FROM #METOO TO #METOOBIN: PROTECTING REMOTE WORKERS FROM VIRTUAL SEXUAL HARASSMENT UNDER FEDERAL DISCRIMINATION LAW

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I. INTRODUCTION

In October 2020, staff writers for *The New Yorker* met on a video call to prep for election night coverage.[1] During a pause in the call for breakout discussions, prominent writer and senior legal analyst for CNN Jeffrey Toobin switched to a second call that was the video-call equivalent of phone sex.[2] Under the incorrect assumption that he was off-camera at the time, his colleagues were unexpectedly shocked by the indecent footage of him masturbating to his computer screen.[3] Throughout the duration of Toobin's self-gratification, his coworkers continued as if nothing were wrong, uncertain how to address this uncomfortable situation.[4]

Soon after the news of Toobin's exposure broke, Twitter erupted with the hashtag #MeToobin, a deviation from the revolutionary #MeToo movement that had sparked national awareness of the prevalence of sexual harassment and the demise of many prominent predators.[5] Social media users shared their own experiences with virtual workplace harassment and sternly criticized Toobin's behavior.[6] They demanded his immediate termination, arguing that, although he unintentionally exposed himself during a virtual meeting, it still happened on the clock, and would have been considered

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[1] Johnny Diaz & Azi Paybarah, *New Yorker Suspends Jeffrey Toobin After Zoom Incident*, N.Y. TIMES (Oct. 19, 2020), https://www.nytimes.com/2020/10/19/business/media/jeffrey-toobin-new-yorker-suspended.html [https://perma.cc/QDA8-6B69].

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] Erica Davies, *'SEXUAL HARASSMENT' What Is #MeToobin and Why Is It Trending?*, THE U.S. SUN, https://www.the-sun.com/news/1668299/metoobin-trending-twitter-jeffrey-zoom-video/#:~:text=%23MeToobin%20is%20a%20reactionary%20hashtag,many%20deemed%20a%20fireable%20offense [https://perma.cc/G6TH-YZCH] (last updated Oct. 12, 2020, 2:19 PM).

[6] *Id.*

sexual harassment if he had done so in the office.[7] By the next month, *The New Yorker* had officially fired Toobin, and they released a statement expressing that the magazine was "committed to fostering an environment where everyone feels respected and upholds our standards of conduct."[8] Initially, Toobin had requested time off, and CNN granted the request.[9] However, after eight months of "becoming a better person" and the decline of his infamous hashtag, Toobin returned to CNN.[10] A network executive commented on the sixty-one year-old's return: "I don't think that one terrible mistake should define a person or ruin their employment opportunities for life."[11]

Although women have been subjected to workplace sexual harassment for generations, Toobin's exposure is proof that a computer screen cannot shield them from continuing to experience this type of mistreatment.[12] And with the dramatic increase in remote work caused by the COVID-19 pandemic, disturbing virtual manifestations of sexual harassment have and will continue to emerge.[13] Despite drastic technological advancements in the workplace, federal discrimination law has refused to evolve, resulting in courts applying the same standards to the remote work environment that they have applied to an office setting for over half a century.[14] Virtual sexual harassment directed toward remote workers, as opposed to employees who work within a close physical proximity to their perpetrators, frequently lacks the potential to escalate into physically harassing conduct.[15] Considering, as well, that some jurisdictions examine the existence of a hostile work

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[7] *Id.*

[8] Oliver Darcy, *Jeffrey Toobin Fired from The New Yorker After Exposing Himself on a Zoom Call*, CNN, https://www.cnn.com/2020/11/11/media/jeffrey-toobin-fired-new-yorker/index.html [https://perma.cc/EYF3-S9FE] (last updated Nov. 11, 2020, 5:34 PM).

[9] *Id.*

[10] Tucker Higgins & Christina Wilkie, *Toobin Returns to CNN Eight Months After Zoom Exposure Incident*, CNBC, https://www.cnbc.com/2021/06/10/toobin-returns-to-cnn-eight-months-after-zoom-exposure-incident.html [https://perma.cc/SA96-ZVKG] (last updated June 10, 2021, 5:13 PM).

[11] Jeremy Barr, *Jeffrey Toobin Returns to CNN for the First Time Since Zoom Exposure Incident*, WASH. POST, https://www.washingtonpost.com/media/2021/06/10/toobin-cnn-return/ [https://perma.cc/439A-G9Z4] (June 10, 2021, 3:23 PM).

[12] It is important to note that men can be, and are, victims and targets of sexual harassment. However, data has shown that, in the majority of sexual harassment cases, women are victims and men are perpetrators. Given that workplace harassment and discrimination have historically plagued women, this Note specifically tailors its focus toward federal discrimination law's effect on women and ways in which it can better protect them.

[13] Catarina Colon et al., *'That's So Meta:' Workplace Harassment Issues in a Virtual World*, LEXOLOGY (June 7, 2022), https://www.lexology.com/library/detail.aspx?g=36868ceb-f18c-4bcc-ad6d-c03acd9228f9 [https://perma.cc/P9J2-LT69].

[14] *See* 42 U.S.C.S. § 2000e-2(a)(1).

[15] *Id.*

environment as a question of law for a judge to determine, the result is that remote workers will have difficulty surviving a defendant's motion for summary judgment.[16] Ensuring that hostile work environment claims are decided by juries as a question of fact would provide victims of virtual sexual harassment with an opportunity for their cases to be judged by those most acquainted with modern workplace dynamics. This realistic resolution would give victims a higher likelihood of succeeding on their sex discrimination claims while also maintaining Title VII's longstanding legislation.

Part II of this Note will discuss the development of workplace sexual harassment law, including both Title VII of the Civil Rights Act of 1964 and the Civil Rights Act of 1991.[17] Part III explains how remote workers who experience virtual sexual harassment will have difficulty proving a prima facie case of a hostile work environment.[18] That section analyzes cases involving virtual sexual harassment directed toward traditional employees to predict how the courts will decide cases involving remote workers.[19] Part III also addresses recent cases revealing procedural obstacles remote workers have faced as they have attempted to bring these virtual sexual harassment suits in the federal court system.[20] Finally, Part IV proposes an amendment to the Civil Rights Act of 1991 that would tip the scale toward victim protection by recognizing the existence of a hostile work environment as a question of fact to be decided by a jury.[21]

II. BACKGROUND

To have a firm understanding of the avenues of legal protection for victims of virtual sexual harassment, it is important to understand the

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[16] Shlomit Yanisky-Ravid, *Making Physical and Virtual Sexual Harassment Illegitimate: The US #MeToo Movement and the Israeli Prevention Act*, 34 ABA J. LAB. & EMP. LAW 181, 204 (2020).

[17] 42 U.S.C.S. § 2000e-2(a)(1); 42 U.S.C.S. § 1981a.

[18] Yanisky-Ravid, *supra* note 16, at 204.

[19] *See* Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1082 (3d Cir. 1996); Hale v. Iancu, No. 3:19-cv-1963, 2021 U.S. Dist. LEXIS 37058, at *34 (D. Conn. Feb. 23, 2021); Darby v. Kimberly-Clark Corp., 77 F.3d 488, 488 (9th Cir. 1996); Fuller v. City of Oakland, 47 F.3d 1522, 1527 (9th Cir. 1995); Love v. Cal., Dep't of Gen. Servs., No. 95-15032, 1996 U.S. App. LEXIS 8392, at *1 (9th Cir. Apr. 4, 1996).

[20] *See* Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1082 (3d Cir. 1996); Hale v. Iancu, No. 3:19-cv-1963, 2021 U.S. Dist. LEXIS 37058, at *34 (D. Conn. Feb. 23, 2021); Darby v. Kimberly-Clark Corp., 77 F.3d 488, 488 (9th Cir. 1996); Fuller v. City of Oakland, 47 F.3d 1522, 1527 (9th Cir. 1995); Love v. Cal., Dep't of Gen. Servs., No. 95-15032, 1996 U.S. App. LEXIS 8392, at *1 (9th Cir. Apr. 4, 1996).

[21] 42 U.S.C.S. § 1981a(c)(1).

evolution of sexual harassment in the workplace and the federal courts' interpretation of both Title VII and the Civil Rights Act of 1991.[22]

A. Sexual Harassment in the Workplace

Sexual harassment has plagued women in the workplace for centuries, although legal recourse for this problem did not emerge until relatively recently.[23] For most of American history, women silently endured mistreatment in the workplace, with little protection or recourse.[24] During the eighteenth and nineteenth centuries, sexual coercion was a grim reality for female slaves in the South as well as a common experience for domestic servants in the North.[25] In the early twentieth century, women employed in manufacturing and clerical positions were subjected to all manner of unwanted physical and verbal advances.[26] Women were often blamed for the harassment they encountered, and because so few were willing to endure the damage to their reputation and harm to marriage prospects that would result from bringing any complaints, they were left with slim choices: tolerate the sexual advances or quit.[27] As women's participation in the workforce increased, women's rights advocates began to mount a resistance against the legal system's failure to recognize women's consent.[28] In 1974, the term "sexual harassment" first surfaced from a Cornell University course on women and employment, which prompted a national survey.[29] The survey revealed that a staggering 80% of respondents had encountered sexual harassment while on the job.[30]

Since then, feminist attorneys and women's rights organizations have worked tirelessly to bring these statistics down.[31] Yet, in spite of their advancements, sexual harassment is currently the most prevalent type of violence against women worldwide.[32] Studies have estimated that anywhere

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[22] *See* 42 U.S.C.S. § 2000e-2(a)(1); 42 U.S.C.S. § 1981a; Yanisky-Ravid, *supra* note 16, at 185.

[23] Reva B. Siegel, *A Short History of Sexual Harassment*, DIRECTIONS IN SEXUAL HARASSMENT LAW 1, 3 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004).

[24] Sascha Cohen, *A Brief History of Sexual Harassment in America Before Anita Hill*, TIME (Apr. 11, 2016, 9:00 AM), https://time.com/4286575/sexual-harassment-before-anita-hill/ [https://perma.cc/CQ8F-3JQR].

[25] Siegel, *supra* note 23, at 3.

[26] *Id.*

[27] *Id.* at 3–4; Cohen, *supra* note 24.

[28] Cohen, *supra* note 24.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] Jacqueline Strenio & Joyita Roy Chowdhury, *Remote Work During COVID-19: Challenges and Opportunities for Combatting Workplace Sexual Harassment*, KING'S COLL. LONDON (Jan. 27, 2021),

from almost a quarter of women to more than eight in ten female employees experience sexual harassment in their lifetimes.[33] Women employed in the food services, retail, and health care industries are especially at risk for becoming victims.[34] Moreover, sexual harassment disproportionately affects women of color, with Black women filing more chargers per 100,000 women workers than white, non-Hispanic women.[35] However, these statistics are skewed by the fact that, although workplace sexual harassment is widespread, the vast majority of victims do not report it.[36] This can be due to the fear of retaliation or simply a lack of resources to secure legal advice and to pursue a costly challenge through the court system.[37]

Sexual harassment has been proven to have negative effects on women's mental and physical health, to disrupt their employment trajectories, and to reduce economic well-being.[38] Women who have experienced harassment suffer from depression, occasionally having such severe symptoms that their conditions meet the medical definition of post-traumatic stress disorder (PTSD).[39] Harassment can also restrict women's access to learning opportunities such as on-the-job instruction and mentorship from more experienced workers.[40] Finally, sexual harassment can lead to long-term harm to women's earnings and career attainment by forcing them into unemployment or sudden job change.[41]

The global #MeToo movement, which emerged in 2017, revealed the pervasiveness of sexual assault in the workplace and prompted many

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https://www.kcl.ac.uk/remote-work-during-covid-19 [https://perma.cc/TAK7-GVGR]. Violence is defined as "any act of gender-based violence that results in, or is likely to result in, physical, sexual or mental harm or suffering to women and girls, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life." *Frequently Asked Questions: Types of Violence Against Women and Girls*, UN WOMEN, https://www.unwomen.org/en/what-we-do/ending-violence-against-women/faqs/types-of-violence#:~:text=Violence%20against%20women%20and%20girls%20is%20defined%20as%20any%20act,public%20or%20in%20private%20life [https://perma.cc/H8SG-2FHD].

[33] Elyse Shaw et al., *Sexual Harassment and Assault at Work: Understanding the Costs*, INST. FOR WOMEN'S POL'Y RSCH. 1 (Oct. 2018) [hereinafter *Sexual Harassment and Assault at Work*], https://iwpr.org/wp-content/uploads/2020/09/IWPR-sexual-harassment-brief_FINAL.pdf.

[34] Amanda Rossie et al., *Out of the Shadows: An Analysis of Sexual Harassment Charges Filed by Working Women*, NAT'L WOMEN'S L. CTR. 16 (Aug. 2, 2018), https://nwlc.org/wp-content/uploads/2018/08/SexualHarassmentReport.pdf.

[35] *Id.* at 6.

[36] *Id.* at 2.

[37] *Id.*

[38] Strenio & Chowdhury, *supra* note 32.

[39] Shaw, *supra* note 33, at 4.

[40] *Id.*

[41] *Id.* at 5.

survivors to share their stories.[42] The movement also uncovered the existence of whisper networks used by female coworkers to combat traditional workplace sexual harassment.[43] These networks consist of informal chains of conversations among women about men who need to be watched because of rumors, allegations, or known incidents of sexual misconduct, harassment, or assault.[44] For women who participate in these networks, information exchanged about these abusive men is neither frivolous nor titillating; rather, it is a means of survival.[45] Whisper networks empower victims to put an end to their abuse by offering emotional relief, affirmations of worth and lived experience, and group-based empowerment.[46]

With technological developments and the rise of social media platforms in the late twentieth century, sexual harassment perpetrators did not limit their conduct to the physical world.[47] Research demonstrates that the gender roles that exist offline have remained in effect in online environments, leading to what has become known as the digital gender divide.[48] For example, one study found that men tend to monopolize conversation in chat rooms, communicate more frequently, and post longer comments than women.[49] Certain characteristics of online culture and technology actually reinforce sexually harassing behavior in ways that in-person interactions do not.[50] First, since the law develops slower than the technological industry, the murky legal status of the Internet creates an environment in which breaking the law is common.[51] This problem is exacerbated by the fact that some sites are also loosely monitored.[52] The absence of visible authorities and

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[42] Rozina Sini, *How 'MeToo' is Exposing the Scale of Sexual Abuse*, BBC NEWS (Oct. 16, 2017), https://www.bbc.com/news/blogs-trending-41633857 [https://perma.cc/98U7-N4JF].

[43] Summer Meza, *What is a Whisper Network? How Women Are Taking Down Bad Men in the #MeToo Age*, NEWSWEEK (Nov. 22, 2017, 1:51 PM), https://www.newsweek.com/what-whisper-network-sexual-misconduct-allegations-719009 [https://perma.cc/2MX6-FGNA].

[44] *Id.*

[45] Anne Helen Petersen, *Here's Why So Many Women Knew the Rumors About Harvey Weinstein*, BUZZFEED NEWS (Oct. 8, 2017, 8:12 PM), https://www.buzzfeednews.com/article/annehelenpetersen/women-believe-other-women [https://perma.cc/G473-7BGB].

[46] Deborah Tuerkheimer, *Beyond #MeToo*, 94 N.Y.U. L. REV. 1146, 1174 (2019).

[47] Barbara A. Ritter, *Deviant Behavior in Computer-Mediated Communication: Development and Validation of a Measure of Cybersexual Harassment*, 19 J. COMPUTER-MEDIATED COMMC'N 197, 199 (2013); Miriam A. Cherry, *A Taxonomy of Virtual Work*, 45 GA. L. REV. 951, 980 (2011).

[48] Cherry, *supra* note 47, at 980.

[49] Ritter, *supra* note 47, at 199.

[50] Azy Barak, *Sexual Harassment on the Internet*, 23 SOC. SCI. COMPUT. REV. 77, 82 (2005).

[51] *Id.* at 83.

[52] Cherry, *supra* note 47, at 979.

enforcement vehicles allows individuals with criminal intentions to act upon them.[53]

Second, psychologists have found that Internet users often view the virtual realm as a relaxed area where the formal rules of social interaction do not typically apply.[54] This phenomenon has been termed the "online disinhibition effect."[55] Because of the powerful factors that exist in cyberspace, such as anonymity, invisibility, lack of eye contact, easy escape, and neutralizing of status, Internet users feel as though they can forgo existing social norms and act more naturally.[56] Moreover, the general availability and affordability of cyberspace makes risk-taking exhilarating and increases the probability that these risky actions go unpunished.[57] Combine both of these factors with a misogynistic atmosphere and the result is a high likelihood of virtual sexual harassment.[58]

Virtual harassers have adapted and adjusted their conduct to create new and disturbing methods of harassment.[59] They target their victims with sexual messages sent through texts or email, with these messages taking the forms of gender-humiliating comments (e.g., "Leave the forum! Go to your natural place, the kitchen"), sexual remarks (e.g., "Nipples make this chat room more interesting"), and dirty jokes.[60] However, not all virtual sexual harassment is so direct; for example, some Internet users identify themselves with inappropriate and offensive nicknames, such as CockSucker, WetPussy, or GreatFuck.[61] Perpetrators sexually harass victims with images, as well, by sending them erotic or pornographic pictures or videos, or posting these graphics to websites to surprise unsuspecting web users.[62] Finally, in some situations, harassers can virtually coerce victims to elicit sexual cooperation.[63] Although the use of physical force is impossible online, harassers have concocted a variety of threats to put pressure on their victims including the use of physical force at a future time, blackmail, and termination of the victims' employment.[64] With a multitude of options for perpetrators to engage in sexually harassing behavior through electronic

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[53] *Id.*
[54] *Id.*
[55] John Suler, *The Online Disinhibition Effect*, 7 CYBERPSYCHOLOGY & BEHAV. 321, 321 (2004).
[56] Barak, *supra* note 50, at 82.
[57] Ritter, *supra* note 47, at 197.
[58] Barak, *supra* note 50, at 82.
[59] *Id.* at 78–81.
[60] *Id.* at 79.
[61] *Id.*
[62] *Id.*
[63] *Id.*
[64] *Id.*

means, virtual sexual harassment has unfortunately become just as common and problematic as the physically harassing behavior that existed before these technological advancements.[65]

Virtual harassers have utilized these techniques in the modern workplace as well, and with the rapid increase of remote work spurred by the COVID-19 pandemic, more workers are vulnerable to experiencing this mistreatment.[66] Given that the majority of the workforce's transition to the remote world occurred so recently, there are few studies available at this point that have focused on the prevalence of virtual sexual harassment.[67] However, according to the studies that have been released, statistics are warning readers that virtual sexual harassment has increased.[68] For example, more than a quarter of respondents in one survey reported that they experienced gender-based harassment more often or much more often since the outbreak of COVID-19.[69] Moreover, the growth in virtual sexual harassment has not been limited to the United States, as other countries have also reported this problem.[70] One teleworker from the United Kingdom spoke about the cyber harassment that she experienced via Zoom: "The director of the company uses Zoom to take screenshots of myself and other women, which he shares with colleagues, making derogatory statements and implying the photos look like we're doing sexual acts."[71] Thus, virtual sexual harassment is on the rise around the world.[72] While harassment has existed in cyberspace throughout

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[65] *Id.* at 78.

[66] *But see* Kim Elsesser, *Covid's Impact on Sexual Harassment*, FORBES (Dec. 21, 2020) https://www.forbes.com/sites/kimelsesser/2020/12/21/covids-impact-on-sexual-harassment/?sh=4e77d1c5348a [https://perma.cc/UYG4-5UNR].

[67] *Id.*

[68] *See Remote Work Since Covid-19 Is Exacerbating Harm*, PROJECT INCLUDE 1 (Mar. 2021) [hereinafter *Remote Work Since Covid-19*], https://projectinclude.org/assets/pdf/Project-Include-Harassment-Report-0321-F3.pdf; *Rights of Women Survey Reveals Online Sexual Harassment Has Increased, As Women Continue to Suffer Sexual Harassment Whilst Working Through the Covid-19 Pandemic*, RTS. WOMEN (Jan. 11, 2021) [hereinafter *Rights of Women Survey*], https://rightsofwomen.org.uk/news/rights-of-women-survey-reveals-online-sexual-harassment-has-increased-as-women-continue-to-suffer-sexual-harassment-whilst-working-through-the-covid-19-pandemic/#survey-exposes-an-upsurge-in-online-sexual-harassme.

[69] *Remote Work Since Covid-19*, *supra* note 68, at 9.

[70] *Rights of Women Survey*, *supra* note 68 (arguing that the United Kingdom's current legal framework for sexual harassment complaints is not sufficient to protect teleworkers); Melissa Davey, *Online Violence Against Women 'Flourishing,' and Most Common on Facebook, Survey Finds*, GUARDIAN (Oct. 4, 2020), https://www.theguardian.com/society/2020/oct/05/online-violence-against-women-flourishing-and-most-common-on-facebook-survey-finds [https://perma.cc/W2YL-TEB6] (detailing a survey which revealed shocking accounts of escalating online violence against women and girls across more than twenty countries).

[71] *Rights of Women Survey*, *supra* note 68.

[72] *Id.*

the twenty-first century, the recent rise in remote work is substantially increasing this pre-existing problem to unprecedented levels.[73]

B. Title VII of the Civil Rights Act of 1964

Title VII prohibits discrimination on the basis of race, color, religion, sex, or national origin, and has been construed to prohibit sexual harassment in the workplace.[74] The statute specifies that "[i]t shall be unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[75] Title VII applies to private employers, labor unions, and employment and governmental agencies.[76] The statute establishes two different theories of liability based on gender discrimination and sexual harassment: (1) hostile work environment and (2) quid pro quo—discriminatory acts having tangible employment consequences.[77]

The prohibition of discrimination in employment on the basis of sex was added to the civil rights bill through an amendment sponsored by Representative Howard Worth Smith who was, ironically, an ardent opponent of Title VII.[78] By adding a prohibition of sex discrimination, Smith intended to bring ridicule to the legislation as a whole to ultimately cause it to fail.[79] Because of Smith's questionable motives, because of the occasionally facetious tone of the debate on the amendment, and because women's rights were generally not taken seriously then, the amendment originally tended to be lightly regarded, even after it became law.[80] The Equal Employment Opportunity Commission (EEOC), the executive agency charged with enforcing the Civil Rights Act of 1964 (the "1964 Act") in employment discrimination, initially treated the ban on sex discrimination as something of a joke.[81] Pressure from the National Organization for Women and other women's rights groups, along with changing consciousness about

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[73] *See* Elsesser, *supra* note 66.

[74] 42 U.S.C.S. § 2000e-2(a)(1).

[75] *Id.*

[76] *Timeline of Important EEOC Events*, EEOC, https://www.eeoc.gov/youth/timeline-important-eeoc-events [https://perma.cc/S2QN-S4J5].

[77] 42 U.S.C.S. § 2000e-2(a).

[78] Carl M. Brauer, *Women Activists, Southern Conservatives, and the Prohibition of Sex Discrimination in Title VII of the 1964 Civil Rights Act*, 49 S. HIST. ASS'N 37, 37 (1983).

[79] *Id.* at 42.

[80] *Id.*

[81] *Id.*

sex roles over time, led to more rigorous enforcement and generally sympathetic court rulings.[82]

1. Equal Employment Opportunity Commission (EEOC) Guidelines

Title VII created the EEOC to enforce the 1964 Act by filing lawsuits against violators.[83] The EEOC issues sub-regulatory guidelines that express official agency policy and explain how the laws and regulations apply to specific workplace situations.[84] For example, the EEOC's "Guidelines on Discrimination Because of Sex" provide a definition of workplace sexual harassment that is prohibited by Title VII:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.[85]

To bring a discrimination claim under Title VII, a plaintiff is required to exhaust all administrative remedies.[86] To do so, a potential plaintiff must file a charge against her employer with the EEOC for unlawful employment practice.[87] The Commission subsequently serves notice of the charge to the employer and begins an investigation.[88] If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true, it initiates informal tactics to eliminate the discrimination through "conference, conciliation, and persuasion."[89] However, if the EEOC is

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[82] *Id.*

[83] *Timeline of Important EEOC Events*, *supra* note 76.

[84] *Laws & Guidance*, EEOC, https://www.eeoc.gov/laws-guidance-0 [https://perma.cc/KX3M-JFE8].

[85] 29 C.F.R. § 1604.11(a).

[86] 42 U.S.C.S. § 2000e-5.

[87] *Id.* § 2000e-5(b).

[88] *Id.*

[89] *Id.*

unsuccessful in reaching an informal agreement with the employer, it may bring a civil action.[90]

2. Judicial Standards

In following these guidelines, the Supreme Court upheld them as law when it ruled that, to prevail on a hostile work environment claim, the victim must prove that the harassment is "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[91] A hostile work environment must be both objectively and subjectively offensive: one that a reasonable person would find hostile or abusive and one that the victim in fact did perceive to be so.[92] Whether the work environment is "hostile" or "abusive" can be determined by looking at all of the circumstances.[93] This requires the court to look at the following factors: "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."[94]

However, no conduct is actionable if the court deems it to be "merely offensive."[95] Thus, the Court has held that the mere utterance of an epithet which engenders offensive feelings in an employee does not sufficiently affect the conditions of employment to implicate Title VII.[96] Similarly, simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to a hostile work environment.[97] The policy underlying these demanding standards is the Court's view that the ordinary tribulations of the workplace, such as "the sporadic use of abusive language, gender-related jokes, and occasional teasing," should be permitted so as to ensure that Title VII does not become a general civility code.[98]

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[90] *Id.* § 2000e-5(f)(1).

[91] Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 60 (1986).

[92] Harris v. Forklift Sys., 510 U.S. 17, 21 (1993).

[93] *Id.* at 23.

[94] *Id.* (emphasis added); *see also* Baskerville v. Culligan Int'l Co., 50 F.3d 428, 430 (7th Cir. 1995) (noting how "drawing the line is not always easy. On one side lie sexual assaults; other physical contact, whether amorous or hostile, for which there is no consent express or implied; uninvited sexual solicitations; intimidating words or acts; obscene language or gestures; pornographic pictures. On the other side lies the occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers."). This line is made even blurrier in the context of remote work, where personal and work lives are more likely to converge.

[95] *Harris*, 510 U.S. at 21.

[96] *Id.*

[97] Faragher v. City of Boca Raton, 524 U.S. 775, 789 (1998).

[98] *Id.*

Additionally, courts may hold employers liable for sexual harassment committed by employees if they had actual or constructive knowledge of the harassment and failed to take immediate and appropriate corrective action.[99] Employers can also be held liable for the acts of non-employees where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action.[100] However, employers can avoid liability by asserting the *Faragher-Ellerth* affirmative defense.[101] This requires that the employer prove by a preponderance of the evidence that: (1) they 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 or to otherwise avoid harm.[102]

C. Civil Rights Act of 1991

Prior to 1991, juries played no role in Title VII cases because the only monetary relief available to victims was back pay, a remedy which the lower courts had unanimously concluded was equitable.[103] However, this changed with the passage of the Civil Rights Act of 1991 (the "1991 Act") which amended the 1964 Act.[104] The 1991 Act authorizes awards of compensatory and punitive damages, as well as a right to a trial by jury in intentional discrimination cases.[105] The specific statutory language reads as follows: "If a complaining party seeks compensatory or punitive damages under this section—any party may demand a trial by jury . . . ."[106] Although the issue was bitterly divided on partisan lines, the legislative history of the 1991 Act makes clear that Congress was concerned with authorizing jury trials in sex discrimination cases specifically.[107] Congress was split for more than a year as opponents of the jury trial provision proposed a series of amendments that would have replaced damages and jury trials with equitable monetary awards

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[99] 29 C.F.R. § 1604.11(d).

[100] 29 C.F.R. § 1604.11(e). The primary determination of whether an employee qualifies as a "supervisor" in the context of hostile work environment claims is whether he or she is empowered by the employer to take tangible employment actions against the victim. Vance v. Ball State Univ., 570 U.S. 421, 424 (2013).

[101] Hunt v. Wal-Mart Stores, Inc., 931 F.3d 624, 628 (7th Cir. 2019).

[102] *Faragher*, 524 U.S. at 805–06; Burlington Indus. v. Ellerth, 524 U.S. 742, 765 (1998).

[103] Eric Schnapper, *Some of Them Still Don't Get It: Hostile Work Environment Litigation in the Lower Courts*, 1999 U. CHI. LEGAL F. 277, 296 (1999).

[104] 42 U.S.C.S. § 1981a.

[105] *Id.*

[106] *Id.* § 1981a(c)(1).

[107] H.R. Rep. No. 102-40, pt. 1, at 72 (1991).

to be made by and at the discretion of district judges.[108] However, both houses of Congress repeatedly rejected these proposals, and the legislation ultimately was codified.[109]

A surge of appellate cases followed, in which district courts' grants of summary judgment required an assessment of whether the dispute should have been heard by a jury.[110] Circuit courts were divided on whether the existence of a hostile work environment was a question of law, a question of fact, or something in between.[111] These are critical distinctions in summary judgment decisions because issues of fact are decided by juries and reviewed deferentially on appeal.[112] On the other hand, legal questions are determined by judges and subject to independent review.[113] Currently, while the First, Second, Third, Eighth, and Eleventh Circuits insist that this is a factual issue and juries should properly have the central role in its resolution, the Fourth, Sixth, Seventh, and Ninth Circuits generally treat this issue as a matter for de novo consideration by appellate judges.[114] In the Fifth and Tenth Circuits, there are conflicting approaches to this problem.[115] Appellate courts further compound this confusion by reversing, altering, or simply ignoring their previous understandings of sexual harassment cases.[116] For example, the Ninth Circuit has on separate occasions regarded the existence of a hostile work environment as a question of fact, a question of law, and a mixed question of fact and law virtually all within the same year.[117]

Title VII is the only source of federal protection for remote workers who endure virtual sexual harassment.[118] However, it is more burdensome for telecommuters to prove the existence of a hostile work environment than the traditional, in-office plaintiffs.[119] This difficulty is exacerbated by the fact

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[108] Schnapper, *supra* note 103, at 295.

[109] *Id.*

[110] *Id.* at 298.

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.* at 298–99.

[115] *Id.* at 299.

[116] Dara Purvis, Comment, *Overruling the Jury: Duncan v. GMC and Appellate Treatment of Hostile Work Environment Judgments*, 24 YALE L. & POL'Y REV. 485, 489 (2006).

[117] *See* Darby v. Kimberly-Clark Corp., 77 F.3d 488, 488 (9th Cir. 1996); Fuller v. City of Oakland, 47 F.3d 1522, 1527 (9th Cir. 1995); Love v. Cal., Dep't of Gen. Servs., No. 95-15032, 1996 U.S. App. LEXIS 8392, at *1 (9th Cir. Apr. 4, 1996).

[118] *See* E. Gary Spitko, *He Said, He Said: Same-Sex Sexual Harassment Under Title VII and the "Reasonable Heterosexist" Standard*, 18 BERKELEY J. EMP. & LAB. L. 56, 58 (1997) (discussing all viable legal remedies for sexual harassment).

[119] *See infra* Part III.

that federal judges often decide these claims rather than a jury of their peers.[120]

III. ANALYSIS: REMOTE WORKERS HAVE DIFFICULTY PROVING A PRIMA FACIE CASE OF A HOSTILE WORK ENVIRONMENT

Although telecommuting is not a new form of employment, technological developments in workplace communications and the dramatic increase in remote work as a result of the COVID-19 pandemic have thrust many employees into unfamiliar working environments.[121] However, modern sexual harassment claims continue to be scrutinized under the same tests and doctrines developed for traditional workplaces, often to the detriment of remote workers.[122] Worse still, telecommuters are frequently precluded from even having their claims considered due to procedural obstacles.[123] Therefore, federal legislation must be revised to provide victims of virtual sexual harassment with more adequate measures of relief.

A. Remote Workers Are at a High Risk for Experiencing Sexual Harassment

Even though the COVID-19 pandemic prompted a dramatic increase in remote work, telecommuting is not a new phenomenon.[124] Employers and employees alike have taken advantage of remote work's numerous benefits, including greater flexibility and freedoms for employees and the elimination of long commutes.[125] However, research toward the beginning of the twenty-first century predicted that telecommuting would lead to increased gender inequality as well as the potential for the development of new forms of sexual harassment.[126]

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[120] Schnapper, *supra* note 103, at 298–99.

[121] Kim Parker et al., *How the Coronavirus Outbreak Has – and Hasn't – Changed the Way Americans Work*, PEW RSCH. CTR. (Dec. 9, 2020), https://www.pewresearch.org/social-trends/2020/12/09/how-the-coronavirus-outbreak-has-and-hasnt-changed-the-way-americans-work/ [https://perma.cc/M7FA-GHQS].

[122] Yanisky-Ravid, *supra* note 16, at 203–06.

[123] *Id.*

[124] Suzanne B. Goldberg, *Harassment, Workplace Culture, and the Power and Limits of Law*, 70 AM. U.L. REV. 419, 424 n. 6 (2020).

[125] Megan Tatum, *Could Remote Work Spark a Rise in Workplace Harassment?*, RACONTEUR (Mar. 13, 2021), https://www.raconteur.net/hr/employee-engagement/remote-work-harassment/ [https://perma.cc/2KKM-CZ35].

[126] Michelle A. Travis, *Equality in the Virtual Workplace*, 24 BERKELEY J. EMP. & LAB. L. 283, 285 (2003).

Specifically, sociological reports revealed early on that telecommuting arrangements affect male and female professionals differently.[127] While employers allowed their male employees to work remotely in order to achieve greater flexibility and autonomy, their female counterparts (who often served in clerical positions) were granted this "benefit" as a means of increasing managerial control and reducing costs.[128] This resulted in decreased pay, autonomy, job security, and advancement in opportunities for women in the workplace.[129] Moreover, remote work exposed the gendered division of labor in the home as female telecommuters utilized their prior commute time for additional caregiving, while male telecommuters used this extra time to perform additional hours of paid work.[130]

Thus, the technological development of the work environment, despite all of its benefits, has not put an end to gender inequality.[131] Companies with misogynistic workplace cultures and power differentials still breed hostile work environments, even if their employees are physically dispersed throughout the nation.[132] Indeed, early evidence from employees' transition to remote work clearly emphasized that a computer screen cannot shield women from continuing to experience workplace sexual harassment.[133]

Remote workers, as compared with traditional employees, are especially at risk for experiencing sexual harassment for several unique reasons.[134] First, an EEOC task force report observed that decentralized work may make employees feel less accountable.[135] Second, communications over the Internet could be viewed as less formal, inviting perpetrators to engage in inappropriate conduct they would not have otherwise engaged in had they been in a professional workplace.[136] Third, the blurring between personal and professional lives has led to a rise in workplace sexual harassment around the globe.[137] An upsurge in one-on-one online meetings and general work

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[127] *Id.*

[128] Barbara J. Risman & Donald Tomaskovic-Devey, *The Social Construction of Technology: Microcomputers and the Organization of Work*, 32 BUS. HORIZONS 71, 74 (1989).

[129] *Id.*

[130] Travis, *supra* note 126, at 285.

[131] *Id.*

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] *Select Task Force on the Study of Harassment in the Workplace*, EEOC (June 2016), https://www.eeoc.gov/select-task-force-study-harassment-workplace [https://perma.cc/U6LY-DDU9]; Taylor L. Haran et al., *Hostile Environment Claims in a Work-From-Home World*, NAT'L L. REV. (Oct. 20, 2020), https://www.natlawreview.com/article/hostile-environment-claims-work-home-world [https://perma.cc/P58K-LRQB].

[136] Cherry, *supra* note 47, at 979.

[137] *Id.*; Strenio & Chowdhury, *supra* note 32.

communications during evening hours has made it increasingly more difficult for managers to monitor all workplace interactions.[138] Additionally, given the digital gender divide, women are at a higher risk of experiencing these forms of violence, especially those in professions frequently targeted by the media and social media users, such as politicians, journalists, and bloggers.[139]

Remote workers also have less access to informal protections against sexual harassment.[140] Because these employees are distanced from daily, physical interactions with their coworkers, it is more challenging for them to develop strong enough connections to become integrated into any existing whisper network.[141] The traditional whisper network entails face-to-face exchanges; yet, modern technology has expanded informal reporting systems, erasing the need for in-person interactions in what has been termed "double secret whisper networks."[142] These channels rely on technology to spread anonymous allegations within a closed network in various electronic forms, such as private social media groups, Excel spreadsheets, and Google Docs.[143] While these networks could provide potential avenues for remote workers to report their abuse, they still necessitate either established connections with other female coworkers to gain knowledge of these channels or, at the very least, the actual existence of an electronic network.[144] Because whisper networks provide women with a means of articulating their experiences and finding validation from others who are similarly situated, remote workers could be more vulnerable to enduring prolonged sexual harassment.[145]

Not only is virtual sexual harassment difficult for coworkers to witness, but victims also might be unable to identify this conduct as harassing behavior, at least initially.[146] Oftentimes, electronic communication can be

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[138] Strenio & Chowdhury, *supra* note 32.

[139] *Online and ITC Facilitated Violence Against Women and Girls During COVID-19*, UN WOMEN 2 [hereinafter *Online and ITC Facilitated Violence*], https://www.unwomen.org/en/digital-library/publications/2020/04/brief-online-and-ict-facilitated-violence-against-women-and-girls-during-covid-19 [https://perma.cc/CQX6-WXUU].

[140] *See supra* notes 136–40 and accompanying text.

[141] *Id.*

[142] Tuerkheimer, *supra* note 46, at 1169.

[143] *Id.*; *see also* Moira Donegan, *I Started the Media Men List*, THE CUT (Jan. 10, 2018), https://www.thecut.com/2018/01/moira-donegan-i-started-the-media-men-list.html [https://perma.cc/YZQ2-6T9B] (detailing Donegan's creation of a Google spreadsheet called "Shitty Media Men").

[144] Sarah Jeong, *When Whisper Networks Let Us Down*, THE VERGE (Feb. 21, 2018), https://www.theverge.com/2018/2/21/17035552/sexual-assault-harassment-whisper-network-reporting-failure-marquis-boire [https://perma.cc/CBQ4-K8QY].

[145] Tuerkheimer, *supra* note 46, at 1208 n. 115.

[146] Mike Enright, *Identifying and Preventing Harassment in Your Workplace*, WOLTERS KLUWER (Sept. 9, 2020), https://www.wolterskluwer.com/en/expert-insights/identifying-and-preventing-

ambiguous.[147] Despite the workforce's increase in technological communications, a person's intent, when conveyed face-to-face, is still much easier to understand than when expressed through digital means.[148] This point is exacerbated by the fact that extreme manifestations of discrimination are rare; rather, harassing behavior is often masked by "educated" perpetrators in more subtle forms.[149] Perpetrators, hiding behind a screen, can handily coat their harassment with the appearance of propriety or ascribe some less odious intention to their actions once confronted.[150] Especially since remote work has blurred the lines between one's professional and home lives, it is easier for victims to give their harassers the benefit of the doubt about the intent underlying their actions.[151]

Indeed, in a recent Title VII case discussing a procedural issue, a Connecticut district court hypothesized that fewer discrimination and retaliation actions will be brought by remote employees.[152] The court referred to three main reasons for its prediction.[153] First, it argued that, although teleworkers retain their status as employees, they simultaneously absorb their employer's business expenses, such as rent, furniture, and equipment, often without any compensation.[154] This consequently decreases remote workers' economic bargaining power with their employers.[155] Second, the court asserted that detecting discrimination is more difficult in the remote workplace as opposed to the traditional one.[156] The reason for this is as follows:

> Discrimination is often unmasked when an employee learns that another worker outside of their protected class is being treated more favorably or when a manager persistently uses derogatory language . . . . Such behavior is more likely to be uncovered through an employee's direct observation and personal interactions with their peers or managers. The separation and isolation of gig and remote work makes detecting and ultimately proving

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harassment-in-your-workplace [https://perma.cc/X2EZ-8VH4].

147 HBR IdeaCast, *Avoiding Miscommunication in a Digital World*, HARV. BUS. REV. (Nov. 6, 2018), https://hbr.org/podcast/2018/11/avoiding-miscommunication-in-a-digital-world [https://perma.cc/Z7GS-BQPM].

148 *Id.*

149 Aman v. Cort Furniture Rental Corp., 85 F.3d 1074, 1082 (3d Cir. 1996).

150 *Id.*

151 HBR IdeaCast, *supra* note 147.

152 Hale v. Iancu, No. 3:19-cv-1963, 2021 U.S. Dist. LEXIS 37058, at *34 (D. Conn. Feb. 23, 2021).

153 *Id.*

154 *Id.* at *32–33.

155 *Id.* at *33.

156 *Id.*

discrimination more difficult because these interactions are less frequent and occur virtually.[157]

Finally, those victims who still intend to proceed with their claims could be discouraged by the additional burdens of deposing a disburse workforce.[158]

COVID-19 has been described as the first major pandemic of the social media age.[159] Resulting stay-at-home orders, however, have invited the arrival of an adjacent, but lesser known, pandemic entitled the "shadow pandemic."[160] This phenomenon symbolizes the emerging data and reports that are conclusively demonstrating that all types of violence against women and girls have intensified since the outbreak of COVID-19.[161] While many statistics documented by those investigating the shadow pandemic relate to domestic violence, evidence proves that sexual harassment has continued to occur in the streets, public spaces, and, notably, online.[162] In some countries, resources and efforts have been diverted from the violence against women response to immediate COVID-19 relief, heightening victims' sense of isolation and helplessness at a time when they most need governmental and judicial aid.[163]

Economic issues spurred by the pandemic have also had a negative effect on women in particular. COVID-19, while causing general economic disruption worldwide, has disproportionately affected women in what observers are referring to as the "shecession."[164] Not only are women more likely to work in the hardest hit industries like hospitality and leisure, but many have been forced to leave their jobs due to a lack of childcare.[165] As of February 2021, women have recorded more than 5.3 million job losses since the pandemic began, bringing women's labor force participation to a 33-year low.[166] Unemployment, as with sexual harassment, has disproportionately

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[157] *Id.*

[158] *Id.*

[159] *Online and ITC Facilitated Violence*, *supra* note 139.

[160] Strenio & Chowdhury, *supra* note 32.

[161] *The Shadow Pandemic: Violence Against Women During COVID-19*, UN WOMEN, https://www.unwomen.org/en/news/in-focus/in-focus-gender-equality-in-covid-19-response/violence-against-women-during-covid-19 [https://perma.cc/4FNC-WPUR].

[162] *Id.*

[163] *Id.*

[164] Ivana Pino et al., *Skimm Money: The Shecession, Skimm'd*, THE SKIMM (Feb. 12, 2021), https://www.theskimm.com/money/skimm-money-the-shecession-skimmd-4aPF50M1Y1aAN7EHtJrN4l [https://perma.cc/8VEX-25CN?type=image].

[165] *Id.*

[166] Alexandra Kelley, *Women's Labor Force Participation Hits 33-Year Low*, THE HILL (Feb. 8, 2021), https://thehill.com/changing-america/respect/equality/537884-womens-labor-force-participation-hits-33-year-low [https://perma.cc/QC5M-EA33].

affected women of color.[167] Moreover, economists have predicted that the pandemic will widen the gender pay gap from 81 cents for every dollar the average male worker makes, to 76 cents.[168] Given the financial uncertainty and stress affecting women, some scholars have predicted that fewer sexual harassment claims will be brought during the pandemic: "[if] you're going to be laid off and think it's going to be hard to find another job, maybe you're deterred from reporting."[169] Unfortunately, some women who face virtual sexual harassment in these uncertain times must make a dreadful choice either to report the harassment and risk retaliation or to suffer through it and guarantee job stability.

The pandemic has spurred physical, mental, and economic hardships for women, in addition to drastic changes in their work environments.[170] These hardships must be considered to fully comprehend how victims of virtual sexual harassment react to their situations and how federal legislation can best protect them.

B. Title VII's "Severe and Pervasive" Test is Difficult for Victims of Virtual Sexual Harassment to Satisfy

Not only is Title VII's "severe and pervasive" standard incredibly difficult for even victims of physical sexual harassment to prove, but this doctrine relies on an outdated conception of the single-setting nature of sexual harassment.[171] However, given the vast developments in communication methods, sexual harassment that occurs in one setting of the

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[167] Courtney Connley, *Women's Labor Force Participation Rate Hit a 33-Year Low in January, According to a New Analysis*, CNBC (Feb. 8, 2021), https://www.cnbc.com/2021/02/08/womens-labor-force-participation-rate-hit-33-year-low-in-january-2021.html [https://perma.cc/QC5Y-SNQV].

[168] Greg Rosalsky, *How the Pandemic Is Making the Gender Pay Gap Worse*, NPR (Aug. 18, 2020), https://www.npr.org/sections/money/2020/08/18/903221371/how-the-pandemic-is-making-the-gender-pay-gap-worse [https://perma.cc/T3B8-WZK9].

[169] Charles Toutant, *Lawyers: 'False Sense of Liberation' at Home Fuels Spike in Workplace Sexual Harassment*, N.J. L. J. (Mar. 10, 2021), https://www.law.com/njlawjournal/2021/03/10/lawyers-false-sense-of-liberation-at-home-fuels-spike-in-workplace-sexual-harassment/ [https://perma.cc/U2EL-799R].

[170] *See* Nicole Bateman & Martha Ross, *Why Has COVID-19 Been Especially Harmful for Working Women?*, THE BROOKINGS INST. (Oct. 2020), https://www.brookings.edu/essay/why-has-covid-19-been-especially-harmful-for-working-women/ [https://perma.cc/3L9W-J7MK].

[171] *See* Yanisky-Ravid, *supra* note 16, at 204; Christi Cunningham, *Preserving Normal Heterosexual Male Fantasy: The "Severe or Pervasive" Missed Interpretation of Sexual Harassment in the Absence of a Tangible Job Consequence*, 1999 U. CHI. LEGAL F. 199, 262 (1999) (noting how the Supreme Court in sexual harassment cases requires a higher degree of discrimination than in racial discrimination cases, thus "permitting some discrimination because of sex"); Mary Anne Franks, *Sexual Harassment 2.0*, 71 MD. L. REV. 655, 669 (2012).

modern workplace can produce harms in another.[172] Because courts apply Title VII's standard equally to sexual harassment occurring in physical and remote workplaces (thus ignoring the different manifestations of virtual harassment), it is even more challenging for remote workers to establish a prima facie case of a hostile work environment.[173] It is additionally important to note that it is perhaps too soon to find any substantive cases detailing sexual harassment claims brought by remote workers specifically, given how recently many workers transitioned to a work-from-home environment.[174] However, there exists an abundant source of caselaw and scholarly commentary regarding virtual sexual harassment, especially from the years after social media began to emerge in the workplace.[175] An analysis of these claims provides a strong indication of the likely outcomes of future claims involving virtual sexual harassment in the remote workplace.[176]

1. Caselaw Where Virtual Sexual Harassment Was Unable to Meet the "Severe and Pervasive" Standard

The vast majority of cases addressing hostile work environments involving electronic communications, especially email, have found only isolated events that did not give rise to a hostile or abusive environment.[177] For example, in *Schwenn v. Anheuser-Busch, Inc.*, the court ruled that a barrage of offensive e-mail messages addressed to Deborah Schwenn, the plaintiff, sent over a three week period did not meet the "severe and pervasive" standard because the harassment was minor, did not affect the conditions of her employment, and was merely offensive.[178] To demonstrate that Schwenn's allegations were minor, the court discussed conduct that it *would* consider as creating a hostile work environment: requests for female employees to retrieve items from the defendant's front pants pocket, unwelcome physical contact, and rape.[179] Noticeably, none of the court's enumerated instances involved any form of virtual sexual harassment.[180]

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[172] Franks, *supra* note 171, at 657.

[173] Yanisky-Ravid, *supra* note 16, at 204 (discussing how, although cyber harassment has been recognized by courts as part of sexual harassment, damages in these cases are harder to prove).

[174] *See supra* notes 66–67 and accompanying text.

[175] Sheila Gladstone, *New Era of Sexual Harassment Law*, 24 PERSPECTIVES 2, 46 (2000).

[176] *See infra* Section III.B.1.

[177] Robert Sprague, *Invasion of the Social Networks: Blurring the Line Between Personal Life and the Employment Relationship*, 50 U. LOUISVILLE L. REV. 1, 29 (2011).

[178] Schwenn v. Anheuser-Busch, Inc., Civil Action No. 95-CV-716 (RSP/GJD), 1998 U.S. Dist. LEXIS 5027, at *4 (N.D.N.Y. Apr. 7, 1998).

[179] *Id.* at *11–12.

[180] *See generally id.*

These reasonings have not evolved with time.[181] More recently, in *Chinery v. American Airlines*, the Third Circuit dismissed an employee's hostile work environment claim because the offhand social media comments and isolated incidents were not sufficiently extreme to amount to severe and pervasive conduct.[182] Melissa Chinery worked as a flight attendant and experienced virtual sexual harassment from male coworkers during and after her election campaign for the union's presidency.[183] The virtual sexual harassment involved posts to a Facebook group directed toward Chinery that included, among others: 1) the use of derogatory and anti-feminist names such as "harpies" and "shrews," 2) comments about these "harpies'" appearances, 3) photographs of bedazzled female reproductive organs, and 4) a picture of the Wicked Witch of the West with the caption, "I don't have time for basic bitches."[184] Chinery initially filed a complaint with the EEOC, which was unable to conclude that the conduct violated Title VII.[185] Likewise, while admitting that some of the posts were offensive, the court ultimately found that these "sporadic instances" of harassment did not meet Title VII's test.[186] It compared Chinery's experience with cases involving conduct it deemed "more serious in kind" such as stalking, groping, and keying a victim's car.[187] Because the court dismissed Chinery's claim on the severe or pervasive element, it did not address the issue of whether the harassment occurred in her workplace.[188]

Likewise, a Maryland district court ruled that plaintiff Callie Hoffman, who received twelve obscene e-mail messages from her supervisor over a period of seventeen months, failed to satisfy Title VII's requirements.[189] The court placed great emphasis on the "obvious" joking nature of the emails, and its assessment that Hoffman could have avoided this situation "simply by not reading them."[190] Furthermore, a district court in Wisconsin concluded that the fact that plaintiff Tami Ott caught glimpses of nude women on computer screens at her workplace did not constitute a hostile work environment.[191] The court stated that Ott's claims that her supervisor engaged in uninvited

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[181] *See infra* notes 184–96 and accompanying text.
[182] Chinery v. Am. Airlines, 778 F. App'x 142, 146 (3d Cir. 2019).
[183] *Id.* at 143.
[184] *Id.* at 144.
[185] *Id.* at 147 n. 10.
[186] *Id.* at 146.
[187] *Id.* at 147 n. 24.
[188] *Id.* at 147 n. 20.
[189] Hoffman v. Lincoln Life & Annuity Distribs., 174 F. Supp. 2d 367, 375 (D. Md. 2001).
[190] *Id.* at 376.
[191] Ott v. AirTran Airways, No. 06-C-0371, 2010 U.S. Dist. LEXIS 31208, at *21 (E.D. Wis. Mar. 31, 2010).

physical contact with her were "more serious" than any allegations of virtual harassment.[192]

These cases, among others, demonstrate that although most courts that ultimately dismiss claims of virtual sexual harassment often concede that the perpetrator's conduct is "crass" or "distasteful,"[193] they rarely view electronic methods of harassment as anything more than "merely offensive" conduct.[194]

2. Caselaw Where Virtual Sexual Harassment Met the "Severe and Pervasive" Standard

Although virtual sexual harassment rarely meets Title VII's stringent requirements, that is not to say it has never been accomplished, especially when accompanied by an impending threat of physical harassment.[195]

For example, in a case with facts similar to the *Ott* case, another district court denied an employer's motion for summary judgment.[196] Rather, the court recognized the possibility of a hostile work environment where the facts demonstrated that the employer repeatedly viewed pornography on his computer monitor, which was only twelve feet from plaintiff Susan Coniglio's desk and could be seen through a glass partition.[197] Of course, it is notable that the harassment was still occurring at Coniglio's physical worksite, albeit in an electronic form.[198] Furthermore, in *Petersen v. Minneapolis Community Development Agency*, the Minnesota appellate court found that harassing emails that continued after unwanted physical advances ceased were sufficient to withstand summary judgment.[199]

In a case in which the defendants' harassment was mostly virtual, the highest court of New Jersey reversed the appellate court's grant of summary judgment to plaintiff Tammy Blakey's harassers.[200] The court ruled that the alleged harassment—gender-based messages posted to a work-related electronic "bulletin board"—was sufficiently severe and pervasive to constitute a hostile work environment and could subject Blakey's employer

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[192] *Id.* at *25.

[193] *Hoffman*, 174 F. Supp. 2d at 376.

[194] *See* 42 U.S.C.A. §2000e.

[195] *See infra* notes 198–201 and accompanying text.

[196] Coniglio v. City of Berwyn, 99 C 4475, 2000 U.S. Dist. LEXIS 9841, at *23 (N.D. Ill. June 29, 2000).

[197] *Id.* at *22.

[198] *Id.* at *7.

[199] Petersen v. Minneapolis Cmty. Dev. Agency, C7-94-510, 1994 Minn. App. LEXIS 834 (Ct. App. Aug. 23, 1994).

[200] Blakey v. Cont'l Airlines, 164 N.J. 38, 55 (2000).

to liability.[201] The court explicitly held that "harassment by a supervisor that takes place outside of the workplace can be actionable."[202]

However, the court refused to determine whether the relationship between the bulletin board and the employer established a sufficient connection with the workplace, citing that the record was too inadequate.[203] Additionally, the court held that "severe and pervasive harassment in a work-related setting that continues a pattern of harassment on the job is sufficiently related to the workplace," suggesting that harassment occurring at a traditional worksite acts as a prerequisite to proving a hostile work environment. [204] Thus, it is uncertain whether the court would have ruled similarly if Blakey had worked completely remotely and would have been unable to prove any physical harassment occurring in-person at her worksite in addition to the virtual harassment.[205]

As the caselaw demonstrates, it is difficult for plaintiffs solely alleging virtual sexual harassment to meet Title VII's requirements for a hostile work environment.[206] And, even where a plaintiff has strong evidence of harassing electronic communications, courts often look to see how the virtual conduct permeates the plaintiff's traditional worksite or amplifies a pattern of physical harassment that has been occurring there already.[207] Although the Supreme Court has held that psychological harm should be considered in determining the severity of harassing conduct, courts appear to place little weight on this factor; instead, they consider physical conduct and threats as more serious than their virtual counterparts.[208] By continuing to view instances of virtual sexual harassment within the confines of the traditional, "single-setting" workplace, the current federal framework of sexual harassment claims effectively ignores teleworkers' unique status.[209] Thus, remote workers are at a disadvantage in comparison to traditional plaintiffs in the sense that a lack of physical interaction with their perpetrators could hinder their claims from overcoming a judicial dismissal of "merely offensive" conduct.[210]

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[201] *Id.* at 38.
[202] *Id.* at 57.
[203] *Id.* at 46.
[204] *Id.* at 59.
[205] *Id.*
[206] *See supra* Sections III.B.1 & III.B.2.
[207] *Id.*
[208] Harris v. Forklift Sys., 510 U.S. 17, 23 (1993).
[209] Franks, *supra* note 171, at 669.
[210] *Id.*

C. Jurisdictional Obstacles Limit Protection for Victims of Virtual Sexual Harassment

Many recent cases concerning harassment against remote workers are being struck down on the basis of procedural issues before substantive decisions can even be considered.[211] Specifically, remote workers who have brought Title VII claims in the jurisdiction where they physically reside have had their claims dismissed based on a lack of personal or subject matter jurisdiction.[212]

In *Clarke v. Tango Networks, Inc.*, Kathleen Clarke brought suit against her employer, alleging retaliation for reporting a coworker's sexually harassing conduct.[213] After the COVID-19 outbreak caused Clarke to work remotely, her supervisors required her to attend weekly video calls with her harasser, even though they were aware that it caused Clarke distress to continue to interact with him.[214] The West Virginia court, which presided over the jurisdiction in which Clarke teleworked, dismissed the case based on a lack of personal jurisdiction.[215] The court found that, despite the fact that Clarke's employer recruited her, Clarke completed her work in West Virginia, and she attended video calls with her harasser from West Virginia, these contacts were too attenuated to satisfy the minimum contacts test.[216] Although the court admitted that "the rise of COVID-19 and the increase in remote work may one day counsel for revisiting the personal jurisdiction analysis framework," it found no compelling reason to expand its limited jurisdiction in this case.[217]

Similarly, a California district court dismissed plaintiff April Powell-Willingham's discrimination and retaliation claims based on a lack of personal jurisdiction.[218] Relying on precedent establishing that phone calls

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[211] *See infra* notes 219–26 and accompanying text.

[212] To satisfy the constitutional elements of personal jurisdiction, the defendant must have sufficient "minimum contacts" with the forum state such that requiring the defendant to defend his interests in the state does not offend traditional notions of fair play and substantial justice. Int'l Shoe Co. v. Washington, 326 U.S. 310, 317 (1945). The minimum contacts test requires the plaintiff to show that the defendant purposefully directed his activities at the residents of the forum and that the plaintiff's cause of action arose out of those activities. Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 (1985). However, a plaintiff's unilateral activity is insufficient to satisfy the minimum contacts test, regardless of the plaintiff's relationship to the nonresident defendant. *Id.* at 475.

[213] Clarke v. Tango Networks, Inc., No. 2:21-cv-00546, 2021 U.S. Dist. LEXIS 244952, at *8–10 (S.D. W. Va. Dec. 23, 2021) (alleging the physical conduct occurred over a work trip).

[214] *Id.* at *9–10.

[215] *Id.* at *38.

[216] *Id.* at *23.

[217] *Id.* at *28–29.

[218] Powell-Willingham v. Joint Aid Mgmt. USA, Inc., No. CV 17-6508 DSF (KSx), 2020 U.S. Dist.

and other communications to a forum resident do not satisfy the minimum contacts test, the court found that Powell-Willingham's physical presence in California only established *her* contacts with the state, not the employer's contacts.[219] This, the court emphasized, was precisely the type of unilateral activity that cannot meet the constitutional requirements of personal jurisdiction.[220]

Sexual harassment claims brought by remote workers have additionally been dismissed on other procedural grounds besides a lack of personal jurisdiction.[221] These procedural issues present yet another obstacle preventing victims of virtual sexual harassment from Title VII's protection.[222] Even if these issues do not definitively dismiss plaintiffs' substantive claims, forcing them to litigate in a federal court on the other side of the country significantly increases the cost of prosecuting their action.[223] It creates a substantial burden on teleworking plaintiffs and discourages them from bringing claims, consequences that are inconsistent with the beneficent purposes of Title VII.[224]

Virtual sexual harassment claims have been dismissed based on both substantive and procedural grounds, a pattern that will continue unless federal legislation is revised.[225] It is additionally important that uniform regulations be adopted before remote workers bring more of these claims, so as to avoid circuit court splits and conflicting decisions dependent on jurisdiction.[226] However, a comprehensive revision of Title VII is not necessary (and perhaps not realistic) to add more protections for these victims, at least not yet.[227] Rather, an amendment to the procedural aspects of a sexual harassment case would better protect remote workers because it would maintain Title VII's established legislation, resolve a long-standing circuit court split, and satisfy Congress' original intent.[228]

LEXIS 111758, at *20 (C.D. Cal. June 25, 2020).

[219] *Id.* at *17.

[220] *Id.* at *18–19.

[221] *See* Pakniat v. Moor, 192 A.D.3d 596, 597 (N.Y. App. Div. 1st Dept. 2021) (holding that, although electronic tools enabling remote work can be conduits for discriminatory conduct and the state's human rights laws are meant to deter discriminatory behavior by New York employers, the remote worker's discrimination claims were dismissed based on a lack of subject matter jurisdiction).

[222] *Id.*

[223] Passantino v. Johnson & Johnson Consumer Prods., 212 F.3d 493, 505 (9th Cir. 2000).

[224] *Id.*

[225] *See supra* Section III.B & III.C.

[226] *See supra* Section II.B.

[227] *See infra* Part IV.

[228] *Id.*

IV. RESOLUTION: THE EXISTENCE OF A HOSTILE WORK ENVIRONMENT SHOULD BE A QUESTION OF FACT

A promising avenue for victims of virtual sexual harassment that has yet to be explored in-depth is protection through procedural amendments to the mechanism of Title VII.[229] Rather than focusing on substantive revisions to a law that has been firmly established and relatively unchanged for almost half a century, a more feasible approach concentrates on who has the power to interpret and decide virtual sexual harassment cases.[230] These types of decisions are often made depending on distinctions courts draw between "questions of fact" and "questions of law."[231] Issues of fact are decided by juries and reviewed deferentially on appeal.[232] Questions of law, on the other hand, are decided by judges and subjected to independent review.[233] These distinctions are particularly important when a party makes a motion for summary judgment because when such motions are granted, the jury is denied any role in the decision-making process.[234] This result is often the case for sexual harassment claims in circuits that still view the existence of a hostile work environment as a question of law.[235]

An example illustrates how this discrepancy affects plaintiffs who bring virtual sexual harassment claims.[236] While the Sixth Circuit considers the existence of a hostile work environment a question of law, Kentucky state courts have adopted the opposite standard.[237] In *Louisville/Jefferson County Metro Government v. Hume*, the Kentucky Court of Appeals affirmed a verdict in favor of Jill Hume, a female police officer claiming virtual sexual harassment against a coworker.[238] Hume's coworker had sent four text messages to her, one of which was a picture of a man clutching his erect penis and testicles, accompanied by the text "thinking about you."[239] All four text

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[229] Shira A. Scheindlin & John Elofson, *Judges, Juries, and Sexual Harassment*, 17 YALE L. & POL'Y REV. 813, 827 (1999) (noting that no decision in any circuit has engaged in anything like a thorough discussion of the issue, nor even acknowledged the existence of opposing views).

[230] *Id.*

[231] *Id.* at 814.

[232] *Id.*

[233] *Id.*

[234] *Id.* at 821.

[235] *See supra* Section II.B.

[236] *See* Louisville/Jefferson Cty. Metro Gov't v. Hume, No. 2019-CA-1906-MR, 2021 Ky. App. Unpub. LEXIS 271 (Ct. App. Apr. 30, 2021).

[237] Meyers v. Chapman Printing Co., 840 S.W.2d 814, 821 (Ky. 1992) (holding that whether the evidence presented proves misconduct "severe or pervasive" is not a question of law but a question of fact).

[238] *Hume*, 2021 Ky. App. Unpub. LEXIS 271, at *2.

[239] *Id.*

messages were intended to be sent to another recipient rather than Hume.[240] After Hume reported the conduct, her employer failed to acknowledge her request to end continued interactions between herself and the defendant.[241] Subsequently, Hume filed a complaint against her employer, alleging that she was subjected to sexual harassment and a hostile work environment in violation of the Kentucky Civil Rights Act.[242] Although her employer attempted to argue that the text message merely constituted "offensive" conduct, the trial court submitted the question to the jury which found that the message and the employer's lack of meaningful response were sufficiently severe to be deemed sexual harassment.[243]

While emphasizing that this case was "a close question," the appellate court concluded that submitting the question to the jury was proper.[244] After distinguishing Sixth Circuit cases where summary judgment was awarded to the defendant for single incidents of offensive conduct, the court acknowledged that the Kentucky standard favors deference to the factfinder.[245] Thus, even under the same substantive law, viewing hostile work environment claims as a question of fact can save virtual sexual harassment suits from being automatically dismissed as "merely offensive" conduct.[246]

Ensuring that all circuit courts consider the existence of a hostile work environment a question of fact would provide more protections for victims of virtual sexual harassment while maintaining Title VII's longstanding legislation.[247] Ultimately, more plaintiffs would be able to survive the summary judgment stage and appeal to a jury of their peers.[248] Several courts, the majority of which already view this issue as a question of fact, have stressed that summary judgment for defendants in Title VII cases should

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[240] *Id.* at *4.

[241] *Id.* at *5.

[242] *Id.* at *5–6. The Kentucky Civil Rights Act echoes the same statutory language as Title VII. *See* KY. REV. STAT. § 344.020 (1966).

[243] *Hume*, 2021 Ky. App. Unpub. LEXIS 271, at *6.

[244] *Id.* at *14.

[245] *Id.* at *13. Although the defendant sought discretionary review from the Kentucky Supreme Court, the court declined to grant review on the basis that the party filed its motion after the thirty-day deadline. Andrew Wolfson, *Oops: Jefferson County Attorney's Office Blows Chance to Appeal $1.2M 'Sexting' Verdict*, COURIER J. (Aug. 17, 2021), https://www.courier-journal.com/story/news/crime/2021/08/17/louisville-stuck-with-sexting-verdict-after-mistake/8155764002/ [https://perma.cc/4524-PV68].

[246] Wolfson, *supra* note 245.

[247] *See supra* Section II.B.

[248] Michael Selmi, *The Supreme Court's Surprising and Strategic Response to the Civil Rights Act of 1991*, 46 WAKE FOREST L. REV. 281, 302 (2011).

generally be granted with extra caution.[249] They have recognized that a defendant's intent to discriminate is, like any other subjective state of mind, difficult to prove directly and often must be demonstrated through circumstantial evidence.[250] Additionally, juries represent a broader spectrum of society than judges.[251] The Second Circuit in *Gallagher v. Delaney* acknowledged that, because Article III judges tend to live in a "narrow segment of the enormously broad American socio-economic spectrum," they lack the concrete experience jurors can be expected to have with the realities of subtle sexual dynamics in the workplace.[252] Even Congress, in passing the Civil Rights Act of 1991, demonstrated agreement with the idea that a jury, consisting of diverse backgrounds, "would bring an invaluable understanding of workplace realities, of the nuances of race and gender relations, and of the complexities of human motivation."[253] Indeed, statistics further prove this point: employment discrimination plaintiffs "succeed in somewhere between 35-40% of their cases tried before a jury, with a *significantly* lower success rate before a judge."[254]

This is especially relevant for teleworking plaintiffs.[255] In *Gallagher*, the plaintiff argued that juries, not judges, are better suited to decide what workplace conduct is sufficiently severe or pervasive to merit damages.[256] The court emphasized the rapidly evolving nature of gender relations in the workplace and shifting views of what constitutes appropriate behavior that make a diverse jury suitable for deciding borderline sexual harassment situations.[257] These words especially ring true in the post-pandemic context of the remote workplace.[258] Judges, having only recently adapted to electronic communications, are perhaps less familiar than most working-class citizens with the various technologies through which perpetrators can sexually harass their victims.[259] Moreover, federal judges are especially unlikely to have ever experienced virtual sexual harassment.[260] Most victims of sexual harassment are women, especially women of color and women of

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[249] *See, e.g.*, Alston v. Town of Brookline, 997 F.3d 23, 45 (1st Cir. 2021); Gallo v. Prudential Residential Servs., Ltd. Pshp., 22 F.3d 1219, 1224 (2d Cir. 1994).

[250] Scheindlin & Elofson, *supra* note 229, at 822; *Alston*, 997 F.3d at 45–46.

[251] Scheindlin & Elofson, *supra* note 229, at 833.

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

[253] Schnapper, *supra* note 103, at 298.

[254] Selmi, *supra* note 248, at 302 (emphasis added).

[255] *See* Gallagher, 139 F.3d at 342.

[256] *Id.*

[257] *Id.*

[258] *See supra* notes 68–69 and accompanying text.

[259] *Id.*

[260] *See infra* notes 267–68 and accompanying text.

lower socio-economic status.[261] By contrast, over 64% of judges in Article III courts are men and over 71% are white.[262]

Finally, establishing a uniform standard for summary judgment for Title VII cases would create more consistency in federal discrimination law.[263] A consistent standard would particularly benefit teleworking plaintiffs who are currently forced to litigate in states outside of their jurisdiction, often with differing standards.[264] Moreover, this change would ensure that plaintiffs are not having to rely on state civil rights laws that could vary in both substantive and procedural aspects.[265]

A. Proposed Statutory Amendment

This Note proposes the following amendment to the Civil Rights Act of 1991[266] (the amended section is emphasized in bold):

(c) Jury trial. If a complaining party seeks compensatory or punitive damages under this section—

(1) any party may demand a trial by jury;

(2) in cases involving sexual harassment claims, the decision about whether the evidence presented proves that harassment is severe or pervasive is a question of fact; and

(3) the court shall not inform the jury of the limitations described in subsection (b)(3).

COMMENTARY to 42 U.S.C.S. § 1981a

1. Question of fact. The policy reasoning behind the passage of the Civil Rights Act of 1991 was to place the primary evaluation of sexual harassment claims in the hands of the jury. To resolve discrepancies between the circuit courts of appeal, the amended statute establishes that the existence of a hostile work environment is a question of fact. Thus, if enough evidence exists that a reasonable jury could find the presence of a hostile work

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[261] Alieza Durana et al., *Sexual Harassment: A Severe and Pervasive Problem*, NEW AM. 6 (Sept. 2018), https://d1y8sb8igg2f8e.cloudfront.net/documents/Sexual_Harassment_A_Severe_and_Pervasive_Problem_2018-10-10_190248.pdf.

[262] *Diversity of the Federal Bench*, AM. CONST. SOC'Y, https://www.acslaw.org/judicial-nominations/diversity-of-the-federal-bench/ [https://perma.cc/4LG8-U9LF].

[263] *See supra* Section III.C.

[264] *Id.*

[265] *See supra* notes 242–44 and accompanying text.

[266] 42 U.S.C.S. § 1981a(c)(1).

> **environment by a preponderance of the evidence, the trial judge must submit this evidence to the jury for the ultimate determination, unless the right to a jury is waived by the parties. On appeal, this issue of fact should be reviewed deferentially. Trial by jury ensures that each plaintiff's claim is heard by those in the best position to judge the severity or pervasiveness of the defendant's conduct in light of current workplace standards.**

Although the proposed amendment specifically refers to sexual harassment claims, Congress could broaden this amendment to instruct federal judges to consider other issues in discrimination cases as questions of fact.

The inclusion of the Commentary is intended to conclusively resolve the circuit court split and to establish the hostile work environment issue as a question of fact. An amendment such as this would strike the ideal balance between protecting victims' right to relief and ensuring judicial economy and efficiency. While the amendment intends to provide victims with the ability to plead their cases before a jury, procedural safeguards still exist to protect the courts from being overcrowded with frivolous claims. For example, victims would still have the burden of proving to the judge, in a motion for a judgment of law, that a reasonable jury could find in their favor; thus, at the very least, the weakest claims for juries to decide would constitute borderline sexual harassment cases. A jury decision places these close calls in the hands of fellow citizens most familiar with recent workplace developments and professional interactions.[267] Finally, the mere fact that many circuit courts already view this issue as a question of fact confirms that the use of juries has not substantially overburdened the courts.

Virtual sexual harassment claims, albeit not completely unfamiliar to federal courts, have a high likelihood of growing and evolving as more Americans continue to work remotely.[268] Under current Title VII legislation, these cases are often borderline decisions between severe and "merely" offensive conduct.[269] Establishing that the existence of a hostile work environment is a question of fact in federal courts would tip the scale towards victim protection and at least suggest the appearance of propriety even if the plaintiff does not prevail. This amendment would constitute a significant step in recognizing the detrimental effects of virtual sexual harassment and increase the probability that victims—such as Deborah Schwenn, Melissa

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[267] *See supra* notes 263–66 and accompanying text.
[268] *See supra* Section II.A.1.
[269] *See supra* Sections III.A & III.B.

Chinery, Callie Hoffman, and Tami Ott—achieve justice for their perpetrators' wrongdoings.[270] And in the future, hopefully, this could be a step towards more substantive revisions as new caselaw begins to emerge.[271]

V. CONCLUSION

Remote work has led to an increase in gender harassment and the development of virtual manifestations of sexual harassment.[272] However, victims of these newer forms of harassment have more difficulty proving a prima facie case of a hostile work environment than victims who encounter physical contact with their perpetrators.[273] Under Title VII's current interpretation, virtual sexual harassment can rarely overcome the "merely offensive" threshold without the threat of escalation into physical disturbances.[274] But treating virtual sexual harassment less seriously than physical sexual harassment discounts the psychological and emotional harm suffered by these victims and poses a threat to women's economic liberties.[275] Ensuring that virtual sexual harassment cases are decided by those most familiar with developments in the modern workplace would not only codify Congress' intent but would also give victims' claims a better likelihood of overcoming the "merely offensive" threshold.[276] This would pave the way for

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[270] *See supra* Section III.A.1.

[271] If Congress eventually considers a more comprehensive revision of Title VII in order to officially recognize virtual sexual harassment as a form of sex discrimination, a potential model to follow is New York's recently updated Sexual Harassment Prevention Model Policy. Tracey Porpora, *NY Sexual Harassment Prevention Policy Updated to Include Remote Workers, Define Different Gender Identities*, SILIVE (Jan. 12, 2023, 2:35 PM), https://www.silive.com/business/2023/01/ny-sexual-harassment-prevention-policy-updated-to-include-remote-workers-define-different-gender-identities.html [https://perma.cc/G9L9-UN9R]. In January 2023, the New York State Department of Labor released proposed revisions to its policy which address remote workers. *Id.* The policy language explicitly states that "[s]exual harassment can occur when employees are working remotely from home." STATE OF N.Y. DEP'T OF LAB., SEXUAL HARASSMENT AND DISCRIMINATION PREVENTION POLICY, at 6 (2023), https://www.ny.gov/sites/default/files/2023-01/SexualHarassmentModelPolicy2022Proposed.pdf. Examples of virtual sexual harassment that could constitute a hostile work environment include "[r]emarks made over virtual platforms and in messaging apps" as well as sexual or discriminatory displays "visible in the background of one's home during a virtual meeting." *Id.* at 5.

[272] *Remote Work Since Covid-19*, *supra* note 68, at 9; *see also* Shannon Bond, *Remote Work is Leading to More Gender and Racial Harassment, Say Tech Workers*, NPR (Mar. 30, 2021), https://www.npr.org/2021/03/30/982449551/remote-work-is-leading-to-more-gender-and-racial-harassment-say-tech-workers#:~:text=Ethics,Remote%20Work%20Is%20Leading%20To%20More%20Gender%20And%20Racial%20Harassment,the%20pandemic%2C%20a%20survey%20says [https://perma.cc/7G3W-TWNJ].

[273] Bond, *supra* note 272.

[274] *See supra* Section II.B.2.

[275] Strenio & Chowdhury, *supra* note 32.

[276] *See supra* Part IV.

broader federal recognition that virtual sexual harassment can be sufficiently severe and pervasive to warrant liability under Title VII.[277] With the rise of the remote workforce, virtual sexual harassment lawsuits have the potential to alter sex discrimination law in unprecedented ways. Legislation should reflect and adapt to the changing workplace dynamics to protect women from sexual harassment, no matter where they work, and successfully foster gender equality and female empowerment in the realm of employment.

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[277] *See supra* note 277 and accompanying text.