374 (stating that a plaintiff must demonstrate either that a single incident was extraordinarily severe, or that a series of incidents was sufficiently continuous and concerted); *Madray*, 208 F.3d at 1300; *Indest*, 164 F.3d at 264 (stating that actionable cases have involved patterns or allegations of extensive, long-lasting, unredressed, and uninhibited sexual threats or conduct that permeated the plaintiffs' work environment); *supra* notes 55–212 and accompanying text.

³³⁰ See *Faragher*, 524 U.S. at 807 (concluding that to assert its affirmative defense an employer must prove that (1) it exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and (2) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm); *Ellerth*, 524 U.S. at 765; *supra* notes 55–212 and accompanying text.

³³¹ See *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765; *supra* notes 55–212 and accompanying text.

³³² See *Faragher*, 524 U.S. at 807–08 (stating that an employer will be subject to vicarious liability for an "actionable" hostile work environment); *Alfano*, 294 F.3d at 374; *Indest*, 164 F.3d at 264; *supra* notes 55–212 and accompanying text.

³³³ See *Faragher*, 524 U.S. at 807–08; *Ellerth*, 524 U.S. at 765; *Madray*, 208 F.3d at 1300; *supra* notes 55–212 and accompanying text.

³³⁴ See *Faragher*, 524 U.S. at 788; *Conatzer*, 95 F. App'x at 278; *Alfano*, 294 F.3d at 374; *Indest*, 164 F.3d at 264; *Phillips*, 83 F. Supp. 2d at 1033–34; *supra* notes 55–212 and accompanying text.

³³⁵ See *Faragher*, 524 U.S. at 788; *Conatzer*, 95 F. App'x at 278; *Alfano*, 294 F.3d at 374; *Indest*, 164 F.3d at 264; *Phillips*, 83 F. Supp. 2d at 1033–34; *supra* notes 55–212 and accompanying text.

This standard is much more consistent than the current system.³³⁶ Presently, the courts are faced with plaintiffs who cannot present a prima facie case and also who cannot defeat the employer's affirmative defense.³³⁷ An employer is not legally required to do anything until the harassment becomes actionable.³³⁸ If an employer is only required to respond to actionable harassment, then an employee should only be required to report actionable harassment.³³⁹

This proposed standard would also make the courts' analysis of a plaintiff's prima facie case and the employer's affirmative defense more consistent with each other.³⁴⁰ Under the present standards, many courts conclude that a plaintiff suffered only isolated or trivial harassment—that is, non-actionable—while also concluding that the plaintiff was unreasonable for failing to report it.³⁴¹ When evaluating the plaintiff's prima facie case, such courts find that the harassment was insignificant, some even opining that the victim was overly sensitive for perceiving such conduct as offensive.³⁴² When evaluating the affirmative defense, however, the same incident of harassment could be the decisive factor in absolving the employer of liability because the court may conclude that any reasonable person would have promptly reported the incident.³⁴³ Under the proposed standard, the courts' reasoning would be more consistent and equitable.³⁴⁴ If the court finds that the harassment was sufficiently severe or pervasive to be actionable, then it could logically conclude that the plaintiff was

³³⁶ See *Faragher*, 524 U.S. at 788; *Conatzer*, 95 F. App'x at 278; *Alfano*, 294 F.3d at 374; *Indest*, 164 F.3d at 264; *Phillips*, 83 F. Supp. 2d at 1033-34; *supra* notes 55-212 and accompanying text.

³³⁷ See, e.g., *Faragher*, 524 U.S. at 788; *Conatzer*, 95 F. App'x at 278; *Alfano*, 294 F.3d at 374; *Indest*, 164 F.3d at 264; *Phillips*, 83 F. Supp. 2d at 1033-34; *supra* notes 80-117, 160-191 and accompanying text.

³³⁸ See *Faragher*, 524 U.S. at 788; *supra* notes 193-212 and accompanying text.

³³⁹ See *Faragher*, 524 U.S. at 788; *supra* notes 80-117, 160-191 and accompanying text.

³⁴⁰ See *Conatzer*, 95 F. App'x at 278 (finding that the plaintiff unreasonably failed to report harassment even though it was no more than isolated incidents, and therefore, non-actionable); *DeAngelis*, 51 F.3d at 593; *Baskerville*, 50 F.3d at 430-31; *Stay*, 137 F. Supp. 2d at 751-52 (finding that the plaintiff unreasonably failed to report the harassment while also finding that a reasonable person would not consider the complained-of harassment to constitute a hostile work environment); *Phillips*, 83 F. Supp. 2d at 1033-34; *Hosey*, 1996 WL 414057, at *1-2; *supra* notes 80-117, 160-191 and accompanying text.

³⁴¹ See *supra* notes 80-117, 160-191 and accompanying text.

³⁴² See *DeAngelis*, 51 F.3d at 593; *Baskerville*, 50 F.3d at 430-31; *supra* notes 80-117 and accompanying text.

³⁴³ See *supra* notes 160-191 and accompanying text.

³⁴⁴ See *supra* notes 80-117, 160-191 and accompanying text.

unreasonable in failing to report it.³⁴⁵ If the harassment was not severe or pervasive, however, then it is irrational to require the victim to report what is non-actionable.³⁴⁶ Under the proposed standard, plaintiffs and employers are treated equally.³⁴⁷

Although victims of sexual harassment should be encouraged to report any incidents that they deem serious or that could lead to more severe incidents, they should only have a legal obligation to report actionable, and thus "severe or pervasive," harassment.³⁴⁸ It is inappropriate to require victims to report every trivial incident of annoying behavior simply to ensure they can retain a cause of action in the future.³⁴⁹ This inconsistent legal standard is unduly burdensome for victims of sexual harassment.³⁵⁰ It is not good for workplace morale or workplace relations.³⁵¹ And it creates additional administrative costs for employers because they must investigate complaints that employees may not otherwise have chosen to file unless required to do so.³⁵² Therefore, lower federal courts should abandon the current standards for hostile work environment sexual harassment cases in favor of an approach that is more consistent, logical, and evenhanded.³⁵³

CONCLUSION

Hostile work environment sexual harassment has become a recurrent problem in this country. The standards developed by the U.S. Supreme Court for handling this issue have been ineffective because, for the most part, these standards unduly favor employers over victims. The leniency that lower federal courts show towards employers has led them to engage in liability-avoidance techniques rather than harassment-prevention practices. Conversely, the strict standards to which plaintiff-employees are held make it extremely difficult to establish a *prima facie* case. Even if a plaintiff establishes an actionable claim, she may still find it challenging to prevail because many courts effectively require a plaintiff to refute a presumption in favor of the employer on the employer's own affirmative defense.

³⁴⁵ See *supra* notes 80–117, 160–191 and accompanying text.

³⁴⁶ See *supra* notes 80–117, 160–191 and accompanying text.

³⁴⁷ See *supra* notes 80–117, 160–191 and accompanying text.

³⁴⁸ See *supra* notes 55–212 and accompanying text.

³⁴⁹ See *supra* notes 55–212 and accompanying text.

³⁵⁰ See *supra* notes 55–212 and accompanying text.

³⁵¹ See *supra* notes 55–212 and accompanying text.

³⁵² See *supra* notes 55–212 and accompanying text.

³⁵³ See *supra* notes 55–212 and accompanying text.

First, lower federal courts require an unreasonably high level of severity or pervasiveness to establish an actionable claim. Federal courts have essentially required that the conduct either be extremely severe or be extensive, continuous, and long-lasting. Second, courts give plaintiffs a narrow window in which to report harassment. Without regard to the many reasons victims of sexual harassment may wish not to report isolated or trivial conduct, courts have found it unreasonable for victims to delay even a few weeks before filing a formal report with the employer. Third, even in cases where harassment is promptly reported, courts show leniency to employers in evaluating the reasonableness of their response. If the complained-of harassment was not severe or pervasive, the courts do not require an employer to make any response at all, and in cases where the harassment was actionable, employers are not required to end the harassment. These practices have tipped the scales heavily in favor of employers.

Given the disparity in resources available to most employers in comparison to employees, it is unfair to give them an additional advantage in court. It is unreasonable to expect a victim of sexual harassment to know which types of conduct are actionable and which are not. Likewise, it is unlikely that a victim is aware that if she waits more than a couple of weeks to report an incident, she will lose her cause of action, if she ever had one. Because victims are usually unaware of the legal standards, courts should show them leniency, rather than showing it to employers that commonly deal with the legal issues surrounding sexual harassment.

If victims of sexual harassment were only required to report actionable conduct, it would be more reasonable to hold them accountable for failing to bring it to the employer's attention. It is understandable that victims are more likely to report serious incidents than trivial ones. Furthermore, only requiring victims to report actionable harassment places their legal claims on the same footing as the employer's affirmative defense. The plaintiff will win or lose on her prima facie case based on whether the harassment was sufficiently severe or pervasive. The employer will win or lose on its affirmative defense based on whether the victim reported the harassment and the reasonableness of the employer's response. This is more consistent than the current standard, under which courts may find that the plaintiff failed to establish a prima facie case and also failed to get past the employer's affirmative defense by failing to report what was not actionable.

A standard that provides that sexual harassment must either be extremely severe or continue long enough to be pervasive, but then

also provides that a victim must promptly report the conduct following the first incident—whether actionable or not—is contradictory. Under the proposed standard, by contrast, the victim must report the conduct only if (1) the conduct is extremely severe and therefore actionable, or (2) the conduct continues long enough to be pervasive and is therefore actionable. This standard is both more consistent with the principles behind the hostile work environment cause of action and more equitable.

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