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Sexual Harassment Litigation with a Dose of Reality

Diane P. Wood[†]

Title VII of the Civil Rights Act of 1964,¹ which prohibits discrimination on the basis of “race, color, religion, *sex*, or national origin”² has been around for 55 years. One might think that this was long enough to work out the kinks and ensure that its protections are readily available to any covered person who needs them. But at least parts of the statute are still works-in-progress. Prominent among the latter group is the prohibition against “discriminat[ion] against any individual with respect to his [sic] compensation, terms, conditions, or privileges of employment, because of such individual’s . . . *sex*.”³ There is much one could say about this, starting with the question “what does the word ‘sex’ mean here?”⁴ But that topic, important though it is, deserves its own Symposium.⁵ The focus of today’s discussion is the #MeToo Movement. If there is any message to be taken from the explosive growth of that hashtag, it is that there is still a great deal of work to be done if the goal is to eliminate sexual harassment and related abusive behaviors.

Why is that? As I just said, statutory protections against sex discrimination in the workplace have existed for more than half a century,

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¹ 42 U.S.C. § 2000e *et seq.* (2012).

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

³ *Id.*

⁴ See *Hively v. Ivy Tech Comm. College of Ind.*, 853 F.3d 339, 340 (7th Cir. 2017) (en banc) (construing the word “sex” to encompass classifications based on sexual orientation); *Whitaker v. Kenosha Unified Schl. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1038 (7th Cir. 2017) (applying Title IX protections to transgender high school student on sex-stereotyping theory).

⁶ See, e.g., *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 121 (2d Cir. 2018) (en banc) (agreeing with *Hively*); *Wittmer v. Phillips 66 Co.*, 915 F.3d 328, 330 (5th Cir. 2019) (disagreeing with *Hively*).

and there are comparable protections in other specialized settings, including housing,⁶ educational institutions,⁷ and public benefits.⁸ The flood of stories that has emerged in the wake of the #MeToo Movement, however, strongly indicates that those legal rules are not doing the job. The question is why not? And in particular, why have the laws addressing #MeToo in the workplace not been a match for the problem? This inquiry sheds light both on changes that may be especially useful, and on the competing interests that will have to be addressed.

Let's start with the basics: what does *discrimination* on the basis of sex mean? Does it mean classifying one's employees by biological gender and paying the males more money? Certainly yes, but that isn't all it means. Does it mean excluding one sex on the basis of characteristics unique to it—pregnancy for women, susceptibility to prostate cancer for men, and so on? This is a more difficult question in some instances, but Congress has answered it in others. For example, the Pregnancy Discrimination Act of 1978⁹ clarifies that the terms “because of sex” or “on the basis of sex” include actions taken on the basis of pregnancy, childbirth, or related medical conditions.¹⁰ For issues covered by that statute, at least, the answer to the second question is also yes. But what about sexual harassment?

For more than two decades after Title VII was enacted, it seems fair to say that very few people imagined that the statute addressed sexual harassment. Some, however, realized that few things affect a person's “terms and conditions of employment” more than sexual harassment. In 1979, Catharine MacKinnon published her groundbreaking book entitled simply “Sexual Harassment of Working Women: A Case of Sex Discrimination.”¹¹ The book revolutionized thinking in this area. In what must be record time for a legal scholar, MacKinnon's concept made its way up to the Supreme Court in 1986, in a case called *Meritor Savings Bank, FSB v. Vinson*.¹² There, in an opinion by then-Associate

⁶ Fair Housing Act of 1968, Pub. L. No. 90-284, 82 Stat. 81 (codified at 42 U.S.C. § 3601 *et seq.*).

⁷ Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 373 (codified as amended at 20 U.S.C. § 1681 *et seq.*).

⁸ *See, e.g.*, *Califano v. Goldfarb*, 430 U.S. 199, 223 (1977) (finding that gender-based discrimination in the criteria for awarding social security survivor benefits violated the Constitution's due process and equal protection guarantees); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 642–44 (1975) (striking down as unlawful sex discrimination in violation of equal protection a provision basing social security benefits based only on the earnings of a deceased husband, and not on earnings of a deceased wife).

⁹ Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e-(k)).

¹⁰ 42 U.S.C. § 2000e(k).

¹¹ CATHERINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979).

¹² 477 U.S. 57 (1986).

Justice William Rehnquist, the Court recognized that sexual harassment is covered by Title VII. In so doing, it settled several important questions:

- When a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor discriminates on the basis of sex.¹³
- The language of Title VII is not limited to economic or tangible discrimination. The phrase "terms, conditions, or privileges of employment" evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment.¹⁴
- Sexual misconduct constitutes prohibited sexual harassment, whether or not it is directly linked to the grant or denial of an economic quid pro quo, where such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.¹⁵
- A plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.¹⁶
- For sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.¹⁷
- The fact that sex-related conduct is "voluntary," in the sense that the complainant has not been forced to participate against her will, is not a defense to a sexual-harassment suit brought under Title VII. The gravamen of any sexual harassment claim is that the alleged sexual advances were "unwelcome."¹⁸

The Supreme Court has reaffirmed these rulings over the years. In 1993, in the case of *Harris v. Forklift Systems, Inc.*,¹⁹ it held that har-

¹³ *Id.* at 64.

¹⁴ *Id.*

¹⁵ *Id.* at 65.

¹⁶ *Id.* at 66.

¹⁷ *Id.* at 67.

¹⁸ *Id.* at 68.

¹⁹ 510 U.S. 17 (1993) (former employee brought suit against her employer, arguing the company president's gender-based insults and innuendos created an abusive work environment. While the lower court held that the comments were not so severe as to affect her psychological well-being nor to cause her injury, the Supreme Court ultimately held "when the workplace is permeated with 'discriminatory intimidation, ridicule, and insult' that is 'sufficiently severe or pervasive to

assment need not reach the level of tangible psychological injury in order to be actionable.²⁰ In *Oncale v. Sundowner Offshore Services, Inc.*,²¹ it recognized that harassment at the hands of a person of the same sex as the victim falls within the statute.²² In the twin cases of *Burlington Industries, Inc. v. Ellerth*²³ and *Faragher v. City of Boca Raton*,²⁴ it set forth the rules for linking a supervisor or other actor's conduct to the employer; those rules in turn establish when the employer will be vicariously liable for misconduct. It is worth stressing in this connection that the link to the ultimate employer is critical—indeed, it is outcome-determinative for purposes of a Title VII action. Courts have held that Title VII creates a remedy *only* against the “employer.”²⁵ From that, they infer that the offender, whether a supervisor, a fellow employee, a customer, or another workplace participant, is *not* individually liable under the statute.²⁶ Unless, therefore, a state-law theory exists, or another federal statute is available (often true in racial discrimination and harassment cases),²⁷ the plaintiff can proceed only indirectly against the offending party, by pursuing an action against the employer.

The need to link the offending behavior to the employer is thus one of the hurdles that a victim of sexual harassment must surmount. But it is far from the only one. Most cases do not make it all the way up to the Supreme Court, and the Court chooses only those in which a broader point needs to be made. It is the district courts and the courts of appeals that have the responsibility of sifting through the filed cases and deciding at retail who wins and who loses. At that level, it becomes apparent that even blatant cases of sexual harassment frequently fail.

alter the conditions of the victim's employment and create an abusive working environment,' Title VII is violated”).

²⁰ *Id.* at 21–22.

²¹ 523 U.S. 75 (1998) (the male plaintiff quit and brought a sexual harassment claim against his employer after male crewmen on the oil rig where he worked subjected him to sexual humiliation, sexual assault, and threats of rape).

²² *Id.* at 81–82.

²³ 524 U.S. 742, 765 (1998) (holding that an employer is vicariously liable for harassment perpetrated by an employee with higher authority over the victim, and noting that this liability is strict if there are tangible job consequences, but if there are no tangible job consequences, the employer may avail itself of an affirmative defense, which requires a showing that the employer exercised reasonable care to “prevent and correct promptly any sexually harassing behavior” and that the employee “unreasonably failed to take advantage of any preventive or corrective opportunities provided”).

²⁴ 524 U.S. 775, 780 (1998) (holding that, in cases not involving a tangible employment action, an employer may raise an affirmative defense that “looks to the reasonableness of employer's conduct in seeking to prevent and correct harassing conduct and to the reasonableness of employee's conduct in seeking to avoid harm”).

²⁵ *See, e.g.*, *Williams v. Banning*, 72 F.3d 552, 555 (7th Cir. 1995); *Fantini v. Salem State Coll.*, 557 F.3d 22, 29 (1st Cir. 2009).

²⁶ *Id.*

²⁷ *See, e.g.*, 42 U.S.C. § 1981 (2012).

This paper looks at those cases and asks what went wrong and whether changes in the law are necessary, or if on the other hand the plaintiffs' failures occur as a result of competing policies. Importantly, because more than 98% of all civil litigation is resolved short of a trial, the facts in the cases discussed here are generally not contested: at the motion-to-dismiss stage, the court accepts the facts and inferences in favor of the opponent of the motion;²⁸ at the summary judgment stage, the court reviews the proffered evidence in the light most favorable to the plaintiff (or more accurately, the non-moving party, as plaintiff normally is in an employment-discrimination case).²⁹ Yet even with this thumb on the scale, plaintiffs lose an impressive percentage of cases. Sometimes they lose because the court concludes that the described conduct is not severe enough, or not pervasive enough, to affect the terms and conditions of employment.³⁰ Sometimes, based on the same notion, courts actually overturn jury verdicts for plaintiffs.³¹ In other instances, plaintiffs lose because they do not adequately inform the employer of the abuse that is going on.³² In another line of cases, the court does not see the connection between the harassing acts and the plaintiff's sex.³³ Plaintiffs lose notwithstanding facts that strongly suggest harassment, if they make a mistake and choose the wrong legal theory—for example, if they complain to the Equal Employment Opportunity Commission about sex discrimination, but the facts are later judged to be a better fit for unlawful retaliation.³⁴ In one egregious instance described below, the EEOC took over a complaint and secured a victory on liability, but the battle then shifted to punitive damages. A jury thought that these damages were appropriate, but the court of appeals overturned the

²⁸ See, e.g., *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (“When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.”); *Acosta v. Jani-King of Okla., Inc.*, 905 F.3d 1156, 1158 (10th Cir. 2018); *Progressive Credit Union v. City of New York*, 889 F.3d 40, 48 (2d Cir. 2018).

²⁹ See *Scott v. Harris*, 550 U.S. 372, 380 (2007); *Matsushita Elec. Indus. Co., v. Zenith Radio Corp.*, 475 U.S. 574, 588–89 (1986); *Hutchison v. Fitzgerald Equip. Co.*, 910 F.3d 1016, 1021–22 (7th Cir. 2018).

³⁰ See, e.g., *Saxton v. Am. Tel. & Tel. Co.*, 10 F.3d 526, 528 (7th Cir. 1993) (upper thigh rubbing, unwanted kissing, leaping out from behind bush); *Hilt-Dyson v. City of Chicago*, 282 F.3d 456, 463–64 (7th Cir. 2002) (leering, touching); *Bilal v. Rotec Indus.*, 326 Fed. App'x 949, 952–53 (7th Cir. 2009) (inviting sex, sticking chocolate into plaintiff's mouth). *But see* *Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 801 (7th Cir. 2000) (overturning a district court that dismissed a case on the ground that the conduct was not sufficiently severe).

³¹ See, e.g., *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 432–33 (7th Cir. 1995) (overturning a district court ruling in favor of the plaintiff on the grounds that the plaintiff's alleged harasser neither touch her nor asked her to go on a date or have sex with him).

³² See, e.g., *Zimmerman v. Cook Cty. Sheriff's Dept.*, 96 F.3d 1017, 1019 (7th Cir. 1996); *Perry v. Harris Chernin, Inc.*, 126 F.3d 1010, 1014–15 (7th Cir. 1997); *Faragher v. City of Boca Raton*, 524 U.S. 775, 782–83 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 748–49 (1998).

³³ See *Berry v. Delta Airlines, Inc.*, 260 F.3d 803, 810–11 (7th Cir. 2001).

³⁴ See, e.g., *id.* at 809–10.

jury's verdict because it found that the instructions did not give the jury enough latitude to take into account the relevant collective bargaining agreement.

Other problems lie behind these observable results. As the law has developed, in all but a small number of cases nothing can or will happen unless the victim reports the abuse or harassment in a timely and complete manner. But reporting is often difficult, both psychologically and practically. Reporting mechanisms and confidentiality measures are notoriously leaky. Victims fear either ineffectual responses or retaliation. Victims also fear, with some warrant, that they will not be believed or that the seriousness of the problem will not be appreciated. In those instances, the victim might wind up as the party paying a price for the offensive conduct, through a transfer to a less desirable location, a move to a different job, or in the most extreme cases, even dismissal. Investigations of complaints may be cursory, and their results may rest on credibility determinations that are themselves questionable.

To address these and related problems, changes in the law may be necessary. One area ripe for re-examination is the distinction the Supreme Court has recognized between supervisory harassment and fellow-employee or customer harassment. Another area where greater scrutiny would help is that of preventive measures and remedies. It is, or at least should be, shocking that 80% of women report that they have experienced sexual harassment, and many men have also been victimized. That must stop.

A closer look at some cases in this area will drive these points home. The specific examples presented here come from the Seventh Circuit; in addition, I discuss the preliminary results of a broader survey of the cases that have reached the federal courts of appeals since *Meritor*.³⁵ One might view the Seventh Circuit examples as the legal version of the popular TV show "Mythbusters." In the spirit of that show, these cases debunk the idea that companies and individuals are routinely found liable for sexual harassment based on innocuous or misunderstood behavior (e.g., "you look nice today," or "let me hold the door for you"). The reality is otherwise: the innocuous actions never get litigated, or if they do, they are quickly thrown out of court, while even truly awful actions frequently fall outside the scope of the law as a result of one or more of the doctrines mentioned earlier. It is worth considering whether those doctrines are performing a valuable function, or if they need to be modified or jettisoned altogether.

The Seventh Circuit cases almost all involve behavior described by the victim of harassment—and accepted by the court because the appeal

³⁵ 477 U.S. 57 (1986).

is from a motion to dismiss or the grant of summary judgment—that was *not* enough to allow the victim to go forward with her case. For want of a better organizational mechanism, they are presented in chronological order.

The first example is the case of *Saxton v. American Telephone & Telegraph Co.*³⁶ Plaintiff Saxton began working for AT&T's Design Engineering Staff in 1986.³⁷ Shortly after she joined the company, she encountered a supervisor in the International Division named Jerome Richardson.³⁸ The two struck up a casual acquaintance and discussed the question whether Saxton might transfer to Richardson's group.³⁹ Richardson boasted that he could bring Saxton into his group with a job classification (called MTS) that typically required a bachelor of science degree in engineering or a related field from a reputable university, even though Saxton had only a bachelor of arts degree in computer science from a lesser-known college.⁴⁰ Saxton's supervisor told her that the supervisor doubted that Saxton could be transferred into the MTS job.⁴¹ Saxton, however, decided to give the transfer a try; she accepted Richardson's offer and joined his group in January 1988.⁴² The former supervisor's qualms were vindicated when, in February or March, Richardson informed Saxton that she actually did not have the MTS job, but instead had a lower classification.⁴³ Richardson assured her that the opportunity for the promotion was still available, if she performed satisfactorily. As far as the record shows, however, "she never received the MTS promotion."⁴⁴

Then matters took a disturbing turn. In April 1988, Richardson suggested that Saxton and he should meet for drinks after work.⁴⁵ Saxton accepted, hoping to discuss her dissatisfaction with her initial lab assignment.⁴⁶ The two spent a couple of hours at a suburban nightclub and then drove to a jazz club in Chicago.⁴⁷ As the court's opinion recounts, "[w]hile they were at the jazz club, Richardson placed his hand on Saxton's leg above the knee several times and once he rubbed his

³⁶ 10 F.3d 526 (7th Cir. 1993).

³⁷ *Id.* at 528.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Saxton v. Am. Tel. & Tel. Co.*, 10 F.3d 526, 528 (7th Cir. 1993).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

hand along her upper thigh.”⁴⁸ Saxton rebuffed his advances and asked him to stop. She warned him that this behavior could lead to trouble.⁴⁹ Richardson, however, was not deterred: on the way out of the club, he pulled Saxton aside and kissed her. She pushed him away after two or three seconds.⁵⁰ Once again, Saxton asked him not to repeat his advances, and he seemingly acquiesced.⁵¹ The next morning at work, Saxton reiterated her request that he cease the sexual advances. At the time, Richardson apologized and assured her that he would respect her wishes.⁵²

Richardson did not keep his word, as one can see from the court’s account of the case:

Approximately three weeks later, Richardson invited Saxton to lunch with the stated purpose of discussing work-related matters. Afterwards, Richardson was driving Saxton back to her car when he took a detour to an arboretum, stopped the car, and got out to take a walk. Saxton decided to follow suit and walk off on her own. As she did so, Richardson suddenly “lurched” at her from behind some bushes, as if to grab her. Saxton ran several feet in order to avoid Richardson’s sudden motion. She again reminded Richardson that his conduct was inappropriate, causing him to become sullen. They then resumed the drive back to Saxton’s car without further incident.⁵³

After the arboretum incident, Richardson ceased any sexual advances toward Saxton.⁵⁴ Saxton then sued for sexual harassment, but her case was dismissed. Here is the court’s explanation for its result: “Although Richardson’s conduct was undoubtedly inappropriate, it was not so severe or pervasive as to create an objectively hostile working environment.”⁵⁵ In addition, the court said, AT&T took adequate remedial steps.⁵⁶

Example number two is *Baskerville v. Culligan International Co.*⁵⁷ This result was, if possible, even less favorable to the claimant, in whose

⁴⁸ *Id.* at 528.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 529.

⁵⁵ *Id.* at 534.

⁵⁶ *Id.* at 535–36.

⁵⁷ 50 F.3d 428 (7th Cir. 1995), *abrogated by* Gates v. Bd. of Educ. of the City of Chicago, 916 F.3d 631, 640 (7th Cir. 2019).

favor a jury had ruled at the trial level, but who lost in the court of appeals.⁵⁸ Baskerville was hired as a secretary in the marketing department of Culligan, a manufacturer of water-treatment products.⁵⁹ Shortly after she joined the company, she was assigned to work for Michael Hall, who had recently been hired to be the Western Regional Manager.⁶⁰ Here are the acts of sexual harassment about which Baskerville was complaining, some of which may seem trivial, others more serious:

- He would call her “pretty girl.”
- When she was wearing a leather skirt, he made an obnoxious sound as she was leaving his office.
- In response to her comment about how hot his office was, he raised his eyebrows and said, “Not until you stepped your foot in here.”
- When the company was broadcasting an announcement over the public address system, Hall said to Baskerville, “You know what that means, don’t you? All pretty girls run around naked.”⁶¹
- He once called Baskerville a “tilly,” a term that he admitted using for all women.
- He told her that his wife had said that he had “better clean up [his] act” and “better think of [Baskerville] as Ms. Anita Hill.”
- He told Baskerville that he left a Christmas party early because he thought he might “lose control” with “so many pretty girls there.”⁶²
- When she complained about cigarette smoke in Hall’s office, he replied “Oh really? Were we dancing, like in a nightclub?”⁶³
- When Baskerville checked to see if Hall had sent his wife a Valentine’s Day card, he responded that he had not. He continued by saying that it was lonely in his hotel room, where he lived alone while awaiting his wife’s move to Chicago, and he had nothing but his pillow for company. At that point, he made a gesture intended to suggest masturbation.⁶⁴

⁵⁸ *Id.* at 430.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

Using a standard that the courts have since rejected, under which actionable harassment occurs only if the workplace becomes “hellish” for the victim,⁶⁵ the court of appeals found as a matter of law that no jury could conclude that these incidents added up to harassment.⁶⁶ In addition, as in *Saxton*, the court was impressed that the company took some steps to protect the victim.⁶⁷ Although one might think that the later disapproval of the “hellish” standard is a step forward, we will see that later cases confirm that it is still necessary to show both subjective and objective offensiveness, and that the latter must be enough to affect terms and conditions of employment.

The facts of the next example, *Zimmerman v. Cook County Sheriff’s Department*,⁶⁸ are more graphic. Michelle Zimmerman was employed as a correctional officer by the Cook County Sheriff’s Department.⁶⁹ In August of 1992 a fellow officer, Salvatore Terranova, launched a campaign of inappropriate sexual remarks and behavior.⁷⁰ For example, he repeatedly referred to his “big dick.”⁷¹ His worst act, however, took place on August 14, “when he placed a zucchini between his legs and thrust it against [Zimmerman]’s buttocks.”⁷² Three days later, she asked her supervisor for a change in work assignment. She did not tie her request directly to Terranova’s offensive sexual conduct; she complained only of “a severe personality conflict at my present job.”⁷³ Her supervisor turned her down the next day without conducting any investigation.⁷⁴ After a brief time during which the Sheriff’s Office separated the two, Zimmerman was reassigned to Terranova’s area.⁷⁵ He picked up where he had left off.⁷⁶ This time, his behavior was even more offensive: the opinion reports that on one occasion, “he grabbed one of her breasts,

⁶⁵ For instance, in *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993), the Supreme Court confirmed that “Title VII comes into play before the harassing conduct leads to a nervous breakdown.” *Id.* at 22. It continued, “[a] discriminatorily abusive work environment, even one that does not seriously affect employees’ psychological well-being, can and often will detract from employees’ job performance, discourage employees from remaining on the job, or keep them from advancing their careers.” *Id.* See also *Swyare v. Fare Foods Corp.*, 911 F.3d 874, 881 (7th Cir. 2018) (“While ‘hellish’ was once the standard, it is no longer. The Supreme Court standard dictates that the discrimination just be only so severe or pervasive so as to affect the terms and conditions of employment. . . . This is a far cry from hellish.”) (citations and quotation marks omitted).

⁶⁶ *Baskerville v. Culligan Int’l Co.*, 50 F.3d 428, 431 (7th Cir. 1995).

⁶⁷ *Id.*

⁶⁸ 96 F.3d 1017 (7th Cir. 1996).

⁶⁹ *Id.* at 1018.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

grabbed and rubbed her buttocks, and grabbed her by her wrists and yanked her arms down, injuring one of her arms.”⁷⁷ The next day, she submitted detailed memoranda concerning these incidents to her superiors.⁷⁸ During their investigation, which exonerated Terranova, they separated the two.⁷⁹ Shortly afterward she went on disability leave and did not return to her job for a year.⁸⁰ The one-year hiatus apparently resolved her remaining workplace problems with Terranova, with whom she had no further contact on the job.⁸¹ She did not, however, acquiesce in his behavior. To the contrary, she filed criminal charges against Terranova. Interestingly, even though he had been exonerated by the Sheriff’s Department, he was convicted of sexual assault.⁸² Nevertheless, Zimmerman lost her civil sexual harassment action.⁸³ The problem this time? Insufficient notice to the employer of the nature of the problem she had with Terranova.⁸⁴

The case of *Perry v. Harris Chernin, Inc.*,⁸⁵ also failed for lack of adequate notice to the employer.⁸⁶ This was an example of less intrusive, but persistent, inappropriate remarks. For instance, about six months into plaintiff Perry’s employment, Jackson commented to her, “You know you want me, don’t you?”⁸⁷ It did not take long for Jackson to escalate his advances. He called Perry to his office a couple of months later on the pretext of discussing her performance.⁸⁸ And that is how the conversation began: Jackson commented on Perry’s absenteeism. But he then said, “By the way, [in] your interview, I saw your breasts. I saw your nipples . . . You wore a low-cut blouse, and I could see your breasts, and I knew your nipples were hard.”⁸⁹ On another occasion, Jackson told Perry that he would “beat [her] with the stick [her] husband used.”⁹⁰ She understood him to be referring to his penis and his desire to have sex with her.⁹¹ Other inappropriate remarks followed, including comments about her waking up next to him in bed, about whether she was a “screamer,” and the observation that she “wore her

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 1019.

⁸⁵ 126 F.3d 1010 (7th Cir. 1997).

⁹² *Id.* at 1011.

⁸⁷ *Id.* at 1011–12.

⁸⁸ *Id.* at 1012.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹¹ *Id.*

clothes well.”⁹² Perry’s effort to sue was blocked by two facts: she never reported any of these comments to anyone at Chernin’s; and Chernin’s had published policies against sexual harassment in the workplace.⁹³

Hostetler v. Quality Dining, Inc.,⁹⁴ the next example, shows that plaintiffs occasionally win. Although the district court had granted summary judgment for the employer, the Seventh Circuit reversed and remanded to allow the case to go forward.⁹⁵ A quick glimpse of those facts explains that ruling. The plaintiff, Hostetler, worked at a Burger King.⁹⁶ She alleged that a fellow supervisory employee at her restaurant grabbed her face one day at work and stuck his tongue down her throat.⁹⁷ He repeated his effort to kiss her the next day.⁹⁸ When she struggled to evade him, he began to unfasten her brassiere, managing to get four out of five snaps undone and threatening to “undo it all the way.”⁹⁹ On another occasion while Hostetler was working, Payton announced that “he could perform oral sex on her so effectively that [she] would do cartwheels.”¹⁰⁰ When Hostetler reported these incidents to her superiors, her district manager remarked that he dealt with his problems by getting rid of them.¹⁰¹ Days later, Hostetler—not Payton—was transferred to a distant Burger King location.¹⁰² The district court thought that these incidents were not severe enough to amount to harassment and that Burger King had done enough, but the Seventh Circuit saw matters otherwise.¹⁰³ It held that “the type of conduct at issue here falls on the actionable side of the line dividing abusive conduct from behavior that is merely vulgar or mildly offensive.”¹⁰⁴ Although the court found it more difficult to say whether Payton’s behavior was so serious that it would allow a finder of fact to label Hostetler’s work environment hostile, since the number of incidents was not high, the court resolved that issue in Hostetler’s favor because the two principal acts were physical, rather than merely verbal.¹⁰⁵ It is hard to say why Hostetler received a more favorable reception by the court, but perhaps

⁹² *Id.*

⁹³ *Id.*

⁹⁴ 218 F.3d 798 (7th Cir. 2000).

⁹⁵ *Id.* at 812.

⁹⁶ *Id.* at 802.

⁹⁷ *Id.* at 801.

⁹⁸ *Id.*

⁹⁹ *Id.* at 801–02.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 804.

¹⁰² *Id.*

¹⁰³ *Id.* at 806–07.

¹⁰⁴ *Id.* at 807.

¹⁰⁵ *Id.* at 808.

the physical dimension of the abuse she experienced made a difference. In any event, the court of appeals remanded the case to a district court for trial.¹⁰⁶

In *Berry v. Delta Airlines, Inc.*,¹⁰⁷ plaintiff Berry complained to her regional manager about incessant harassment from Causevic, her supervisor at Delta Airline's cargo facilities at Chicago's O'Hare Airport.¹⁰⁸ She asserted that Causevic had taken a substantial number of improper and harassing actions: he slid his hand up her shorts to her panty line and told her that he loved her smooth legs; he pulled her blouse away from her chest and tried to look down her shirt at her breasts; he repeatedly asked her if she would take him up on his "proposition" (for sex) and if she would go with him on a "very, very long ride home"; he referred to her as his "girlfriend" in front of others; he asked her on a date; he told her that he thought her "butt" and legs were "sexy"; and he tried to touch or embrace her inappropriately on various occasions.¹⁰⁹ Almost every time Berry sought help from Causevic at work, he would say things such as "give me a kiss first," "what will you do for me," or "only if you go on a long ride with me."¹¹⁰ The district court granted summary judgment for Delta, and the Seventh Circuit affirmed.¹¹¹ It is worth quoting the holding:

"[I]t is clear that the incidents of workplace "harassment" which occurred after Berry complained to [the regional manager] on June 7, 1999, while unfortunate, are not actionable as sexual harassment under Title VII (either collectively or individually) because Berry has presented no evidence suggesting that any of these incidents were motivated by her gender. Even taken in the light most favorable to Berry, the evidence presented suggests that all of the claimed instances of post-complaint harassment were meant as retaliation for Berry's having complained about Causevic's prior sexual harassment, and were not motivated by any anti-female animus."¹¹²

The court added that, insofar as the claimed harassment was motivated by Berry's sex, Delta could not be liable because it did not know what was going on.¹¹³

¹⁰⁶ *Id.* at 812.

¹⁰⁷ 260 F.3d 803 (7th Cir. 2001).

¹⁰⁸ *Id.* at 805.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.* at 804, 814.

¹¹² *Id.* at 808–09.

¹¹³ *Id.* at 811.

The next example is a good-news, bad-news story: the case for liability went to a jury, which ruled in the plaintiff's favor, but the case for punitive damages failed in the court of appeals. It is *Equal Employment Opportunity Commission v. Indiana Bell Telephone Co.*¹¹⁴ The legal question, which went all the way to the en banc court of appeals, related to whether evidence about a company's obligations under its collective bargaining agreement (CBA) was admissible to show the reasonableness of its response to known (indeed, very well known) harassment.¹¹⁵ The majority held that the company might be able to escape punitive damages based on its obligations under the CBA, and so it vacated the jury's award of punitive damages and remanded for further proceedings.¹¹⁶

The underlying behavior was appalling. Gary Amos was a long-time employee of Ameritech; he worked in its coin center and its small business unit.¹¹⁷ Most of his fellow employees were women.¹¹⁸ Unfortunately for everyone, he could not seem to resist exposing himself at the workplace. The first glimpse of this behavior dated back to 1975 (and this was a 2002 decision!), when Barbara Huckeba complained to her supervisor that Amos had exposed himself to her three times.¹¹⁹ Ameritech's response—shocking to modern eyes—was to fire *Huckeba*, not to discipline Amos. It justified that action by saying that Huckeba was more likely than Amos to find a good job elsewhere.¹²⁰ And Huckeba was not alone in her complaints. Two other employees also complained in 1975 about sexually offensive conduct; they were luckier than Huckeba only insofar as they did not lose their jobs.¹²¹ But neither did Amos, who both kept his position and avoided discipline.¹²² The record established other misconduct on Amos's part in 1988, 1989, 1990, 1991, 1992, 1993, and 1994. The list of misdeeds is a long one: "telling female co-workers that he was in love with them, flashing them, sending notes with sexual messages or propositions, grabbing them and rubbing their hair or buttocks (sometimes with his hands, sometimes with his erect penis), and allowing himself to be seen masturbating at his desk."¹²³

¹¹⁴ 256 F.3d 516 (7th Cir. 2002) (en banc).

¹¹⁵ *Id.* at 526.

¹¹⁶ *Id.* at 528–29.

¹¹⁷ *Id.* at 519.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

Amos flashed someone in 1989 but was reprimanded only with a warning.¹²⁴ The discipline escalated slightly in 1990, when five women informed Ameritech that Amos had pressed his erect penis against them.¹²⁵ The company suspended Amos for two weeks. It did not choose a more severe sanction, it appears, because the responsible supervisor did not bother to read Amos's personnel file and thus was unaware of his inglorious history.¹²⁶ More complaints followed in 1991 and 1992, but they did not result in discipline.¹²⁷ Other than admonitions to stop the offensive behavior,¹²⁸ Amos ignored the advice. At long last, the company appeared to be on the brink of firing Amos: on December 18, 1992, the equal employment opportunity coordinator recommended this action.¹²⁹ But the coordinator had no power unilaterally to implement that recommendation.¹³⁰ And the responsible person—the labor relations manager—was on vacation on December 18.¹³¹ He did not return and review the file until after the Christmas break. Critically more than 30 days had elapsed since Amos's most recent documented misconduct.¹³² This was important because the CBA said that disciplinary measures had to be taken within 30 days of the misconduct.¹³³ That meant, Ameritech said (and the en banc court accepted) that Ameritech had to wait for yet another incident before firing Amos.¹³⁴ Not surprisingly, more misconduct occurred in 1993 and early 1994, but Ameritech still did nothing. As the majority put it, "Another public-masturbation incident in March 1994 at last produced Amos's removal."¹³⁵ This was enough in the unanimous view of the en banc court to support the jury's verdict on liability for the EEOC; on that point, the court rejected Ameritech's efforts to show why it should not be vicariously liable for Amos's actions.¹³⁶ The court split only on the question of punitive damages.¹³⁷

The majority held that even though the terms of the CBA could not help Ameritech on liability, that evidence was still relevant for punitive

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 519–20.

¹²⁹ *Id.* at 520.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 523.

¹³⁷ *See generally id.*

damages.¹³⁸ In order to win such damages, the court noted, the complaining party (in this case, the EEOC) had to demonstrate that the respondent “engaged in a discriminatory practice . . . with malice or with reckless indifference to the federally protected rights of an aggrieved individual.”¹³⁹ Ameritech, the court held, was entitled to try to persuade the district court that its decision to comply with the letter of the CBA did not “evince ‘malice’ or ‘reckless indifference’ to the federally protected rights of female employees.”¹⁴⁰ The case was remanded for further proceedings on this point, though the court did note that a jury that was fully aware of the CBA and Ameritech’s explanation for its actions might still return the same \$650,000 punitive damages award.¹⁴¹ Whether this case is a “good news” or a “bad news” story depends on one’s viewpoint. From the negative perspective, it shows a company that repeatedly fails to follow through on the promise of its workplace conduct policies, to the great harm of its employees. And it seizes on the technicality of the CBA’s 30-day rule to take away the EEOC’s punitive damages verdict, despite the overwhelming evidence supporting that remedy. From the positive perspective, the EEOC won the case on liability and, to the extent that victory sent a message to companies not to tolerate this kind of egregious behavior, it may have helped victims of harassment well beyond the Ameritech employees involved.

*Bilal v. Rotec Industries, Inc.*¹⁴² provides the last example. Once again, a defense verdict on summary judgment was upheld by the court of appeals.¹⁴³ The key holding was that the following incidents of harassment, spread over 14 months, were not sufficiently severe or pervasive to create an abusive work environment.¹⁴⁴ Admittedly, the first few do not seem too bad in isolation. They include a statement from Chief Executive Officer Oury that plaintiff Bilal (a receptionist for the company) was a “fox,” and Oury’s invitation to Bilal to join him while watching the Chicago marathon.¹⁴⁵ The remaining three are more troublesome. For example, Bilal alleged that Oury told her pointblank “that her job would be easier if she had sex with him.”¹⁴⁶ On another occasion

¹³⁸ *Id.* at 527–28.

¹³⁹ *Id.* at 527 (quoting 42 U.S.C. § 1981a(b)(1)).

¹⁴⁰ *Id.* at 528.

¹⁴¹ *Id.* at 528–29.

¹⁴² 326 Fed. App’x. 949 (7th Cir. 2009).

¹⁴³ *Id.* at 951.

¹⁴⁴ *Id.* at 956–57.

¹⁴⁵ *Id.* at 957.

¹⁴⁶ *Id.*

he “walked behind her desk and rubbed his genitalia through his clothing against her arm.”¹⁴⁷ In a third incident, Oury “took a piece of chocolate from his mouth and placed it in Bilal’s mouth while she was speaking.”¹⁴⁸ The court of appeals conceded that at least the chocolate incident deserved comment, but it said that “while bizarre and disgusting, [this behavior] was ‘middle-of-the-continuum’ physical contact which, because it occurred in relative isolation, cannot be regarded as severe under the existing case law.”¹⁴⁹ But perhaps the court’s most telling comment came earlier in the opinion, when it had this to say:

[I]t is lamentable that what appears to have been a robust claim for hostile work environment was so significantly weakened by the inadequate response to the summary judgment motion of the defendants. However, we find no error in the district court’s limitation of the analysis and thus proceed to review this claim in light of only the incidents plaintiff presented to the district court.¹⁵⁰

Bilal’s lawyer had failed to support her allegations with evidence admissible at the summary judgment stage, and her complaint failed to alert the company to the precise legal theories she was pursuing.¹⁵¹ She was left with nothing—not even a job, as the company fired her for alleged insubordination before she brought her Title VII case.¹⁵² *Bilal* thus shows that people can lose cases because of bad lawyering, just as they can lose them because of unfavorable legal rules. It can be hard, however, for a lawyer to know exactly what the court will demand at the summary judgment stage to show a *genuine* issue of *material* fact, especially in any case such as employment cases in which motivation or intent plays a major role.

This anecdotal evidence (for that is all it is) from the Seventh Circuit is nonetheless enough to raise serious concerns about the effectiveness of the legal system in addressing claims of sexual harassment in the workplace. There is a great problem of under-reporting, which leads to the problem that many cases never cross the threshold of a courthouse. For those that do, only some go to the federal courts, while others show up in state court as batteries, intentional infliction of emotional distress, violations of state equal employment laws, and similar theories. And in the federal district courts, sexual harassment cases are,

¹⁴⁷ *Id.* at 952

¹⁴⁸ *Id.* at 957.

¹⁴⁹ *Id.* at 958.

¹⁵⁰ *Id.* at 956.

¹⁵¹ *Id.* at 954.

¹⁵² *Id.* at 952.

like almost all other cases, frequently settled. The latter group leave very little in the way of footprints. Finally, even cases that are judicially resolved in the district courts often are not appealed. For the year ending June 30, 2018, 277,000 civil cases were commenced in the district courts, but less than 28,000 civil appeals were commenced over the same period.¹⁵³ On the other hand, it is interesting to see the cases that are appealed because they usually reach the court of appeals on an agreed factual record, and so they allow one to see which kinds of situations pass muster and which do not.

That is why it is interesting (and manageable) to study the cases that reach the courts of appeals. Plaintiffs lose these cases for a variety of reasons, some of which are entirely legitimate. Those reasons include:

- Failure to allege a violation of the law
- Insufficient evidence to support allegations
- Another non-merits factor, such as lack of personal jurisdiction, failure to prosecute, etc., dooms the case
- The employer should not be held liable because it responded appropriately or took appropriate preventive or remedial measures
- The employer did not know about the bad behavior
- The employer's reasons for its action were not pretextual
- The employee failed to take advantage of the employer's workplace conduct policy
- The employee did not complain in a timely way

Studying the reasons why plaintiffs lose sheds some light on possible reforms, if the evidence of the widespread incidence of #MeToo problems points to systematic under-enforcement of the laws forbidding sexual harassment, or if it reveals that those laws are too narrow or technical in their scope. A number of avenues are worth studying. First, the mechanisms for reporting harassment still need improvement. Victims fear that they will be seen as whiners, or worse, and that they may wind up with no job at all if they complain about a co-worker, or worse, a supervisor. Anti-retaliation policies can help in this respect, but they have not been as strong as they should be. Second, the inability to sue the offending person under federal law—or put differently, the need to tie all harassment directly to the employer—has hampered enforcement. Particularly if one is concerned with fellow-employee harassment, or harassment from a line supervisor who does not have the power to hire and fire, it may be both undesirable and difficult to tar the ultimate employer with misbehavior that very likely violates the

¹⁵³ See *Federal Judicial Caseload Statistics 2018*, UNITED STATES COURTS (2018), <https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2018> [<https://perma.cc/KAL8-R5UL>].

company's written policies. Informal methods of dispute resolution that are available on a voluntary basis (i.e., not compulsory arbitration) have also proven to be trustworthy and helpful. Finally, a broader re-examination of what ought to be regarded as severe enough to constitute harassment, or pervasive enough, might reveal that even if courts no longer require literal hellishness, the bar may still be too high.

This re-examination will succeed only if it takes all relevant perspectives into account. The courts must be fair arbiters attentive to the positions of all concerned—the victim, the alleged harasser, and the employer. There is much work to be done. But it is important to start from a realistic appraisal of the status quo. We can begin by jettisoning the myth that benign behavior is routinely condemned and getting to work on the serious issues.