

DISCRIMINATION OUTSIDE OF THE OFFICE:
WHERE TO DRAW THE WALLS OF THE WORKPLACE FOR A
“HOSTILE WORK ENVIRONMENT” CLAIM UNDER TITLE VII

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INTRODUCTION

Title VII of the Civil Rights Act of 1964 states, “It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”¹ Consider three scenarios in the context of today’s workplace: (1) two or more employees travel to a location outside of the traditional corporate headquarters as a requirement or consequence of their jobs.² While traveling, the employees spend their evening at a hotel and may accompany each other for a meal, entertainment, or perhaps meet each other for company in one of their rooms.³ During this “personal” time, one employee assaults, verbally harasses, or performs some other affirmative act towards the other employee which is interpreted as a hostile gesture.⁴ (2) Two or more employees attend a gathering as a social obligation required either expressly or implicitly by the company for which they work.⁵ The gathering occurs off the premises of the corporate office or headquarters.⁶ At this gathering, one of the employees inappropriately touches or makes verbal remarks that the other views as a hostile gesture.⁷ (3) During the course of employment, a friendly relationship develops between two employees who make contact outside of work and occasionally get together

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1. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2006).
2. *E.g.*, *Ferris v. Delta Air Lines, Inc.*, 277 F.3d 128, 131–34 (2d Cir. 2001).
3. *E.g.*, *id.*
4. *E.g.*, *id.*
5. *E.g.*, *Parrish v. Sollecito*, 249 F. Supp. 2d 342, 346 (S.D.N.Y. 2003).
6. *E.g.*, *id.*
7. *E.g.*, *id.*

for entertainment.⁸ At work, one of those employees begins making unsettling comments which causes discomfort to the other employee.⁹ Eventually, this conduct escalates outside of work hours when that employee shows up at the other's private residence and engages in harassing conduct.¹⁰

Certainly, the circumstance in which each of these situations develops would be familiar to many, whereas the result would fortunately be a rare occurrence. Many courts properly consider this conduct, which occurred outside of working hours and the physical confines of the office, as relevant to a hostile work environment claim under Title VII.¹¹ However, one court recently noted a circuit split on the issue of whether conduct occurring outside the workplace should be considered in a hostile work environment case.¹² The United States Court of Appeals for the Fifth Circuit, in *Gowesky v. Singing River Hospital Systems*, stated that "a harassment claim, to be cognizable, must affect a person's working environment."¹³ The Court found that the cases cited by the plaintiff referred to "harassment *in the workplace*" and dismissed her claim of harassment based on offensive comments made, both over the phone and in writing, while she was on leave for treatment of a disease.¹⁴ Similarly, another court dismissed conduct outside the workplace on the basis that "[g]enerally, hostile work environment sexual harassment is 'unwelcome sexual conduct *in the workplace*.'"¹⁵

In contrast, the United States Court of Appeals for the Seventh Circuit held that "harassment does not have to take place within the physical confines of the workplace to be actionable; it need only have consequences in the workplace."¹⁶ Similarly, the United States Court of Appeals for the

8. *E.g.*, *Cromer-Kendall v. District of Columbia*, 326 F. Supp. 2d 50, 53 (D.D.C. 2004).

9. *E.g.*, *id.*

10. *E.g.*, *id.*

11. *See* 42 U.S.C. § 2000e-2(a)(1) (2006); *Ferris v. Delta Air Lines, Inc.*, 277 F.3d 128, 137 (2d Cir. 2001) (involving a similar fact pattern to situation 1); *Cromer-Kendall*, 326 F. Supp. 2d at 58–59 (involving a similar fact pattern to situation 3); *Parrish*, 249 F. Supp. 2d at 352–53 (involving a similar fact pattern to situation 2).

12. *Reed v. Airtran Airways*, 531 F. Supp. 2d 660, 670 n.17 (D. Md. 2008).

13. *Gowesky v. Singing River Hosp. Sys.*, 321 F.3d 503, 510 (5th Cir. 2003). Despite this language's suggestion that conduct outside the workplace could be relevant to the extent it "affect[s] a person's working environment," the Court primarily distinguished the conduct on the questionable basis that most communications were not made while both parties were present in the workplace and that the plaintiff "never returned to work," even though the plaintiff "maintained staff privileges and continued to attend monthly staff meetings." *Id.* at 506, 510–11.

14. *Id.* at 510–11.

15. *Diepenhorst v. City of Battle Creek*, No. 1:05-CV-734, 2007 WL 1141492, at *12 (W.D. Mich. Apr. 17, 2007) (quoting *Pepperman v. Gen. Motors Corp.*, No. 197097, 1997 WL 33339576, at *2 (Mich. Ct. App. Nov. 4, 1997)).

16. *Lapka v. Chertoff*, 517 F.3d 974, 983 (7th Cir. 2008).

First Circuit explained that it “permit[s] evidence of non-workplace conduct to help determine the severity and pervasiveness of the hostility in the workplace.”¹⁷ The absence of a position by the United States Court of Appeals for the Sixth Circuit creates even more uncertainty in the law concerning this issue.¹⁸

This note discusses whether courts should consider conduct outside the workplace when determining hostile work environment claims under Title VII by: (1) examining the legislative history of the Civil Rights Act of 1964 for guidance; (2) providing an overview of the judicial development of hostile work environment claims under Title VII and the different ways in which courts have addressed conduct outside the workplace within that framework; and lastly, (3) recommending a test for when courts confront the issue of conduct outside the workplace.

I. LEGISLATIVE HISTORY

The legislative history of the Civil Rights Act of 1964 provides little information or guidance from Congress for determining the boundaries of the workplace. The debate over the Act took shape as a political/regional battle in Congress, one in which the fundamental principle of Civil Rights became the focal point rather than practical application and enforcement for the future.¹⁹ Much of the debate focused on the bill’s urgent purpose of opening up America’s workplaces to African Americans,²⁰ and even the amendment adding “sex” as a protected category was an attempt to defeat the bill, rather than to provide substantive protection.²¹ As a result, workplace “harassment” never entered the discussion, and therefore judicial development of Title VII must fill this gap. A brief overview of the passage of Title VII will reveal why the statute is silent on the issue of conduct outside the workplace, and why judicial development of Title VII is neces-

17. *Crowley v. L.L. Bean, Inc.*, 303 F.3d 387, 409 (1st Cir. 2002).

18. *See Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 335 (6th Cir. 2008).

19. *See CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT (1985)* [hereinafter *LONGEST DEBATE*].

20. H.R. Rep. No. 914 (1963), *reprinted in* EQUAL OPPORTUNITY EMPLOYMENT COMM’N, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964, at 2026, 2147–49 (1964). According to a Department of Labor report, in 1962, 4.6 percent of white males were unemployed compared to eleven percent of non-white males. And, of those who were working, whites composed 47.3 percent of the white-collar workforce, whereas non-white workers composed only 16.7 percent. These statistics, in combination with the additional views of several House Judiciary Committee members that “failure of our society to extend job opportunities to the Negro is an economic waste” along with the bill’s stated purpose of “eliminat[ing] . . . discrimination in employment,” leads to the conclusion that at the time the bill was introduced, it primarily addressed inequality in access to the workplace along with the entire range of economic opportunity within it. H.R. Rep. No. 914.

21. *See LONGEST DEBATE, supra* note 19, at 116.

sary.

Opposition to civil rights can be seen in the early tactical maneuvering by the bill's proponents to get the bill to the House floor. On June 20, 1963, Representative Emanuel Celler (D-NY) introduced the bill that would eventually become The Civil Rights Act of 1964 in the House of Representatives.²² When the bill entered the Judiciary Committee, Celler assigned it to a subcommittee which he chaired.²³ Upon the completion of hearings, Subcommittee Chairman Celler introduced "a vastly strengthened bill" to the House Judiciary Committee, the intent being to create "'trading purposes' with the southern Democrats and conservative Republicans who sat on the full committee" and to preserve the bill's purpose by maintaining moderate measures and "trading" more controversial measures.²⁴ As expected, the bill outraged many on the Judiciary Committee and, before passing, required the political "patching" for which the strengthened bill was created.²⁵ The bill encountered another obstacle as it entered the Rules Committee, chaired by Howard "Judge" Smith, who "[t]hrough the years . . . imposed his will on the nation by stopping, delaying, or watering down progressive legislation in such fields as civil rights."²⁶ Smith's attempt to defeat the bill in committee failed, however.²⁷ Republicans and Democrats on the committee threatened to "strip [Judge Smith] of the bill," and he eventually allowed a vote, which resulted in the bill's passage by the Rules Committee.²⁸

Although the bill reached the floor of the House for debate, it was during the amendments phase that Judge Smith rose with "the trump card he had been waiting so long to play."²⁹ Judge Smith offered an amendment adding "sex" as a protected category to the bill.³⁰ Smith offered the amendment for the purpose of defeating the bill by making it too controversial for passage.³¹ However, a group of female representatives in the

22. *Id.* at 4.

23. *Id.*

24. *Id.* at 31, 37.

25. *Id.* at 38-39, 42. The report issued by the House Judiciary Committee, in its "General Statement," acknowledged the reasons for which the bill was being considered, by explaining that it addressed "discrimination against some minority groups . . . [particularly] discrimination against Negroes." Under the statement referring explicitly to Title VII, the House Report expressed the desired effect of Title VII on employment as "eliminat[ing] . . . discrimination in employment based on race, color, religion, or national origin." H.R. Rep. No. 914.

26. LONGEST DEBATE, *supra* note 19, at 84.

27. *Id.* at 99.

28. *Id.* at 98-99.

29. *Id.* at 115.

30. *Id.*

31. *Id.* at 116.

House lauded this amendment as a “logical” addition to the bill.³² The result of the amendment adding “sex” hardly accomplished Judge Smith’s purpose of defeating the bill, and instead, “broadened and strengthened” it.³³ The House voted 290–130 in favor of the bill.³⁴

Representative Cellar’s maneuvers in the Judiciary Committee, Judge Smith’s defeated attempt to stop the bill in the Rules Committee, and his later attempt to defeat the bill by expanding civil rights to encompass “sex,” all demonstrate the stark divide separating Southern Democrats from civil rights legislation.³⁵ These tactical measures portray a political body with a fundamental difference in ideology, with each side worried less about practical considerations of the bill than about defeating or approving the basic concept of civil rights. Within this legislative milieu, no debate or report from the House even uses the words “hostile work environment,” let alone reveals any information on how far the workplace extends for a hostile work environment claim.

In the Senate, the bill’s proponents expected opposition in the form of a filibuster by the Southerners.³⁶ However, the bill first needed to be maneuvered through a potentially hostile committee phase and reach the floor for debate.³⁷ In order to bypass the Judiciary Committee, chaired by James Eastland of Mississippi, Senate Majority Leader Mike Mansfield proposed to place the bill on the calendar, a procedural tactic resulting in circumvention of committee action.³⁸ Because this calendar measure received a majority vote, the bill never went to committee in the Senate.³⁹ As debate began, the bill’s proponents picked out Senate Minority Leader Everett Dirksen, a Republican, whose “civil rights stand at that time was ambivalent,” as the key to obtaining the Republican votes necessary to stop the Southerners’ “inevitable filibuster.”⁴⁰ After extensive negotiations, Senator Dirksen declared the bill “perfectly satisfactory” and delivered the essential

32. *Id.* at 117. In justifying support for the amendment to add “sex” as a protected category, Representative Griffiths stated that otherwise the bill would “take colored men and colored women and give them equal employment rights, and down at the bottom of the list is going to be a white woman with no rights at all.” The fear reflected in this comment was that an African-American woman’s rights would trump a white woman’s rights in getting a particular job, rather than concern about working in an environment free from sexual harassment. 110 CONG. REC. 2579 (1964).

33. LONGEST DEBATE, *supra* note 19, at 121.

34. *Id.*

35. *See id. passim.*

36. *Id.* at 124.

37. *Id.* at 132.

38. *Id.* Although this was atypical, Mansfield stated that “the reason for unusual procedures [is] too well known to require elaboration,” implying that it would be buried in committee by the southern chairman. *Id.*

39. *Id.* at 135.

40. *Id.* at 153.

Republican votes.⁴¹ The Senate voted 71–29 to invoke cloture, and later, a substitute bill passed the Senate by a vote of 73–27.⁴² After the Senate bill passed the House, President Lyndon Johnson signed the Civil Rights bill into law on July 2, 1964.⁴³

In the Senate, the political/regional division on the issue of Civil Rights further played out more as a difference in fundamental principle, than as a battle over the details of future application.⁴⁴ As a result of Senator Mansfield's calendar measure, the bill's presence in the Senate produced no committee report providing guidance on the issue of harassment inside or outside the workplace.⁴⁵ Furthermore, debate in the Senate never touched on harassment either; in most instances, the discussion concerned the specifics of proposed amendments. The use of tactics such as the filibuster, bypassing of committees, and reliance on Senator Dirksen's approval of the bill to deliver votes often overrode discussion on important issues concerning Civil Rights in the workplace.

Thus, Title VII's remedial purpose of ending workplace discrimination never fully developed within the legislature, and with respect to conduct outside the workplace, is completely silent. It is therefore necessary to examine the judicial development of hostile work environment claims and, specifically, court opinions addressing the issue of conduct outside the workplace.

II. JUDICIAL AND REGULATORY DEVELOPMENT OF THE "HOSTILE WORK ENVIRONMENT" CLAIM

A. *United States Supreme Court Development of the "Hostile Work Environment" Claim*

The Supreme Court recognized "hostile work environment" claims in *Meritor Savings Bank v. Vinson* by rejecting the argument that in enacting Title VII, "the focus has been on tangible, economic barriers erected by discrimination."⁴⁶ Broadly interpreting Title VII, the Court stated that "[t]he phrase 'terms, conditions, or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment

41. *Id.* at 166–87.

42. *Id.* at 199, 215. At the time, this was the longest Senate filibuster in United States history: 534 hours, 1 minute, and 51 seconds. *Id.* at 200.

43. *Id.* at 228.

44. *See id. passim.*

45. *See id.* at 132.

46. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986).

of men and women” and expanded the statute to cover psychological injuries as well.⁴⁷ After analyzing regulations promulgated by the EEOC, the Court held that sexual harassment can be proven by showing that “discrimination based on sex has created a hostile or abusive work environment.”⁴⁸ The Court held that to state a claim of sexual harassment, the conduct “must be sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive work environment.’”⁴⁹

The Supreme Court clarified the test for meeting the severe or pervasive requirement in *Harris v. Forklift Systems, Inc.*⁵⁰ After reaffirming *Meritor*, the Court created a two-part test requiring that conduct be hostile under both an objective and subjective standard.⁵¹ Under the objective and subjective standards, a hostile work environment “can be determined only by looking at *all the circumstances.*”⁵² The Court provided factors for establishing the objective standard, including “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.”⁵³ Furthermore, the Court recognized effects relevant to a hostile work environment claim beyond those set forth in *Meritor*, including “discourag[ing] employees from remaining on the job, or keep[ing] them from advancing in their careers.”⁵⁴ In effect, *Harris* lowered the damage requirement for a hostile work environment claim to include effects that would not necessarily be “psychologically injurious” but that would have a significant effect on a person’s employment.⁵⁵ Following *Harris*, the Court eventually expanded sexual harassment to include “same-sex harassment” in the workplace.⁵⁶

Although the Court refused the opportunity to set out a test for employer liability in *Meritor*,⁵⁷ the issue, with regard to supervisors, reached the Court in two separate opinions issued simultaneously in 1998: *Burling-*

47. *Id.* (quoting *L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

48. *Id.* at 65–66.

49. *Id.* at 67 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

50. 510 U.S. 17, 21–22 (1993).

51. *Id.*

52. *Id.* at 23 (emphasis added).

53. *Id.* Notably, none of these factors distinguish the location or time in which discrimination must occur.

54. *Id.* at 22.

55. *See id.*

56. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79–80 (1998) (“[M]ale-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils . . .”).

57. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986).

ton Industries, Inc. v. Ellerth and *Faragher v. City of Boca Raton*.⁵⁸ The necessity for releasing two separate opinions resulted from a distinction between two forms of harassment, “quid pro quo” and “hostile work environment.”⁵⁹ Quid pro quo harassment involves “threats [by the supervisor] to retaliate . . . if . . . denied some sexual liberties.”⁶⁰ Hostile work environment claims involve “bothersome attentions or sexual remarks that are sufficiently severe or pervasive.”⁶¹ For purposes of employer liability, Justice Kennedy noted that the distinction between quid pro quo and hostile work environment harassment provides nothing more than a “helpful” way of classifying the type of conduct leading to a sexual harassment claim and does not involve a difference in the strength of the claim, the test applied, or the remedy.⁶²

In both *Ellerth* and *Faragher*, the Court based the standard for employer liability on agency principles, but limited vicarious liability to “not make employers ‘automatically liable for sexual harassment by their supervisors.’”⁶³ The Court’s acceptance of agency principles for employer liability derived from the definition of “employer” in Title VII, which includes “agents,” and from lower court opinions both supporting employer liability because of “assist[ance] in [the supervisor’s] misconduct by the supervisory relationship” and rejecting employer liability for being “outside the scope of employment.”⁶⁴ Consequently, the Court held that where a supervisor “with immediate (or successively higher) authority over the employee” takes a “tangible employment action,” the employer will be vicariously liable for a hostile work environment.⁶⁵ However, absent a “tangible employment action,” the Court permits the employer to raise an affirmative defense that it “exercised reasonable care to prevent and correct promptly” the conduct and that the employee “unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.”⁶⁶ On the issue of employer liability for harassment by co-workers, the Supreme Court, without holding on the issue, noted that the trend of federal appellate courts is to impose liability “under a negligence

58. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 746–47 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 780 (1998).

59. See *Ellerth*, 524 U.S. at 751 (addressing “quid pro quo” harassment); *Faragher*, 524 U.S. at 786–87 (addressing “hostile work environment” harassment).

60. *Ellerth*, 524 U.S. at 751.

61. *Id.*

62. *Id.* at 751–54.

63. *Faragher*, 524 U.S. at 791–92 (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986)); *Ellerth*, 524 U.S. at 755–56.

64. *Faragher*, 524 U.S. at 793–803; *Ellerth*, 524 U.S. at 754.

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

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

standard.”⁶⁷

B. Lower Court Opinions Addressing the Issue of Conduct Outside the Workplace

Because the Supreme Court has not yet confronted the issue of conduct outside the workplace, lower federal courts continue to release a wide range of opinions both considering such conduct as well as dismissing it. Furthermore, the courts that do consider conduct outside the workplace have inconsistent methods for determining the boundaries of the workplace. In fact, some of those courts overlook the fundamental purpose of Title VII and Supreme Court guidance. For instance, one court implicitly recognized a distinction between supervisor and non-supervisor conduct when defining the boundaries of the workplace when it stated that “other courts have held that generally an employer is not liable for the harassment or other unlawful conduct perpetrated by a *non-supervisory* employee after work hours and away from the workplace setting.”⁶⁸ A distinction between supervisor and non-supervisor conduct outside the workplace confuses the issue, however, by determining the legitimacy of any hostility on the basis of an employment hierarchy, a result that impairs Title VII protections against “the entire spectrum of disparate treatment.”⁶⁹ An analysis of cases on both sides of the issue of whether conduct outside the workplace is relevant to a hostile work environment claim reveals the relative strengths and weaknesses of each side’s positions.

1. Outside Conduct Not Considered in a Hostile Work Environment Claim

The Tenth Circuit Court of Appeals refused to consider conduct outside the workplace in *Sprague v. Thorn Americas, Inc.*⁷⁰ In *Sprague*, the plaintiff worked as a “market analyst” for the defendant-company.⁷¹ Over a period of sixteen months, a supervisor made remarks which the plaintiff found to be discriminatory.⁷² At the plaintiff’s wedding reception, the supervisor looked down her dress and commented, “[W]ell, you got to get it

67. *Faragher*, 524 U.S. at 799.

68. *Duggins v. Steak ‘N Shake, Inc.*, 3 F. App’x 302, 311 (6th Cir. 2001) (emphasis added).

69. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (quoting *L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

70. 129 F.3d 1355, 1366 (10th Cir. 1997).

71. *Id.* at 1359.

72. *Id.* at 1366. The supervisor made comments such as: “you really need to undo that top button”; “Hey, you can’t call them girls. You have to call them ladies”; and “you know how they are at that time of the month.” *Id.*

when you can.”⁷³ The plaintiff expressed her reaction as being “so uncomfortable and . . . so embarrassed that [she] didn’t even tell [her] husband for a few weeks.”⁷⁴ The Court admitted that “[t]he incident at [the] wedding reception was the most serious”; however, it explained that “[the conduct] occurred at a private club, not *in the workplace*.”⁷⁵ In conclusion, the Court held that the defendant’s comments did not meet the threshold of severity or pervasiveness required for a hostile work environment.⁷⁶

In *Sprague*, the Court failed to analyze the effect of the alleged conduct at the wedding, but instead dismissed it entirely because it occurred off the work premises.⁷⁷ The potential importance of the conduct at the wedding, had it been considered in the Court’s conclusion, is unclear—the Court characterized most of the defendant’s remarks as merely “unpleasant and boorish” and noted that “the conduct occurred sporadically over an extended period.”⁷⁸ Regardless, the conclusion in *Sprague* is unsatisfactory because the plaintiff was unable to have a right enforced because the defendant fortuitously engaged in the most serious conduct at a wedding reception, and the Court offered no legitimate support for this result. Additionally, the Court failed to comprehend that hostility can accumulate with each act of harassment, regardless of location, to the extent that the cumulative hostility accompanies less-serious workplace comments and even the potentially ominous presence of the harasser in the workplace.⁷⁹

Although the Court of Appeals for the Sixth Circuit has not yet decided the issue, one district court within the circuit held that off-premises conduct should not be considered.⁸⁰ In *Diepenhorst v. City of Battle Creek*, the plaintiff, a “forensic evidence technician,” engaged in a sexual relationship with a police sergeant for the city, who was not her supervisor.⁸¹ The plaintiff alleged that the relationship eventually resulted in unwanted sexual

73. *Id.*

74. *Id.*

75. *Id.* (emphasis added).

76. *Id.*

77. *See id.*

78. *Id.* The plaintiff was further disadvantaged by filing her case prior to the employer liability rules set out in *Ellerth* and *Faragher*. Under *Ellerth/Faragher*, the plaintiff may have prevailed because allegedly “management was aware of at least three of the[] incidents . . . [and] refused to remedy the situation by placing [the plaintiff] with a different supervisor.” *Id.* at 1365; *see Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).

79. *E.g.*, *Crowley v. L.L. Bean, Inc.*, 303 F.3d 387, 409–10 (1st Cir. 2002) (“[I]nteractions . . . outside of work help explain why [the plaintiff] was so frightened . . . and why [the defendant’s] constant presence around [the plaintiff] at work created a hostile work environment.”).

80. *See Diepenhorst v. City of Battle Creek*, No. 1:05-CV-734, 2007 WL 1141492, at *12 (W.D. Mich. Apr. 17, 2007).

81. *Id.* at *1.

acts, but it never physically entered the workplace.⁸² However, in one instance, another employee witnessed the sergeant take a fastener out of the plaintiff's hair and informed a supervisor that the plaintiff did not approve of the sergeant's behavior.⁸³ The supervisor spoke with the sergeant and, afterward, witnessed no further incidents of unwanted touching.⁸⁴ While the plaintiff waited for an offer from the city police force, other officers suggested that the plaintiff did not have "the right personality for a police officer."⁸⁵ After the plaintiff accepted a job with a county police force, she claimed that the sergeant had raped her.⁸⁶ The District Court for the Western District of Michigan dismissed this conduct, finding that sexual harassment involves "unwelcome sexual conduct *in the workplace*."⁸⁷

The *Diepenhorst* Court also fails to provide adequate rationale for dismissing off-premises conduct. The Court noted that the plaintiff conceded that the sexual acts "occurred outside of the workplace."⁸⁸ In refusing to consider conduct occurring off the work premises, the Court, unlike *Sprague*, cited to another court for authority, which at least provides the appearance of legitimacy.⁸⁹ Still, the Court invariably applied the workplace distinction to eliminate the adequacy of the claim.⁹⁰ Although the Court addresses the claim's unlikelihood of success without the rule, the early dismissal of the conduct shows that the Court was reluctant to seriously consider the conduct's true severity.⁹¹

Similarly, in an unpublished opinion, the Sixth Circuit Court of Appeals acknowledged that "other courts have held that generally an employer is not liable for the harassment or other unlawful conduct perpetrated by a non-supervisory employee after work hours and away from the workplace setting."⁹² However, the Court also accepted, "[W]hen an employee is forced to work for . . . someone who is harassing her outside the workplace, the employee may reasonably perceive the work environment to be hostile."⁹³ In this case, the fourteen-year-old plaintiff, an employee of the defendant, attended a non-mandatory party hosted by a trainer employed at

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* **1-2.

86. *Id.* at *2.

87. *Id.* at *12 (quoting *Pepperman v. Gen. Motors, Corp.*, No. 197097, 1997 WL 33339576, at *2 (Mich. Ct. App. Nov. 4, 1997)).

88. *Id.*

89. *See id.* (quoting *Pepperman*, 1997 WL 33339576, at *2).

90. *Id.*

91. *See id.*

92. *Duggins v. Steak 'N Shake, Inc.*, 3 F. App'x 302, 311 (6th Cir. 2001).

93. *Id.*

another Steak 'N Shake location.⁹⁴ While at the party, the plaintiff drank alcohol and alleged that, after the party, the trainer raped her before driving her home.⁹⁵ A rumor of the incident came to the attention of the company's human resources department, but the plaintiff's mother refused to discuss it with them.⁹⁶ No criminal charges were ever filed against the trainer.⁹⁷ The Court found most determinative the fact that these two employees "never worked together either before or after the alleged rape."⁹⁸ Therefore, the Court concluded that the "[p]laintiff has failed to show that the alleged rape . . . created a hostile work environment."⁹⁹

The Fifth Circuit has also applied the workplace distinction while offering little support for the rule. In *Gowesky v. Singing River Hospital Systems*, an Americans with Disabilities Act ("ADA") case, the plaintiff contracted hepatitis C while working for the defendant.¹⁰⁰ As a result, she stopped working but continued to attend staff meetings for two years while she received treatment.¹⁰¹ After successful treatment, the plaintiff approached an administrator at the hospital and expressed her desire to return.¹⁰² The administrator stated "that he didn't think that [the plaintiff] could work in the Emergency Room with hepatitis C, that he wouldn't go to a dentist with hepatitis C and he would not let [the plaintiff] suture his child."¹⁰³ The plaintiff's immediate supervisor also required "that she would be able to do the work, and that she would not be infectious. . . . [The supervisor also questioned her] on whether she knew of any other emergency room physicians with hepatitis C."¹⁰⁴ The plaintiff alleged further "offensive remarks" and eventually sought legal representation after receiving a notice which she interpreted as a termination of her employment.¹⁰⁵ Although this was an ADA case, ostensibly the Court would apply the same holding under Title VII because it referred to "'harassment' under the ADA or its model, Title VII."¹⁰⁶

94. *Id.* at 305-06.

95. *Id.* at 306.

96. *Id.*

97. *Id.*

98. *Id.* at 311.

99. *Id.*

100. *Gowesky v. Singing River Hosp. Sys.*, 321 F.3d 503, 506 (5th Cir. 2003). *Gowesky* is representative of the circuit split regarding whether conduct outside the workplace is relevant to a hostile work environment claim. *See Reed v. Airtran Airways*, 531 F. Supp. 2d 660, 670 n.17 (D. Md. 2008).

101. *Gowesky*, 321 F.3d at 506.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 507.

106. *Id.* at 510.

The Court stated that “a harassment claim, to be cognizable, must affect a person’s working environment.”¹⁰⁷ The Court found that the cases cited by the plaintiff referred to “harassment *in the workplace*” and dismissed her claim.¹⁰⁸ The *Gowesky* opinion attempts to provide a rational basis for distinguishing between “in the workplace” and outside the workplace but ignores facts germane to the issue. The Court emphasizes that the plaintiff “never returned to work” and that the conversations “occurred via telephone or in writing.”¹⁰⁹ However, the plaintiff still “maintained staff privileges and continued to attend monthly staff meetings.”¹¹⁰ The facts show that the employment relationship continued, just under uncommon circumstances. The Court, however, annuls the employment relationship with artificial distinctions, such as that the plaintiff’s communications with her supervisors did not occur face-to-face and that she never returned to full work-capacity.¹¹¹ By severing comments made in the context of a pure employment relationship from that relationship, the Court engenders a disturbing result: it overlooks potential discrimination in the workplace.

In these cases, the range of analysis runs from completely lacking any policy consideration or reasoning to requiring the presence of hodge-podge—and sometimes irrelevant—factual connections to the workplace, all of which overlook the underlying hostility in the workplace. The decisions imply that the “workplace” can be isolated from events occurring outside its boundaries. To do so, these courts consistently emphasize facts that distance conduct from the physical boundaries of the workplace, without looking at the overwhelming psychological impact the conduct may have within it. Furthermore, these courts provide no substantive discussion of the purposes of Title VII or the actual effects in the workplace.

2. Courts Considering Conduct Outside the Workplace

In *Crowley v. L.L. Bean, Inc.*, the United States Court of Appeals for the First Circuit addressed a defendant’s claim that the district court abused its discretion when it permitted evidence of conduct outside the workplace in a hostile work environment case.¹¹² The plaintiff claimed that while working for the defendant, a co-employee harassed her in a number of ways.¹¹³ The harassment involved unwelcome and improper touching,

107. *Id.*

108. *Id.*

109. *Id.* at 511.

110. *Id.* at 506.

111. *See id.* at 511.

112. *Crowley v. L.L. Bean, Inc.*, 303 F.3d 387, 409 (1st Cir. 2002).

113. *Id.* at 392.

stalking, and eventually a break-in at the plaintiff's home.¹¹⁴ The defendant filed a motion in limine seeking to have evidence of conduct outside the workplace excluded.¹¹⁵ However, the Court acknowledged that "[c]ourts . . . do permit evidence of non-workplace conduct to help determine the severity and pervasiveness of the hostility in the workplace."¹¹⁶ The Court supported this statement by citing another First Circuit case involving sexual harassment in which the Court admitted evidence of "crank phone calls."¹¹⁷ The Court noted that evidence of conduct outside the workplace "explain[s] why she was so frightened . . . and why his constant presence around her at work created a hostile work environment."¹¹⁸ Thus, the Court acknowledged the relevance of conduct outside the workplace when addressing the hostility present in the workplace.¹¹⁹ The inference from the Court's statement is that the Court was concerned that limiting evidence to conduct in the workplace would hinder application of Title VII by excusing the workplace effects that the statute aims to eliminate.¹²⁰

Similarly, the Seventh Circuit Court of Appeals confronted the issue of conduct outside the workplace in *Lapka v. Chertoff* but, in a different approach than *Crowley*, viewed the workplace through a modern lens.¹²¹ In *Lapka*, the plaintiff attended a training session in Georgia as a requirement of her employment with the Immigration and Naturalization Service ("INS").¹²² The plaintiff met other trainees at a bar and became intoxicated.¹²³ While at the bar, the plaintiff danced with another employee of INS who made "sexual advances" and eventually gave the plaintiff a ride to her hotel.¹²⁴ When the employee dropped the plaintiff off at her hotel room, he sexually assaulted the plaintiff.¹²⁵ A local hospital subsequently treated the plaintiff for alcohol poisoning, and plaintiff informed hospital staff of the possibility that she was a victim of date rape.¹²⁶ The plaintiff reported the events to the training center, which called the police and conducted its

114. *Id.*

115. *Id.* at 409.

116. *Id.*

117. *Id.* (citing *O'Rourke v. City of Providence*, 235 F.3d 713, 724 (1st Cir. 2001)).

118. *Id.* at 409–10.

119. *See id.*

120. *See id.*

121. *Lapka v. Chertoff*, 517 F.3d 974, 983 (7th Cir. 2008).

122. *Id.* at 979.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

own investigation before sending a report to INS.¹²⁷ When the accused employee began showing up at the plaintiff's place of employment and her supervisors did not react promptly to her concerns, the plaintiff obtained an order of protection.¹²⁸ The plaintiff continued requesting, to no avail, that her supervisors contact the accused employee and prohibit him from the building.¹²⁹ Eventually, the plaintiff began receiving assignments that she believed were the result of retaliation by her supervisors.¹³⁰

The Court rejected the defendant's argument that outside, off-hours conduct should not be considered and stated that "harassment does not have to take place within the physical confines of the workplace to be actionable; it need only have consequences in the workplace."¹³¹ The Court also acknowledged, "The [training] facility is different from a typical workplace where 'employees go home at the close of their normal workday.'"¹³² The Court's analysis focused on the fact that the employer provided the hotel, training, and cafeteria, and that "[e]mployees in these situations can be expected to 'band together for society and socialize as a matter of course.'"¹³³ The *Lapka* Court recognized that in circumstances such as the INS's training facility, the traditional definition of the workplace collapses.¹³⁴ Analyzing the case with a flexible understanding of the workplace, the Court adapted Title VII to encompass real situations where the conduct cannot be isolated from the workplace.¹³⁵ The Court concluded that under the "severe or pervasive" test, the assault alone could meet the severity option, but that the frequent visits by the alleged harasser would also give rise to a claim under the pervasive option.¹³⁶

The United States District Court for the Southern District of New York, in *Parrish v. Sollecito*, provided the most comprehensive, well-reasoned analysis of the boundaries of the workplace. In *Parrish*, the plaintiff worked for two car dealerships with the position of "finance and income manager."¹³⁷ The General Manager of one of the dealerships began

127. *Id.*

128. *Id.* at 980.

129. *Id.*

130. *Id.*

131. *Id.* at 983.

132. *Id.* (quoting *Ferris v. Delta Air Lines, Inc.*, 277 F.3d 128, 135 (2d Cir. 2001)).

133. *Id.* (quoting *Ferris*, 277 F.3d at 135).

134. *See id.*

135. *See id.*

136. *Id.* at 983–84. The Court noted that the pervasiveness option triggers because "[t]he continued presence of a rapist in the victim's workplace can render the workplace objectively hostile because the rapist's presence exacerbates and reinforces the severe fear and anxiety suffered by the victim." *Id.* at 984. The court later denied the plaintiff's hostile work environment claim on other grounds. *Id.* at 985.

137. *Parrish v. Sollecito*, 249 F. Supp. 2d 342, 344 (S.D.N.Y. 2003).

harassing the plaintiff during a meeting by putting his hand under the plaintiff's skirt and "reaching close to her groin" when two others were present.¹³⁸ The plaintiff reported the incident to the owner of the dealership who "[made] light of the matter" by saying that he "would break [the General Manager's] fingers if he touches you like that."¹³⁹ The General Manager repeated the conduct two more times, with the same employees present.¹⁴⁰ The Office Manager recorded all these incidents.¹⁴¹ In the fourth alleged incident, the General Manager repeated the same conduct, but this time at a funeral reception for the dealership owner's father.¹⁴² The plaintiff subsequently reported the incident to the owner, who said he would discuss it with the General Manager, but never did so.¹⁴³ Following this incident, the General Manager continued to engage in inappropriate behavior and instructed the sales staff to not cooperate with the plaintiff.¹⁴⁴ Eventually, the owner and General Manager terminated the plaintiff's employment.¹⁴⁵ Because the only incident falling within 300 days of the plaintiff's filing with the Equal Employment Opportunity Commission ("EEOC") was the incident at the funeral reception, the issue before the Court was whether conduct outside the workplace was relevant to a hostile work environment claim.¹⁴⁶

The Court began its analysis under the proposition that it was "aware of no settled law that . . . allow[ed] a harasser to pick and choose the venue for his assaults so as to not account for those that occur physically outside the workplace."¹⁴⁷ As a result, it explained that "[t]he proper focus of sexual harassment jurisprudence is not on any particular point in time or coordinate location that rigidly affixes the employment relationship, but on the manifest conduct associated with it, on whether the employer has created a hostile or abusive 'work environment.'"¹⁴⁸ Similar to *Lapka*, the Court recognized that the employment relationship "often carries beyond the work station's physical bounds and regular hours" and noted that "the prevailing attitudes and perceptions" of the office may be manifested outside

138. *Id.* at 345.

139. *Id.*

140. *Id.* at 345-46.

141. *Id.*

142. *Id.* at 346.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 347.

147. *Id.* at 350-51.

148. *Id.* at 351.

the office into other arenas.¹⁴⁹ Furthermore, the Court expanded on a strict definition of work functions by including “social events” and explaining that other confrontations may not be “compelled by a business purpose, but . . . the employment relationship may necessarily carry over by reason of circumstances that may have their origins in the workplace itself.”¹⁵⁰

Under this framework, the Court viewed the workplace “holistically” by providing for a “constructive extension of the work environment” where the employer permitted harassing conduct in the workplace, which provided those engaging in the harassing conduct with “license” to continue outside the workplace.¹⁵¹ It noted that “often such outside misbehavior rebounds and transposes its consequences inside the actual workplace itself.”¹⁵² Admirably, the Court viewed the circumstances through the effect on the victim, stating that whereas the harasser may “dismiss an act of harassment because it allegedly happened beyond the workplace, the victim may not have the equal aplomb to leave the matter behind.”¹⁵³ In summation, the Court stated that “the centripetal bond that pulls the co-workers’ lives around the same work orbit remains what it is wherever their common employment relation may proximately extend.”¹⁵⁴ The Court held that because the incident at the funeral was an “ordinary and necessary social obligation[,]” the incident could support a jury finding of a hostile work environment.¹⁵⁵

C. Equal Employment Opportunity Commission Policy on Hostile Work Environments

Under The Civil Rights Act of 1964, Congress gave administrative authority to the EEOC “to issue, amend, or rescind suitable procedural regulations to carry out the provisions [of the act].”¹⁵⁶ EEOC guidelines provide some guidance regarding conduct occurring outside the workplace. The Code of Federal Regulations provides a definition of sexual harassment that includes “[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.”¹⁵⁷ When investigating sexual harassment, the EEOC reserves the right to “look at

149. *Id.*

150. *Id.*

151. *Id.* at 351–52.

152. *Id.* at 352.

153. *Id.*

154. *Id.*

155. *Id.* at 352–53.

156. 42 U.S.C. § 2000e-12(a) (2006).

157. 29 C.F.R. § 1604.11(a) (2009).

the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred,” which is consistent with the majority opinion in *Harris*.¹⁵⁸ However, the regulations clarify that between co-employees, “an employer is responsible for acts of sexual harassment *in the workplace* where the employer . . . knows or should have known of the conduct.”¹⁵⁹

On the EEOC’s website, the document titled “Policy Guidance on Current Issues of Sexual Harassment” contains no references to conduct outside the workplace, and the last update was on June 21, 1999.¹⁶⁰ The regulation on sexual harassment also appears to cover employer liability for racial harassment, as the EEOC compliance manual for race-based hostile work environment matters cites to the regulation on sexual harassment (§ 1604.11) and the “Policy Guidance on Current Issues of Sexual Harassment.”¹⁶¹ Thus, the EEOC guidelines provide direction consistent with the judicial development of a hostile work environment. The correlation between the regulations promulgated by the EEOC and *Harris*, *Ellerth*, and *Faragher*, as well as the absence of an express position on whether conduct outside the workplace should be considered, suggest that the Commission and the U.S. Supreme Court develop in tandem and have not yet addressed this issue.

III. EXPANSION OF THE WORKPLACE WITHIN THE *ELLERTH* AND *FARAGHER* FRAMEWORK

A. *Courts should consider conduct outside the workplace in “hostile work environment” claims.*

Judicial development of the hostile work environment cause of action and the logic of courts considering conduct outside the workplace provide a strong basis for expanding the workplace definition beyond the traditional concept of “the office.” Such an expansion would encompass modern notions of the workplace, including social obligations, travel requirements, off-premises business meetings, off-premises team-building events, and other social encounters. The attempt to separate employment-related events from the “workplace” represents a judicial disconnect from reality because for the majority of Americans, such events constitute normal occurrences

158. *Id.* § 1604.11(b); see *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).

159. *Id.* § 1604.11(d) (emphasis added).

160. See EEOC, Policy Guidance on Current Issues of Sexual Harassment (Mar. 19, 1990), <http://www.eeoc.gov/policy/docs/currentissues.html>.

161. See EEOC, EEOC Compliance Manual Section 15: Race & Color Discrimination (Apr. 19, 2006), <http://www.eeoc.gov/policy/docs/race-color.html>.

and requirements of employment.

By adopting the view of more progressive courts—those that consider conduct outside the workplace—Title VII will provide necessary employee protections while also producing and sustaining an efficient workforce.¹⁶² Court enforcement of Title VII with respect to conduct outside the workplace will incentivize employer precautions for the prospective actions of supervisors and employees, who may engage in discriminatory behavior, with the elimination of economic waste.¹⁶³ Economic waste may take the form of emotionally distraught employees with little motivation to perform well or be productive, supervisors and co-employees who may be spending work time engaging in harassment, and any collateral effect of harassment taking the form of unhappy workers involved in these situations or disheartened by the conduct itself and suffering lost productivity as a result.¹⁶⁴ Responsible employers must view hostile work environments primarily as economic waste and be concerned with these costly effects.

Statistics of sexual harassment claims show a significant amount of conduct outside the workplace being litigated. In 2007, the EEOC received 27,112 charges of harassment and resolved 22,572 of the claims, with the majority of charges—12,510—based on Sexual Harassment.¹⁶⁵ The EEOC brought 268 suits under Title VII in 2007.¹⁶⁶ Unfortunately, the EEOC does not provide private litigation statistics or statistics as to incidents occurring outside the workplace. However, one study of federal court opinions between 1986 and 1996 revealed almost 650 opinions based on sexual harassment.¹⁶⁷ Significantly, in the same study, 114 of the cases, or twenty-three percent, involved conduct occurring outside the workplace.¹⁶⁸ Furthermore, sixty-nine of the cases, or fourteen percent, exclusively involved conduct outside the workplace.¹⁶⁹ This survey also notes that of the 114 cases which involved conduct outside the workplace, “about half contain an employment related event Thirty cases involve a nonwork social

162. See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 76 (1986) (Marshall, J., concurring).

163. Cf. Richard A. Posner, *An Economic Analysis of Sex Discrimination Laws*, 56 U. CHI. L. REV. 1311, 1321 (1989) (“As more and more women are employed, the employer’s self-interest in curbing intrigue and harassment, which lowers productivity, grows apace.”).

164. See *id.*

165. EEOC, Harassment Charges EEOC & FEPAs Combined: FY 1997–FY 2009, <http://www.eeoc.gov/eeoc/statistics/enforcement/harassment.cfm> (last visited Mar. 17, 2010); EEOC, Sexual Harassment Charges EEOC & FEPAs Combined: FY 1997–FY 2009, http://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment.cfm (last visited Mar. 17, 2010).

166. EEOC, EEOC Litigation Statistics, FY 1997 through FY 2009, <http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm> (last visited Mar. 17, 2010).

167. Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 549–50 (2001).

168. *Id.* at 563.

169. *Id.*

event . . . [and] thirty-five cases . . . included nonconsensual, off-premises conduct, such as phone calls, letters, or visits to the victim's home."¹⁷⁰ Clearly these statistics establish that a significant amount of employment-related harassment involves conduct occurring outside the workplace, and that plaintiffs consider this conduct serious enough to litigate in federal courts.¹⁷¹ Most importantly, though, many courts that fail to consider conduct outside the workplace move against the current of the U.S. Supreme Court and mischaracterize EEOC regulations on sexual harassment. The courts that disregard conduct outside the workplace often rely primarily on the phrase "in the workplace" for rejecting a hostile work environment claim.¹⁷² Nowhere in Title VII does the phrase "in the workplace" appear; rather, the likely source of this phrase is the Code of Federal Regulations which states that "an employer is responsible for acts of sexual harassment *in the workplace*" under a negligence standard, which is also recognized in federal courts.¹⁷³ However, this regulation only relates to "fellow employees," not necessarily supervisors.¹⁷⁴ More importantly, though, the regulation does not negate employer liability for conduct by co-employees outside the workplace; it is merely silent as to whether off-premises conduct should be considered.¹⁷⁵ Looking at the entire regulation, which earlier states that "the Commission will look at the record as a whole and at the totality of the circumstances," the logical conclusion is that the regulations explicitly prescribe employer liability for harassment by a co-employee under a negligence standard, but in looking at the totality of the circumstances, the Commission retains the right to bring a potential action for conduct occurring outside the workplace.¹⁷⁶

The EEOC's conspicuous absence of a position on conduct outside the workplace corresponds with prior U.S. Supreme Court decisions. In *Harris*, Justice O'Connor not only stated that a hostile work environment requires "looking at all the circumstances," but also that it is enough that the acts "discourage employees from remaining on the job, or keep them from ad-

170. *Id.*

171. Furthermore, legal costs in preparing and engaging in any litigation involving conduct outside the workplace would be significant for any employers that fail to take adequate precautions against such conduct.

172. *E.g.*, *Gowesky v. Singing River Hosp. Sys.*, 321 F.3d 503, 510 (5th Cir. 2003); *Sprague v. Thorn Ams., Inc.*, 129 F.3d 1355, 1366 (10th Cir. 1997); *Diepenhorst v. City of Battle Creek*, No. 1:05-CV-734, 2007 WL 1141492, at *12 (W.D. Mich. Apr. 17, 2007).

173. 29 C.F.R. § 1604.11(d) (2009) (emphasis added); *see Faragher v. City of Boca Raton*, 524 U.S. 775, 799 (1998).

174. *See* 29 C.F.R. § 1604.11(d).

175. *See id.*

176. *See id.* § 1604.11(b), (d).

vancing in their careers.”¹⁷⁷ And, in *Meritor*, Justice Rehnquist noted the “congressional intent ‘to strike at the entire spectrum of disparate treatment of men and women.’”¹⁷⁸ Thus, the Supreme Court clearly interprets Title VII as a statute aimed at promoting work environments free of discrimination against protected categories, without specific regard to the origins of that discrimination. Failing to take note of traumatic, degrading incidents occurring outside the workplace subverts the direction of the Supreme Court by distorting its interpretation of the statute’s purpose. A barrier to enforcement of Title VII that legitimizes claims based on the location of the conduct undermines the statute by permitting the effects of discrimination against protected classes to remain in the workplace.

Lastly, courts refusing to consider conduct outside the workplace provide no reasonable analysis as to the policy behind their decision, the purpose of the statute, or the realities of the modern workplace. Some decisions amount to a recitation of the phrase “in the workplace” along with a careless dismissal of conduct that would, if occurring “in the workplace,” amount to a gross display of sexual harassment. Other courts require the existence of vague factual elements that they claim connect conduct to the employment context, but inherently overlook the hostility in the workplace. Therefore, the harassed plaintiff’s options are to either remain working in or remove himself or herself from the discriminatory work environment—options that do not comport with Title VII protections. The legitimacy of decisions that leave a harassed plaintiff with no recourse, because courts—as well as employers—can draw an arbitrary line that distinguishes the boundaries of the workplace, must be questioned when compared with the thoughtful analysis of courts that consider conduct outside the workplace and the clear direction of the Supreme Court.

B. Courts should embrace Parrish’s logic and extend employer liability to all interactions between employees.

1. The Parrish Court’s Analysis

The *Parrish* opinion develops an approach for understanding the modern workplace when enforcing Title VII. The Court’s opinion addresses the remedial purpose of Title VII in a manner fully consistent with what most employees would realistically view as the “work environment” or “workplace.” Following the Court’s rationale leads not only to an expanded defi-

177. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22–23 (1993).

178. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (quoting *L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

inition of the workplace, but also to a framework essential to understanding employee relations and employer liability within the test established by the Supreme Court in *Faragher* and *Ellerth* and the negligence standard for co-employees used in the circuits.

The *Parrish* opinion emphasizes that harassing conduct represents the central issue of a hostile work environment claim. On this point, the Court stated that the crux of liability for discrimination is the “manifest conduct” resulting in a hostile work environment, not merely a time or place that “rigidly affixes the employment relationship.”¹⁷⁹ The Court implicitly acknowledged that phrases such as “outside work hours” or “outside the workplace” should be viewed as collateral circumstances.¹⁸⁰ By deemphasizing these collateral circumstances, the Court shifts the focus of Title VII away from the mechanical distinctions that doom hostile work environment claims based on the location of the conduct. And, instead, the Court recognized that Title VII’s purpose of eliminating workplace discrimination cannot be served by focusing on circumstances relating primarily to the “spacial and temporal” aspects of the workplace at the expense of leaving a hostile work environment in place.¹⁸¹

As a result, the Court adopted an expansive definition of the workplace which focused more on the employment relationship than on any location or time. When defining the workplace, the Court took notice of specific events such as “business-related meals and social events” as well as general work events like being “‘on the road’ or ‘in the field.’”¹⁸² It recognized that the workplace “often carries beyond the work station’s physical bounds and regular hours.”¹⁸³ The Court justified this expansive view of the workplace by stating that “the employment relationship may . . . carry over by reason of circumstances that may have their origins in the workplace itself.”¹⁸⁴ By adopting this more expansive view of the workplace and placing its focus on the conduct leading to a hostile work environment, the Court sought to effect Title VII’s purpose of eliminating the effects of discrimination in the workplace. This is apparent from the Court’s conclusion, in which it states that “wherever a sexual assault occurs, its consequences may be felt in the victim’s ‘workplace.’”¹⁸⁵

The *Parrish* Court followed the Supreme Court’s guidance by focus-

179. *Parrish v. Sollecito*, 249 F. Supp. 2d 342, 351 (S.D.N.Y. 2003).

180. *See id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

ing exclusively on the harassing conduct and whether that conduct led to a hostile work environment, which squarely addresses the “congressional intent ‘to strike at the entire spectrum of disparate treatment of men and women.’”¹⁸⁶ Moreover, the Court truly viewed “all the circumstances” when it analyzed the hostile work environment claim.¹⁸⁷ By de-emphasizing the locus of the conduct, the Court opens its analysis to a variety of important benefits provided by Title VII, such as generally deterring discriminatory conduct, keeping the workplace free from discrimination, and remedying the harmful effects of discrimination on the individual. The *Parrish* opinion falls just short of a fully satisfactory solution when it allows for a “constructive extension of the work environment” where the employer permitted the conduct in the workplace, thereby providing the harasser with “license to engage in sexual misconduct . . . outside the company.”¹⁸⁸ Unfortunately, by requiring that the harassing conduct initially occur in the workplace before holding the employer liable, the Court continued to view conduct outside the workplace as a separate category from conduct inside the workplace.

Regardless, the *Parrish* Court viewed the work environment “holistically” and noted that “the centripetal bond that pulls the co-workers’ lives around the same work orbit remains what it is wherever their common employment relation may proximately extend.”¹⁸⁹ The Court provided little specific guidance for determining how far an “employment relation may proximately extend.”¹⁹⁰ Its conclusion that the conduct, which took place at a funeral reception for the employer’s father, was part of an “ordinary and necessary social obligation[.]” represents the most helpful indication.¹⁹¹ However, the Court’s general guidance proves helpful in a broader sense. The Court’s statement that “the employment relationship may necessarily carry over by reason of circumstances that may have their origins in the workplace itself” suggests that certain circumstances inherently result in the presence of the employment relationship.¹⁹²

The *Parrish* Court’s proposition that circumstances may inherently invoke the employment relationship should be extended in defining the

186. See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (quoting *L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)).

187. See *Parrish*, 249 F. Supp. 2d at 351; *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 23 (1993) (“[W]hether an environment is ‘hostile’ . . . can be determined only by looking at all the circumstances.”).

188. *Parrish*, 249 F. Supp. 2d at 351–52.

189. *Id.*

190. See *id.* at 352.

191. *Id.*

192. See *id.* at 351.

“workplace.” Whenever an employee and a supervisor/co-employee come into contact, it belies reason to accept that the contact can be “parsed” into a variety of factors either negating or validating the existence of an employment relationship.¹⁹³ The link between the employees and the workplace is a fact that neither party can voluntarily abandon in the course of contact. For example, a supervisor encountering an employee outside of the traditional workplace would recognize, even if subconsciously, the workplace connection. Furthermore, the supervisor would be expected by social and business custom to engage in small talk and conduct himself professionally, regardless of where the meeting occurs. Similarly, co-employees meeting outside the workplace would recognize the employment connection as well. Although by custom co-employees may not be expected to conduct themselves according to the same standard of conduct as a supervisor, a co-employee cannot successfully detach words and actions from the circumstances to confine them to an exclusively personal relationship, as distinct from an employment relationship. Allowing a court to manipulate circumstances after the harassing conduct occurs and then divine the non-presence of an employment relationship leads to artificial distinctions that may provide the courts with the challenge of legal obfuscation, but nevertheless results in substantial injustice. As the *Parrish* Court noted, the effects of harassment, whether inside or outside the office, cannot be isolated from the workplace.¹⁹⁴ Instead, the effects of harassment permeate the employment context and may be triggered by another employee’s presence or the workplace itself.¹⁹⁵

As a result, courts must accept that an employment relationship arises simply through contact between two employees. Furthermore, the employment relationship must define the boundaries of the workplace, in which the “office” serves only as the primary forum for the effects of the relationship to manifest themselves. By accepting that the employment relationship cannot be voluntarily abandoned when employees interact, courts can instead focus on each employer’s role of ending discriminatory conduct within its control.

2. Application of Current Precedent to an Extended View of Parrish

Courts must consider the current atmosphere of judicial opinion when determining liability for workplace conduct. Federal courts determining

193. *Id.* (“The employment relationship cannot be so finely and facilely parsed.”).

194. *Id.* at 352.

195. *See* *Crowley v. L.L. Bean, Inc.*, 303 F.3d 387, 409–10 (1st Cir. 2002) (“[I]nteractions . . . outside of work help explain why [the plaintiff] was so frightened . . . and why [the harasser’s] constant presence around [the plaintiff] at work created a hostile work environment.”).

whether an employer should be held liable for the acts of supervisors will instinctively look to the test set out in *Ellerth* and *Faragher*. When determining employer liability for the acts of co-employees, courts will typically respond by applying the negligence standard used in the circuits.¹⁹⁶ Taking the extended view of *Parrish*, that regardless of where the conduct occurred the workplace/employment relationship existed, *Ellerth*, *Faragher*, and the negligence standard act to limit employer liability to matters within the employer's control.¹⁹⁷ Actions within the employer's control include promoting of supervisors, creating intake and information gathering systems for employee misconduct, and training, disciplining, and terminating employees who may violate the protections of Title VII.¹⁹⁸ By preserving the limit on employer liability under *Ellerth*, *Faragher*, or a negligence standard, courts will achieve Title VII's purpose of eliminating discrimination in employment without excessive hardship for the employer.

Ellerth and *Faragher* impute liability to the employer where a supervisor "with immediate (or successively higher) authority over the employee" takes a "tangible employment action."¹⁹⁹ Absent a "tangible employment action," the Court permits the employer to raise an affirmative defense requiring it to prove that the employer took "reasonable care to prevent and correct promptly" the conduct and that the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer."²⁰⁰ Employers spend large amounts of time and money cultivating and vetting employees to take supervisory positions. These promotions do not, or perhaps should not, involve arbitrary, uninformed decisions as to who has the capacity to take on more responsibility. Employers will typically look at many factors when making promotion decisions, notably the ability to lead and communicate with others and take responsibility for not only producing results individually, but collectively as well. When an employer makes a judgment that an individual possesses the necessary qualities for promotion to a supervisory role, the employer vouches for the supervisor as being an eligible spokesperson and executor of the company's directives. Regardless of a potential urgent need to promote an employee to supervisor, companies retain the choice of whether to place a particular person in a supervisory role; thus, the employer entirely controls who ascends to this position and acts as the company's "agent."

196. *Faragher v. City of Boca Raton*, 524 U.S. 775, 799 (1998).

197. *See id.* at 803.

198. *Id.* ("[E]mployers have . . . opportunity and incentive to screen [supervisors], train them, and monitor their performance.").

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

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

Furthermore, employers expect supervisors to conform to a standard of conduct that facilitates the smooth flow of business transactions and reduces aberrations in the company's daily operations.²⁰¹ An extended view of *Parrish* merges the employer's business and legal obligations by charging the employer with eliminating and preventing the economic waste inherent in a hostile work environment.²⁰² Thus, business and legal objectives mutually serve the goals of employers and employees: promoting a workplace free from the economic waste of harassment, while also preserving a private right for victims under Title VII. As a result, employers who satisfy their business obligation by controlling the potential for a hostile work environment and eliminating it if it exists will meet their legal obligation, with the benefits of increased productivity and a positive company image.²⁰³

Therefore, the *Faragher* and *Ellerth* test for employer liability for the conduct of a supervisor should remain in place, yet be understood under an extension of the *Parrish* logic to encompass interactions between employees and supervisors regardless of time or location. Therefore, any "tangible employment action" taken by a supervisor will result in liability, or, if there was no "tangible employment action," the employer can raise the affirmative defense under *Faragher/Ellerth* to show that it took efforts to eliminate any alleged hostility. Employers will suffer no unreasonable burdens by essentially being held to the standards of sound business judgment. The consequence of not using sound judgment, however, will extend not just to the business suffering economic waste, but to potential legal liability as well. The *Faragher/Ellerth* standard correctly views employers as having the most control in avoiding violations of Title VII by being mindful of the employees they promote and their own economic well-being, with the resulting well-being of employees working in an environment free from hostility.

As the Court noted in *Faragher*, many circuits hold employers liable for conduct of a co-employee under a negligence standard.²⁰⁴ Under the negligence standard, "[w]hen an employee is harassed by a co-worker, the employer may be held responsible only if 'the employer knew or should have known about an employee's acts of harassment and fails to take ap-

201. See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 76 (1986) (Marshall, J., concurring) ("[A] supervisor is charged with the day-to-day supervision of the work environment and with ensuring a safe, productive workplace.").

202. Cf. Posner, *supra* note 163, at 1321.

203. Cf. *id.*

204. See *Faragher*, 524 U.S. at 799.

appropriate remedial action.”²⁰⁵ Under the extended view of *Parrish*, a negligence standard should also remain in place. Holding employers responsible only for negligence provides sufficient protection for employers, while also giving them the opportunity to correct any behavior that may lead to a hostile work environment. Unlike supervisors, co-employees do not share the ability of a supervisor to create a “tangible employment action” and may engage in social interactions outside of work more often because they share a similar standing in the workplace and do not face any perceived social barrier between boss and employee.²⁰⁶ Although hostility between co-employees may result in economic waste equivalent to a supervisor’s creation of a hostile work environment, the employer will be protected by a higher burden of proof when co-employees are involved because no tangible employment action may be taken.²⁰⁷ Because the majority of Federal Courts of Appeal would apply a negligence standard for the conduct of co-employees, the courts should similarly apply it to discriminatory events that occur outside the office and involve co-employees.

Once again, employers will not be subject to absolute liability, only a negligence standard. Holding an employer to a negligence standard should theoretically result in little objection because the court is only enforcing the employer’s business obligation of eliminating waste within its knowledge. A suit enforcing employer liability for negligently allowing a hostile work environment to develop not only serves the interest of the victim in obtaining relief, but it creates a positive, productive work environment. An employer could hardly scoff at a policy remedying discrimination when the employer’s continued, profitable existence relies on the productivity it fails to maintain by overlooking such conduct. Therefore, an extended view of *Parrish* equally addresses the interests of employers and employees under *Ellerth*, *Faragher*, or a negligence standard, and these tests should continue to apply wherever the employment relationship between employees results in a hostile work environment.

3. A Response to Concerns about Expanding the Workplace under Title VII

In response to potential arguments that employers will be required to

205. *McKenzie v. Ill. Dep’t of Transp.*, 92 F.3d 473, 480 (7th Cir. 1996) (quoting *Brooms v. Regal Tube Co.*, 881 F.2d 412, 421 (7th Cir. 1989)).

206. *See, e.g., Faragher*, 524 U.S. at 803 (“When a fellow employee harasses, the victim can walk away or tell the offender where to go, but it may be difficult to offer such responses to a supervisor . . .”).

207. *See id.* at 805 (“[C]ourts have consistently held that acts of supervisors have greater power to alter the environment than acts of coemployees generally.”).

take costly measures to end discrimination outside the office walls, any increased costs will be negligible. One argument may be that a more broadly defined workplace will require more time and effort to inform employees and supervisors of the new policy. This argument lacks any force because, essentially, Title VII already requires employers to train and inform employees about issues of discrimination in the workplace. A broader conception of the workplace merely requires employers to explain that the same policies apply in any interaction between employees regardless of location, a simple concept to convey. Furthermore, the costs of vetting and cultivating supervisors will also be slight because the employer is already cultivating and vetting the supervisor to not discriminate in the office. An employee predisposed to abstain from discriminatory conduct in the office will not likely engage in that behavior outside the office; the reverse is also likely true—that one predisposed to engage in discriminatory conduct in the office will likely engage in that conduct outside the office as well.

Employers may also argue that responsibility for conduct outside the workplace will result in an increase in investigative costs. However, this argument also lacks force. First, a responsible employer will likely investigate any alleged discrimination to determine whether or not it could be held liable and the possible effect of the conduct in the workplace. Secondly, the fact that conduct may have occurred outside the office does not mean there will be no attempt at litigation, and preparatory investigation would be necessary anyway. Lastly, employers may argue that conduct outside the workplace is too detached from the employment context. But the fact that some conduct falls outside the employer's reach is exactly the point of limiting employer liability to actions within the employer's control under *Faragher*, *Ellerth*, or a negligence standard. While the employer may not have the ability to prevent all conduct, it bears the responsibility of taking actions against conduct within its control; this is the employer's role in achieving Title VII's purpose of eliminating discrimination within the employment context.

Applying the current rules for employer liability to all conduct and interactions between employees of the same company, regardless of location, does not unfairly extend liability. Rather, it follows current precedent, which imposes liability for conduct largely within the employer's control. Furthermore, the employer's exercise of this control will be beneficial in creating and maintaining a productive workforce. Thus, courts should continue to apply *Ellerth*, *Faragher*, and a negligence standard to the conduct, but open up their analysis to all interactions between employees. By addressing conduct outside the workplace under current precedent, courts can

account for the inescapable logic that the employment relationship between two employees of the same company cannot be legitimately severed, while also only imposing vicarious liability on employers for matters within their control.

CONCLUSION

Currently, arbitrary distinctions between “in the workplace” and “outside the workplace” based on traditional concepts of a physical workspace and work hours serve to protect employers from liability without any substantive basis. Because some courts still do not consider conduct outside the workplace when adjudicating a hostile work environment claim, adoption of this policy may lead to a larger quantity of meritorious lawsuits against employers. However, courts and employers should not view this issue as only creating more cost for employers; it is an issue about demanding that employers value their workers and dedicate the workplace to economic productivity. Extending *Parrish* would not necessarily set the bar for liability higher, but it would keep the current bar in place, without validating a distinction between a hostile work environment created by conduct inside the workplace, as opposed to one created by conduct outside the workplace. Limiting hostile work environments to harassment occurring within a particular building, at a particular time, undercuts each employee’s right to a workplace free from discrimination.