Buyer or Victim Beware?: Successor Liability Doctrine Lacks Proper Protection for Victims of Discrimination and Sexual Harassment in the Workplace

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NOTES

BUYER OR VICTIM BEWARE? SUCCESSOR LIABILITY DOCTRINE LACKS PROPER PROTECTION FOR VICTIMS OF DISCRIMINATION AND SEXUAL HARASSMENT IN THE WORKPLACE.

I. INTRODUCTION

A. A Historic Enactment

Title VII of the Civil Rights Act of 1964 was enacted in order to prohibit employment discrimination based on an individual’s race, color, sex, religion, or national origin. Congress initially intended for Title VII to “foster voluntary compliance,” but it quickly became a common route for litigation. It was expected that employers would adopt practices that would reduce the likelihood of employment discrimination, while also raising awareness of equal employment opportunities. Though most employers have adopted such anti-harassment policies, employment discrimination and sexual harassment are still blatantly present in the workplace.

After multiple amendments, Title VII states that it shall be unlawful for an employer to “discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment,” or to limit, segregate, or classify an individual “in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee.” Title VII, as previously mentioned, also prohibits offensive conduct based on an individual’s race, color, sex, religion, or national origin. The conduct must be unwelcomed and offensive, and either severe or pervasive.

2. See Stache v. Int’l Union of Bricklayers, 852 F.2d 1231, 1234 (9th Cir. 1988).
5. Id.
Employers are required to take appropriate steps to prevent and correct any form of discrimination and harassment.\footnote{7}

Title VII defines an employer as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks . . . and any agent of such a person."\footnote{8} In furtherance of Congress' intent to limit liability to employers with fifteen or more employees, courts have refused to hold individuals liable under Title VII.\footnote{9} The court in \textit{Tomka v. Seiler Corp.} held that the employer as a whole, rather than one individual in an authoritative position is more likely to have the means to provide equitable remedies of back pay to an aggrieved employee.\footnote{10} In \textit{Grigsby v. Johnson}, the Court dismissed a sexual harassment claim against the plaintiff's supervisor (in his personal capacity) because he could not be held individually liable under Title VII.\footnote{11} The proper defendant, the court concluded, was the head of the agency where the harassment took place.\footnote{12} After Title VII was amended in 1991, it allowed employees and the Equal Employment Opportunity Commission ("EEOC")—on behalf of the employee—to sue an employer in court for lost wages, benefits, reinstatement, and attorneys' fees, but compensatory and punitive damages however, are capped based on the size of the employer.\footnote{13}

Title VII also created the Equal Employment Opportunity Commission to issue rules and regulations, hold annual review and approval of equal employment opportunity plans, and other similar responsibilities.\footnote{14} Congress gave the EEOC the authority to enforce Title VII and its rules and regulations in whatever way they deem reasonable and appropriate.\footnote{15} Before an employee can file against their employer under Title VII, they must file a charge with the EEOC.\footnote{16}

The EEOC has developed its own guidelines and issued procedures

\begin{footnotes}
\item[9] \textit{See} \textit{Tomka v. Seiler Corp.}, 66 F.3d 1295, 1314 (2d Cir. 1995); \textit{see also} \textit{Edsall v. Assumption Coll.}, 367 F. Supp. 2d 72, 77 (D. Mass. 2005) (refusing to hold an individual liable the court stated, "[t]his court agrees with the overwhelming weight of authority that Title VII does not provide for individual liability.").
\item[10] \textit{Tomka}, 66 F.3d at 1314.
\item[12] \textit{Id.}
\item[14] \textit{See id.} § 2000e-16(b).
\item[15] \textit{Id.}
\end{footnotes}
BUYER OR VICTIM BEWARE

An employee alleging discrimination is required to use state and local administrative agencies to remedy their claims before filing Title VII charges with the EEOC. The employee has 300 days from the date when the alleged discrimination took place to file a claim with the EEOC. The EEOC must wait until the state agency has ceased action before it processes the employee's charge and begins its own investigation. If the alleged discrimination occurred in a location without a designated state or local agency to handle the claim, the employee has 180 days from the date when the alleged discrimination took place to file a claim with the EEOC. If the EEOC finds that the claim has merit, the EEOC may sue the employer on behalf of the employee, or it can give the employee a "Notice-of-Right-to-Sue" letter that will allow the employee to begin the litigation process on their own. However, if the EEOC finds that the employee's claim or claims lack merit, the EEOC must dismiss the charge and inform the complainant of the decision to do so.

When an EEOC-reviewed Title VII claim finally reaches the courts, the courts are not required to give binding deference to the EEOC's findings, but they usually will defer to them. However, the courts have refused to excuse plaintiffs from the ninety-day statute of limitations for filing suit in court regardless of the EEOC's findings.

Lastly, as a preventive measure, the EEOC has also advised businesses to take certain steps during the purchase agreement in order to avoid successor liability in pending Title VII suits. In order to assure that the obligations imposed by a settlement are carried out in the event of a transfer in ownership of the defendant, or a transfer of any of its assets, the EEOC recommends that following provisions be included

19. Id. § 2000e-5(e)(1).
20. Id. § 2000e-5(d).
21. Id. § 2000e-5(e)(1).
in resolution documents, "a statement that the defendant will provide prior written notice to any potential purchaser of defendant's business or assets, and to any other potential successor, of the Commission's lawsuit, the allegations raised in the Commission's complaint, and the existence and contents of the settlement." Therefore, the well-known notion of "buyer-beware" is conveyed to potential buyers before they purchase any company. If that buyer is in fact aware of any pending claims or past illegal employment practice by their predecessor, it is up to them whether to accept the consequences of the likelihood of being haled into court sooner or later.

The concept that the drafting of an asset purchase agreement can prevent the business from being held liable is reiterated throughout the legal field. Corporate attorneys everywhere are trained to follow these EEOC guidelines and the additional guidelines of their firms. "The involvement of competent counsel in the negotiating and drafting of an asset purchase agreement can significantly reduce the risk of post-closing litigation, the implication of the successor liability doctrine." In many cases, the cost to litigate a successor liability claim will substantially outweigh the benefits and the assets that the buyer receives from a purchase agreement.

B. Not Just Business

In an economy with an abundance of business deals, there is no shortage of mergers and buyouts. When purchasing a business, a buyer will either enter into a stock or an asset purchase agreement. "Under a stock purchase transaction, the buyer acquires a majority of the seller's

27. Id.
28. Id. (explaining that when a transfer of ownership occurs, the resolution documents statement will provide the new employer with notice of the claim prior to transferring ownership, this ensures that the buyer may beware of all existing claims).
29. See id. (describing the legal drafting necessary to avoid successor liability); see also Bardia Fard, Esq. & Brian Afshar (Law Clerk), Purchasing A Business: How To Avoid Successor Liability, ACUMEN L. (July 15, 2009), http://www.acumenlawgroup.com/publication-categories/purchasing-a-business-how-to-avoid-inadvertent-assumption-of-a-sellers-liabilities/ (showing that law groups are continuing to educate the legal community on the concept of drafting asset purchase agreements to avoid liability).
30. See U.S EQUAL EMP'T OPPORTUNITY COMM'N, EEOC Subregulatory Guidance, EEOC, https://www.eeoc.gov/laws/guidance/index.cfm (last visited Oct. 13, 2017) (discussing the EEOC guidelines that are used to explain how laws and regulations apply to workplace situations, which employees are commonly trained to follow).
32. See id.
33. See id.
shares.\textsuperscript{34} The business's underlying assets are still owned by the entity but the buyer now owns the entity.\textsuperscript{35} On the other hand, under an asset purchase agreement, the seller retains ownership of the entity but relinquishes all of its assets to the buyer.\textsuperscript{36} Generally, the transfer of those assets to the buyer leaves the buyer "free and clear" from any prior liabilities.\textsuperscript{37} However, the successor liability doctrine functions as an exception to this general rule if the required factors are met.\textsuperscript{38}

The successor liability doctrine varies among the states and their respective courts. The national development of the successor liability doctrine "began with a series of U.S. Supreme Court cases" in a labor and employment law context.\textsuperscript{39} The Supreme Court has continuously reiterated the importance of prior notice to the buyer of the potential liabilities it may inherit, so that it may become a part of the negotiation or the sale contract.\textsuperscript{40} However, an overarching federal law or regulation to control successor liability does not exist.

The Sixth Circuit was the first to apply the successor liability doctrine to a Title VII case in \textit{EEOC v. MacMillan Bloedel Containers, Inc.} In \textit{MacMillan}, the plaintiff employee followed the necessary procedure of filing a Title VII claim with the EEOC against her employer, Flintkote Company.\textsuperscript{41} During the EEOC investigation, the defendant, MacMillan Bloedel Containers, Inc., acquired the office where the plaintiff was an employee.\textsuperscript{42} The EEOC found the plaintiff's claim to have merit and filed a claim on her behalf against the defendant as the successor.\textsuperscript{43} The Sixth Circuit indicated that in order for a successor employer to inherit liability in a Title VII case, it must be determined on a case-by-case basis in reference to its own particular facts.\textsuperscript{44}

The Sixth Circuit concluded further that the evaluation of successor liability on a case-by-case basis should include the consideration of nine factors: (1) Whether the successor employer had notice of the pending
charge or claim before they agreed to the acquisition; (2) The ability of
the predecessor to provide proper relief; (3) Whether there has been a
substantial continuity of business operations; (4) Whether the successor
employer uses the same plant; (5) Whether the successor employer uses
the same or substantially the same workforce; (6) Whether the successor
employer uses the same or substantially the same supervisory personnel;
(7) Whether the same jobs exist under the same or substantially the same
working conditions; (8) Whether the successor employer uses the same
or substantially the same machinery, equipment, and methods of
production; and (9) Whether the successor employer produces the same
product.\textsuperscript{45}

In deciding this way, the Sixth Circuit wanted to uphold the intent
of Congress when they drafted Title VII to protect employees from
unfair employment practices.\textsuperscript{46} The court again expressed that these
cases must be decided on a case-by-case basis and stated,

We hold only that Title VII per se does not prohibit the
application of the successor doctrine, but rather
mandates its application. Title VII was designed to
eliminate discrimination in employment and the courts
were given broad equitable powers to eradicate the
present and future effects of past discrimination\ldots
Failure to hold a successor employer liable for the
discriminatory practices of its predecessor could
emasculate the relief provisions of Title VII by leaving
the discriminatee without a remedy or with an
incomplete remedy.\textsuperscript{47}

The court also went on to discuss the other requirements of filing a
Title VII claim when the plaintiff asks the court to apply the successor
liability doctrine and the importance of analyzing the doctrine in a way
that is not unduly burdensome upon the successor.\textsuperscript{48} In particular, the

\begin{itemize}
\item \textsuperscript{45} Id. at 1094.
\item \textsuperscript{46} See id. at 1096.
\item \textsuperscript{47} Id. at 1091.
\item \textsuperscript{48} See id. at 1090 ("Appropriate steps must still be taken if the effects of the unfair labor
practices are to be erased and all employees reassured of their statutory rights. And it is the
successor who has taken over control of the business who is generally in the best position to remedy
such unfair labor practices most effectively. The imposition of this responsibility upon even the
bona fide purchaser does not work an unfair hardship upon him. When he substituted himself in
place of the perpetrator of the unfair labor practices, he became the beneficiary of the unremedied
unfair labor practices. Also, his potential liability for remedying the unfair labor practices is a matter
\end{itemize}
court found the filing of a charge with the EEOC to be a "well settled . . . condition precedent" to a suit in court.\textsuperscript{49}

The Sixth Circuit has had an extremely influential role on subsequent Title VII claims in a successor liability context.\textsuperscript{50} It later went on to require the prior notice factor as an "initial hurdle that must be cleared" before considering the remaining factors.\textsuperscript{51} A majority of the circuits agree that a successor can be held liable for a Title VII claim against a predecessor employer using the nine factors of \textit{MacMillan} for analysis on a case-by-case basis.\textsuperscript{52} The court in \textit{Burt v. Ramada Inn} refused to hold a successor employer liable when it was unaware of both the former employee and the pending charges.\textsuperscript{53} The court in \textit{U.S. v. Sheriff of Assumption Parrish} held that summary judgment for the successor employer was inappropriate due to the fact-based nature of the inquiry required under \textit{MacMillan}.\textsuperscript{54} The court in \textit{EEOC v. Nichols Gas & Oil, Inc.} held the successor employer could be held liable for compensatory damages, but not punitive damages because punitive damages are intended to punish the actual wrongdoer (predecessor).\textsuperscript{55} Lastly, the court in \textit{Johns v. Harborage I Ltd.} held the successor employer liable because there was a substantial continuity of business operations.\textsuperscript{56}

Moreover, some courts have condensed the nine factors set forth in \textit{MacMillan} and apply only three factors when determining whether to hold a successor employer liable in a Title VII suit.\textsuperscript{57} The refined three-factor test requires courts to consider: (1) whether the successor employer had prior notice of the pending claim against the predecessor; (2) whether the predecessor is able to provide the requested relief; and (3) whether there is sufficient continuity in the business operations of the predecessor and the successor to justify the imposition of liability.\textsuperscript{58}

\begin{flushleft}
\textsuperscript{49} \textit{MacMillan}, 503 F.2d at 1092.
\textsuperscript{50} See \textit{Hollifield}, supra note 39, at 50.
\textsuperscript{51} Id.
\textsuperscript{52} See id.
\textsuperscript{55} \textit{EEOC v. Nichols Gas & Oil, Inc.}, 688 F. Supp. 2d 193, 204-05 (W.D.N.Y. 2010).
\textsuperscript{56} \textit{Johns v. Harborage I Ltd.}, 664 N.W.2d 291, 299 (Minn. 2003).
\textsuperscript{57} See \textit{Rego v. ARC Water Treatment Co.}, 181 F.3d 396, 402 (3d Cir. 1999); see also \textit{Criswell v. Delta Airlines, Inc.}, 868 F.2d 1093, 1094 (9th Cir. 1989).
\textsuperscript{58} See \textit{Brzozowski v. Correctional Physician Servs., Inc.}, 360 F.3d 173, 178 (3d Cir. 2004)
\end{flushleft}
The court in *Walker v. Faith Techs., Inc.* followed the reduction of the original *MacMillan* factors down to the three-prong test for successor liability and afforded extra weight to the first two factors. On the other hand, some courts have considered these factors and still held that the mere acquisition of the assets of a charged employer at a foreclosure sale is not sufficient to impose successor liability, despite continuity of business.

Lastly, courts will also refuse to hold a successor liable if the seller sold their assets fraudulently or in an attempt to escape their liabilities. The court will look for certain "badges of fraud" in order to determine whether the sale was in good faith. Any of the following is considered a "badge of fraud:" (1) A close relationship among the parties to the transaction; (2) A secret and hasty transfer not in the usual course of business; (3) inadequacy of consideration; and (4) retention of control of the property by the transferor after the conveyance.

### C. A Circuit Split

In many successor liability cases, courts have indicated that there should be a "distinct predicate factor to consider before" considering the nine factors from *MacMillan*. The Eleventh Circuit has chosen to consider whether privity exists between the predecessor employer and the successor employer as that predicate factor. In *Coffinan v. Chugach Support Services*, the court held that the plaintiff "must show some kind of sale, merger, or other type of direct acquisition by a successor ('privity') before successor liability may be imposed." Furthermore, "since there was no merger or transfer of assets between the former employer and the new service provider, the court refused to impose successor liability upon the new service provider. The Sixth Circuit takes a different view of whether a showing of privity between

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(citing *Rego v. ARC Water Treatment Co.*, 181 F.3d 396 (3d Cir. 1999)).


60. *Id.* at 1261.


62. *Id.*


64. *See id.*

65. *Id.* at 51 (quoting *Coffman v. Chugach Support Services*, Inc., 411 F.3d 1231 (11th Cir. 2005)).

66. *Id.*
the predecessor and the successor should always be a necessity before imposing successor liability.\textsuperscript{67}

As successor liability theory developed and adapted to modern day business practices, the Sixth Circuit revisited their nine-factor test. In \textit{Cobb v. Contract Transport, Inc.}, the court declined to hold that "a merger or transfer of assets is always a precondition to successor liability."\textsuperscript{68} The \textit{Cobb} Court also de-emphasized their \textit{MacMillan} nine-factor balancing test and instead announced that a different three-prong test would have authority.\textsuperscript{69} The three-prong test requires courts, on a fact specific case-by-case basis, to balance the interests of the defendant; the interests of the plaintiff employee; and the goals of federal policy and the particular legal obligation at issue.\textsuperscript{70} The third factor is usually weighed the most heavily.\textsuperscript{71} Though the Sixth Circuit believes the nine factors of \textit{MacMillan} are not themselves the test for successor liability, they did not do away completely with the nine-factor test.\textsuperscript{72} The court requires a hybrid analysis that considers the original nine factors when applying the new three-prong balancing test in successor liability suits.\textsuperscript{73}

The Sixth Circuit even went on to criticize the Eleventh Circuit's holding in \textit{Coffman} citing "outdated case law" as their deciding factors.\textsuperscript{74} This circuit split and the "subordinat[ion]" of the \textit{MacMillan} nine-factor test surely has an impact on successor liability cases today.\textsuperscript{75} Because there is no overarching federal law or regulation governing successor liability, this discrepancy in the analytical factors of successor liability law can cause many issues within the system and for the victim employees filing Title VII suits against successor employers.\textsuperscript{76} In general, the federal common law doctrine of successor liability in a Title VII suit is broader than the successor liability under state corporations law.\textsuperscript{77}

\begin{itemize}
\item\textsuperscript{67} \textit{Id.}
\item\textsuperscript{68} \textit{Cobb v. Contract Transport, Inc.}, 452 F.3d 543, 550 (6th Cir. 2006).
\item\textsuperscript{69} \textit{See id.} at 551-52.
\item\textsuperscript{70} \textit{Id.}
\item\textsuperscript{71} \textit{Id.} at 554.
\item\textsuperscript{72} \textit{Id.} at 552-55.
\item\textsuperscript{73} \textit{Id.} at 554.
\item\textsuperscript{74} \textit{Id.} at 556.
\item\textsuperscript{75} \textit{See Hollifield, supra} note 39.
\item\textsuperscript{76} \textit{Id.}
\item\textsuperscript{77} \textit{Johns v. Harborage I Ltd.}, 664 N.W.2d 291, 297 (Minn. 2003).
\end{itemize}
D. Summary

This Note will address the issues of the requirements victim employees are required to follow in order to recover for sexual harassment and discrimination in the workplace under the successor liability doctrine. The EEOC has guidelines and procedures that should be followed but the time constraints may prove to be hard to follow. The requirement of a pending EEOC charge at the time of purchase in order to hold a successor liable in a Title VII suit is especially problematic. What if the alleged sexual harassment or discrimination happened at the tail end of the prior owner’s ownership? Asking a victim employee to rush the litigation process and their healing process is both a systemic problem and a psychological issue. Lastly, the courts have their own way of analyzing on a case-by-case basis that could not possibly give any victim employee a realistic expectation of what the outcome might be. This is portrayed further through the prevalent circuit split. The successor liability doctrine does not effectively protect victim employees, as it should, but rather helps businesses continue to flourish without having to worry about their former, current, or new employees.

II. TITLE VII CLAIMS AND THE ACT’S PROGRESSION

All employment discrimination and sexual harassment claims begin with a Title VII analysis. The enactment of Title VII was indeed historical and an important advancement in the protection of employees. However, it also has its setbacks and kick-starts the issue of limited protection for employees let alone those whose companies have been reorganized or sold to new owners. Savvy discriminators and successors “continue to skate through the gaping holes of Title VII protections.”

A. The Prima Facie Case

Under Title VII, individual discrimination occurs when an employee alleges her employer discriminated against her because she is a member of a protected group based on her race, sex, national origin, or

79. See id. at 48-49 (exemplifying the downfalls of Title VII through unfavorable case law).
80. Id. at 56.
The plaintiff carries the burden of proving the case. Intentional discrimination on the basis of sex can be claimed in several situations: (1) failure to hire or promote; (2) discharge; (3) disciplinary action; (4) constructive discharge; (5) compensation; or (6) employer retaliation for filing a claim.82

To establish a prima facie case of discrimination in the process of hiring or a promotion, an "unsuccessful applicant" or employee claiming sexual discrimination must prove that: (1) she is a member of a protected group; (2) she applied for an open position that she was qualified for or expressed interest in a promotion that she was qualified for; (3) her application was rejected; and (4) after the rejection the position remained open and the employer continued to seek applicants.83

To establish a prima facie case of discrimination for being discharged the plaintiff must prove: (1) she is a member of a protected group; (2) her employer’s expectations were adequately met by her performance; (3) despite her performance she was discharged or demoted; and (4) after her termination or demotion, the employer sought replacement or actually replaced her with a similarly qualified individual who was not a member of the plaintiff’s protected group.84

The fourth prong of the Title VII discharge analysis has been subjected to unclear Supreme Court interpretation and a circuit split.85 A majority of the circuits find that the fact that the successor is not a member of her protected group is not determinative of the discrimination.86 Some circuits require the opposite and mandate that the employer replaced the employee with someone who was not a member of the same protected group.87 Claims of discrimination in a "reduction-in-force layoff" require similar elements to establish a prima

82. Id. at 638.
83. See id.; see also McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (stating that an employee claiming racial discrimination must prove: (1) that he belongs to a racial minority; (2) he applied for an open position that he was qualified for; (3) despite his qualifications his application was rejected; and (4) that the position remained open after he was rejected.).
84. Koffie-Lart & Tyson, supra note 81, at 639.
85. See id. at 638.
86. Perry v. Woodward, 199 F.3d 1126, 1140-41 (10th Cir. 1999), cert. denied, 529 U.S. 110 (2000) (exemplifying that a hispanic plaintiff alleging discriminatory discharge was entitled to recovery and satisfied the fourth element without showing that her replacement was outside of her protected group, or that the replacement was of a different race, not Hispanic).
87. See Bradshaw v. Pac. Bell, 72 Fed. Appx. 532 (9th Cir. 2000) (showing an African American employee failing to establish prima facie case of racial discrimination when discharged under Title VII because of the lack evidence that the employee was replaced by someone outside of his protected group, or that replacement was of a different race, not African American).
facie case.\textsuperscript{88} To establish a prima facie case of discrimination when an employee is disciplined, the plaintiff must prove: (1) he or she belongs to a protected group; (2) he or she was qualified for her job; and (3) that a "similarly situated" employee engaged in identical or similar misconduct but did not receive any discipline or received lesser discipline.\textsuperscript{89}

To establish a prima facie case of discrimination for constructive discharge the plaintiff must prove, "(1) he or she suffered harassment or discrimination so intolerable that a reasonable person in the same position would have felt compelled to resign; and (2) the employees reaction to the workplace situation that is, his or her decision to resign was reasonable given the totality of the circumstances."\textsuperscript{90} This employee felt that work conditions were so unreasonably intolerable that she felt forced to resign. Courts require the employee to give the employer a reasonable amount of time to correct the discriminatory practice before she resigns.\textsuperscript{91} The Court will consider whether the employer had notice of the harassment before holding them responsible.\textsuperscript{92}

To establish a prima facie case of wage or salary discrimination, a plaintiff must prove: (1) she is a member of a protected group; and (2) she was paid less than non-members of her group for substantially the same performance.\textsuperscript{93} Title VII wage or salary discrimination are most commonly sex-based discrimination between females and their male successors. These claims are similar to Equal Pay Act claims.\textsuperscript{94}

To establish a prima facie case of discriminatory retaliation, a plaintiff must prove: (1) she engaged in protected conduct under Title VII; (2) she suffered a negative employment action; and (3) a causal connection exists between the protected activity and the adverse employment action.\textsuperscript{95} This is common if the employees or applicants for

\textsuperscript{88} See Bellaver v. Quanex Corp., 200 F.3d 485, 493 (7th Cir. 2000).
\textsuperscript{89} Alexander v. Fulton Cty., 207 F.3d 1303,1339 (11th Cir. 2000).
\textsuperscript{90} See Pa. State Police v. Suders, 542 U.S. 129, 139 (2004) (demonstrating that hostile-environment constructive discharge claims requires a plaintiff to show that a reasonable person would have felt compelled to resign).
\textsuperscript{91} See id.
\textsuperscript{92} See id. at 2349.
\textsuperscript{93} See Belfi v. Prendergast, 191 F.3d 129, 140 (2d Cir. 1999); see also Lawrence v. CNF Transp., Inc., 340 F.3d 486, 490-495 (8th Cir. 2003) (holding that the plaintiff-employee prevailed on Title VII and Equal Pay Act claims because she proved she was paid less than her male successor).
\textsuperscript{95} See e.g., Walcott v. City of Cleveland, 123 F. App’x 171, 178 (6th Cir. 2005). "To establish a causal connection, a plaintiff must present evidence sufficient to raise the inference that
employment opposed unlawful practices or filed suit, testified, assisted, or participated in any investigation or hearing against the employers.\textsuperscript{96} Courts usually find that an “adverse employment action” does not encompass a mere inconvenience or change in responsibilities but that the action must be “materially adverse” and disruptive.\textsuperscript{97} However, the courts are split on whether Title VII discriminatory retaliation protection extends to third parties, such as a wife experiencing retaliatory discrimination for the acts of her husband at the same company.\textsuperscript{98}

Finally, Title VII requires that employers “assume vicarious liability for decisionmakers” with some kind of authority. In \textit{Burlington Indus. v. Ellerth}, Congress guided federal courts to interpret Title VII based on tort agency principles.\textsuperscript{99} However, the circuits differ in determining whether an employer assumes liability for Title VII actions of non-decisionmakers. The Seventh Circuit held that employers can be held liable for discriminatory actions by “influential” employees in \textit{Lust v. Sealy}.\textsuperscript{100} On the other hand, the Third and Fourth Circuit held that employers could only be held liable for discriminatory actions by decision makers.\textsuperscript{101}

\textbf{B. The Prima Facie Federal Sexual Harassment Case}

A plaintiff bringing a sexual harassment suit must first prove that the conduct was “unwelcome and unsolicited” and that she perceived that conduct to be offensive.\textsuperscript{102} Unwelcome conduct can be determined by whether the plaintiff’s conduct indicated that it was unwanted conduct not whether the participation in any sexual conduct was voluntary on her part.\textsuperscript{103} In \textit{Ocheltree v. Scollon Productions, Inc.},\textsuperscript{104} the

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\textsuperscript{96} 42 U.S.C.A. 2000e-3(a).

\textsuperscript{97} See \textit{DiBrino v. Dep’t of Veterans Affairs}, 118 F. App’x. 533, 543-44 (2d Cir. 2004).

\textsuperscript{98} \textit{Compare} EEOC v. Ohio Edison Co., 7 F.3d 541, 543-44 (6th Cir. 1993) (holding Title VII protects third parties) \textit{with} Smith v. Riceland Foods, Inc., 151 F.3d 813, 819 (8th Cir. 1998) (interpreting Title VII to prohibit third party claims).

\textsuperscript{99} Burlington Indus. v. Ellerth, 524 U.S. 742, 754-55 (1998). Plaintiff-employee brought a Title VII claim against her employer for sexual harassment by her supervisor. \textit{Id.} at 747, 749. The employer was held vicariously liable for the supervisor, who had authority over the employee, “if it knew or should have known about the conduct and failed to stop it.” \textit{Id.} at 759.

\textsuperscript{100} Lust v. Sealy, 383 F.3d 580, 759 (7th Cir. 2004). Plaintiff-employee brought a Title VII claim against her employer after she was denied a promotion. \textit{Id.} at 582-83.

\textsuperscript{101} See \textit{Hill v. Lockheed Martin Logistic Mgmt., Inc.}, 354 F.3d 277 (4th Cir. 2004); see also Foster v. New Castle Area Sch. Dist., 98 Fed. Appx. 85 (3d Cir. 2004).


\textsuperscript{103} See \textit{id.}
court found that while the sexual harassment was out in the open for the public to hear, it was directed at the plaintiff-employee specifically because she was the only woman in the vicinity.\textsuperscript{105}

There are two types of sexual harassment claims: a quid pro quo and a hostile work environment.\textsuperscript{106} Employees claiming a quid pro quo sexual harassment must prove that their employer took a tangible employment action against them and that the employee "refused their unwelcome sexual advances."\textsuperscript{107} The employer must have "explicitly or implicitly conditioned a job, a job benefit, or the absence of a job detriment, upon her acceptance of sexual conduct."\textsuperscript{108} The court has held that a supervisor who can make an effective recommendation is enough to establish an offer of employment change.\textsuperscript{109} On the other hand, a hostile work environment claim has five elements:

(1) [t]he plaintiff belongs to a protected group; (2) [t]he plaintiff was subject to unwelcome sexual advances; (3) [t]he harassment was based on sex; (4) [t]he harassment affected a term, condition or privilege of the plaintiff’s employment; and (5) [t]he plaintiff’s employer knew or should have known of the harassment and failed to take action to stop or prevent it.\textsuperscript{110}

The courts have taken a "totality of the circumstances" approach when determining if a hostile work environment exists.\textsuperscript{111} The courts look to certain factors to help make a determination: (1) the frequency of the conduct; (2) the severity; (3) whether it is physical threatening or humiliating as opposed to an utterance; (4) whether it is an unreasonable interference to the employee’s work performance; and (5) whether the complained of conduct undermines the employee’s workplace

\textsuperscript{104} Ocheltree v. Scollon Productions, Inc., 335 F.3d 325, 331 (4th Cir. 2003).

\textsuperscript{105} Id. at 332.

\textsuperscript{106} See e.g., Frederick v. Sprint/United Mgmt. Co., 246 F.3d 1305, 1312 (11th Cir. 2001) (denying summary judgment for plaintiff because she failed to show connection between the denial of a promotion and the refusal of alleged sexual advances).

\textsuperscript{107} See id.

\textsuperscript{108} Porter v. Cal. Dep’t of Corr., 383 F.3d 1018, 1025 (9th Cir. 2004).

\textsuperscript{109} See Holly D. v. Cal. Inst. Of Tech., 339 F.3d 1158, 1169 n.14 (9th Cir. 2003) (holding that “[a] supervisor who fires his subordinate because she refuses to comply with his sexual demands unquestionably commits a “tangible employment action” for purposes of Title VII... A supervisor who compels a subordinate to submit to such demands by threatening to discharge her if she does not have sex with him also commits such a “tangible employment action”’).

\textsuperscript{110} Hockman v. Westward Comm. 407 F.3d 317 (5th Cir. 2004).

\textsuperscript{111} See id.
competence. A hostile working environment exists if the harassing conduct is "so severely permeated with discriminatory intimidation, ridicule, and insult that the terms and conditions of the employee's employment were thereby altered." A single instance of sexual harassment can constitute a hostile working environment but incidents must be "more than episodic."

C. Categorical Issues

Title VII has been criticized for being "irrationally under-inclusive" in three different ways: (1) at the group level, (2) at the individual level, and (3) the inequality and second-class nature that exists within the individual level. One analysis particularly criticized Title VII's categorical approach for being outdated:

[I]t is no longer always possible to say for certain that an employee did not receive a job because they fit into one and only one category, or possessed a single characteristic (e.g. being a member of a certain racial group); and unlike in 1964, the employer will not always be so explicit about their reasoning. Today, an employer might generally cite a job applicant's "appearance" as their reason for not hiring the candidate, when they really chose not to hire the candidate because they are transgender, and/or are a single parent, and/or because of their political party affiliation. A discriminatory employer might also make an adverse employment decision, such as failing to promote a candidate, for one stated reason (e.g. an unfriendly attitude), when really the reason was based on a category-based stereotype such as race or sex. Employers have had nearly fifty years to become aware of all of Title VII's nooks and crannies, faults and weak points, and have learned how to aptly navigate around them.

112. See id. at 326.
114. See id. at 512.
116. Id. at 49 ("Discrimination today operates in a fashion such that adding categories and
In reality, the statute only protects a limited group of individuals. \(^{117}\) First, Title VII is under-inclusive because it only protects those who fit into its particular set of categories. \(^{118}\) In particular, the transgender community is not protected by these categories because the rigid categories have not adapted to the ever changing and expanding LGBTQ community. \(^{119}\) In order to make any kind of categorical changes, it requires Congress to make amendments or to pass some kind of stand-alone legislation. \(^{120}\) Both options can be “inefficient and difficult to accomplish.” \(^{121}\) In the past, Congress has attempted to amend the categories in Title VII but it has caused Congress an ample amount of time debating the issues before an amendment is even passed, therefore taking away the amendment’s anticipatory effects and “forward-thinking approach.” \(^{122}\) However, the federal courts have proven to be reluctant to broadly read the categories on a case-by-case basis. \(^{123}\) Congress has also attempted to pass stand-alone legislation to expand the Title VII categories but it could take years to pass if it ever actually does. \(^{124}\) Federal courts have also read stand-alone legislation more strictly than it has chosen to read the amendments. \(^{125}\) Therefore, stand-alone legislation to improve Title VII categories is also inefficient. \(^{126}\)

Second, Title VII is under-inclusive because even those who technically are covered by the larger categories by definition are placed outside of those categories by the court’s interpretation. \(^{127}\) Title VII working within a categorical framework like Title VII will never be sufficient to effectively combat discrimination. Title VII achieved positive results for many years. However, times have changed, and revision to the scheme is necessary in order to keep up with the changing face of employment discrimination and the changing character of employee candidates. The next Part of this Article addresses the issues with Title VII’s categorical approach in greater detail.

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\(^{117}\) See id. at 56.

\(^{118}\) See id. at 57.

\(^{119}\) See id. at 63-64.

\(^{120}\) See id. at 58.

\(^{121}\) See id.

\(^{122}\) See id. at 58-59 (“This method of legislating is inefficient and does not employ a forward-thinking approach (i.e. an approach that would anticipate and meet the needs of currently unprotected groups of individuals suffering discrimination before the discrimination against such individuals is widespread and more difficult to remediate.”)).

\(^{123}\) See id. at 58.

\(^{124}\) See id.

\(^{125}\) See id.

\(^{126}\) See id. at 60.

\(^{127}\) See id. at 49, 60 (“All the while, discrimination occurs with assistance from sometimes-witting and other times unwitting courts, which cite judicial restraint and a lack of congressional guidelines as the reason to deny equal employment protections to the most vulnerable and needy employees, even under a broad, remedial statute.”).
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specifically states that some definitions within the categories “are not limited to...” which would normally read as a broad and inclusive clause to the category but that is not always the case.\textsuperscript{128} In some instances, the courts have interpreted categories so narrowly that the interpretation has proved to be detrimental to plaintiffs with a valid claim or even a deterrent for those with valid claims who have not filed.\textsuperscript{129}

Third, Title VII is underinclusive within the individual category because it values characteristics that create an unequal treatment of plaintiffs.\textsuperscript{130} “Both textually and by interpretation,” some plaintiffs are subcategorized as second-class.\textsuperscript{131} With phrases like “similarly situated,” Title VII only protects those who have certain traits that fulfill a popular stigma of employees.\textsuperscript{132} The courts particularly have subcategorized transgender plaintiffs as second-class without any Title VII protection because of its rigid definitions.\textsuperscript{133} Unfortunately, this causes all plaintiffs to be put into classes. Scholars have analyzed the issue and said,

\[
\text{Those who are afforded anti-discrimination protections based on arbitrary values are safeguarded while all others are dehumanized, subjected to pervasive employment discrimination, and prevented from providing for themselves or bettering their circumstances through gainful employment. Therefore, Congress’s categorical approach is intolerably dehumanizing because it amounts to a ratification of discrimination against individuals who are not deemed members of protected classes, placing a lower value on their suffering from discrimination because of who they are as a person.}\textsuperscript{134}
\]

For example, in \textit{Holloway v. Arthur Anderson & Co.}, the Ninth Circuit held that transsexuals are not a class within the scope of Title

\begin{itemize}
\item \textsuperscript{128} \textit{See id.} at 61.
\item \textsuperscript{129} \textit{See id.}
\item \textsuperscript{130} \textit{See id.} at 62.
\item \textsuperscript{131} \textit{See id.}
\item \textsuperscript{132} \textit{See id.}
\item \textsuperscript{133} \textit{See id.}
\item \textsuperscript{134} \textit{See id.} at 65.
\end{itemize}
Furthermore, in *Ulane v. E. Airlines* the Seventh Circuit held that discrimination against transsexual employees does not establish a Title VII discrimination claim where there was discrimination “because of sex.”

**D. Because of Sex**

Title VII requires that the discrimination occur “because of sex” in order for there to be a valid claim. The language of the act itself does not help define “sex” but allows the court to interpret and determine its meaning on a case-by-case basis. The clause protects men and women but in order to determine whether behavior prompting Title VII discrimination claims occurs because of sex requires an examination of the context in regards to the “surrounding circumstances, expectations, and relationships.” Title VII also protects individuals who experienced sexual discrimination from members of the same sex. However, the Court also found that Title VII does not necessarily protect from acts merely sexual in nature.

Some courts have afforded specific protections to some gender subclasses referred to as “sex-plus,” including minority women, women with children, married women. In order for a “sex-plus” complaint to be successful, the employee must show proof that the individual of the opposite sex not possessing any “sex-plus” traits were treated

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135. Holloway v. Arthur Anderson & Co., 566 F.2d 659 (9th Cir. 1977) (Plaintiff-employee brought a Title VII claim against the employer for employment discrimination and alleged that she was discharged for her trans-sexuality. The court found that trans-sexuality was not a category covered by Title VII).

136. Ulane v. E. Airlines, 742 F.2d 1081 (7th Cir. 1984) (Plaintiff-employee had a sex reassignment surgery. After the employee was fired, the employee brought a Title VII claim against his employer for employment discrimination. The court found that the employee was transsexual because he was biologically still male but considered himself female. Then the court found that trans-sexuality was not a category covered by Title VII).

137. *See id.* at 1084.

138. *Id.*


141. *See id.* (The Court “[r]ecognizing liability for same-sex harassment will not transform Title VII into a general civility code for the American workplace, since Title VII is directed at discrimination because of sex, not merely conduct tinged with offensive sexual conduct. . .”).

142. *See e.g., Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (per curiam) (Court distinguishes between women with school-aged children and men with children of the same age if such distinctions is “reasonably necessary to the normal operation of that particular business or enterprise”).
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 differently. However, many “sex-plus” cases were rejected where male employees presented a Title VII claim where their alleged “plus” factor was their familial responsibilities.

E. Categorical Discrimination and the Actuality Requirement

Many federal courts have also denied plaintiff-employees protection under Title VII for alleged “categorical discrimination.” Categorical discrimination exists when an employee is discriminated against for the category that they belong to. This occurs when there is a misconception discrimination against an individual based on their race, religion, color, national origin, or sex.

In order for a plaintiff-employee to bring a successful Title VII claim for categorical discrimination, they must pass the court’s “actuality requirement.” The actuality requirement is only met if, “plaintiffs who suffer from invidious, differential treatment animated by either their self-ascribed or misperceived protected status will be denied statutory protection against discrimination [proves] their actual religious, gender, ethnic, racial, or color identity upon defendant-employers’ challenge.” For example, a plaintiff-employee who is discriminated against as one race but is actually another cannot recover. Under the actuality requirement a plaintiff-employee who is discriminated against as one race can only recover under Title VII if they are actually a member of that race and it was not just a category misconception.

The actuality requirement has been both implicitly and explicitly adopted. In Afshar v. Pinkerton Academy, the court did not expressly hold that “misperception discrimination cases” are outside the bounds of

143. See Fisher v. Vassar College, 70 F.3d 1420, 1446 (2d Cir. 1995) (explaining plaintiff’s allegation that sexual discrimination prevented her from obtaining tenure was unsuccessful because she did not provide evidence showing that married women were treated differently than married men.).
144. See id.
145. D. Wendy Greene, Categorically Black, White, or Wrong: “Misperception Discrimination” and the State of Title VII Protection, 47 U MICH. J. L. REFORM 87 (Fall, 2013).
146. See id.
147. See id. at 100 (“An actuality requirement has steadily gained momentum in the federal judiciary within the past decade in categorical discrimination cases involving misperceptions about the plaintiff’s race, national origin, and religion.”).
148. Id. at 87.
149. See id. at 90.
150. See id. (“Only intentional discrimination claims based upon an individual’s actual protected status are cognizable under Title VII.”).
Title VII but implicitly adopted the actuality requirement.\textsuperscript{151} Though the plaintiff's Muslim background may not have had any bearing on his co-workers' perception of him, the court applied a strict protected class approach to his discrimination claims.\textsuperscript{152} Therefore, the court granted the plaintiff protection under Title VII and "implicitly affirmed that Title VII proscribes discrimination on the basis of the plaintiff's actual protected status."\textsuperscript{153} In Butler v. Potter, the court expressly held that Title VII protection against categorical discrimination requires a showing of actuality.\textsuperscript{154} The court held that "Title VII protects those persons that belong to a protected class, and says nothing about protection of persons who are perceived to belong to a protected class."\textsuperscript{155} Later, multiple district courts expressly adopted the actuality requirement.\textsuperscript{156}

The actuality requirement is "categorically wrong."\textsuperscript{157} In an intentional discrimination case, whether the plaintiff-employee actually belongs to the category that is being discriminated against should not matter because the plaintiff is still feeling the discrimination. It allows discriminators to get away without any repercussions and injures the plaintiff.\textsuperscript{158} "An employer's misperception of an individual's protected status does not negate" the employer's discrimination and malicious intent.\textsuperscript{159}

\textbf{F. Title VII's Religious Expansion}

There have been proposals to expand the "scope of Title VII to include rights of employees to dress, groom, or speak in accordance with that they consider to be their culture."\textsuperscript{160} Such scholars believe that broadening the scope of the religion category in Title VII claims with a religious accommodation would help courts expand their interpretation

\begin{itemize}
  \item 151. See Afshar v. Pinkerton Acad., No. Civ. 03-137-JD, 2004 WL 1969873, at *3 (D.N.H. Sept. 7, 2004); see also Greene, \textit{supra} note 145, at 87.
  \item 152. See Afshar v. Pinkerton Acad., No. Civ. 03-137-JD, 2004 WL 1969873, at *4 (D.N.H. Sept. 7, 2004); see also Greene, \textit{supra} note 145, at 87.
  \item 153. Greene, \textit{supra} note 146, at 90 (discussing the court's implicit adoption of the actuality requirement in \textit{Afshar}, 2004 WL 1969873, at *3).
  \item 155. \textit{Id.} at 850.
  \item 156. Greene, \textit{supra} note 145, at 96.
  \item 157. \textit{Id.} at 91.
  \item 158. See \textit{id.} at 165.
  \item 159. \textit{Id.} at 102.
\end{itemize}
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of cases involving race, national origin, or sex.\textsuperscript{161} However, this theory fails to consider how narrowly the federal courts have interpreted the religion category in Title VII cases over the years.\textsuperscript{162}

Religion may not be the best way to progress interpretation of Title VII, because the history of Title VII litigation has not proved to be very progressive.\textsuperscript{163} There are several explanations about how Title VII litigation has approached the cases regarding religion,

One explanation is that the statute treats religion differently. Unlike the other protected classifications, religious conduct, or observance, is explicitly covered by the statute. Another explanation is that the courts do not interrogate the relationship between plaintiffs' claimed religious beliefs and observances to keep the statute from being successfully challenged under the Establishment Clause. Still another might be that religion just feels different from the other categories in that it seems both compelled and voluntary and that it is largely about observance...Moreover, it does not appear that either the protection of both belief and observance or the refusal of courts to question a plaintiff's religious beliefs has led to more "progressive" results in the religion area.\textsuperscript{164}

The religious accommodation may not have been the Title VII expansion that employees had hoped for.

The EEOC responded to the religious accommodation by holding hearings of its own about it in the 1970s.\textsuperscript{165} Employers argued that there

\begin{itemize}
\item \textsuperscript{161} See id.
\item \textsuperscript{162} See id.
\item \textsuperscript{163} See id. at 431-32 (analyzing the "three dominant modes of thinking in American antidiscrimination doctrine: (1) that status and conduct are separable, and that only discrimination based on status is forbidden; (2) that courts should defer to an employer's judgment about how to structure the workplace, unless specifically mandated by statute or common law to do otherwise; and (3) that the antidiscrimination norm prohibits treating individuals differently from one another. Because Title VII religious accommodation doctrine purports to counter each of these three statements, by abolishing the status-conduct distinction, balancing employer and employee interests, and requiring preferential treatment, it provides the best ground for studying their entrenchment. The religious accommodation advocates know all too well that the doctrine has not "worked" for them. Rather than confronting the demons, however, they often look to other solutions... The process could be endless.").
\item \textsuperscript{164} Id. at 359.
\item \textsuperscript{165} See id. at 381.
\end{itemize}
were great potential harms of a broad reading of Title VII and the difficulty with determining what exactly constitutes a religion and what religious practices coincide.\textsuperscript{166} Three major issues regarding the relationship between a religious belief and its practices: "The first considered a need for an institutional affiliation, the second concerned the difficulty of discerning the sincerity of one's belief, and the third, involved how employers should respond to the fact that not all members of any particular religion necessarily agree on observance requirements."\textsuperscript{167} These hearings proved that employers and courts were both against the religious accommodation.\textsuperscript{168}

The EEOC resolved these hearings by issuing a guideline.\textsuperscript{169} The guidelines do not restrict the definition of religious practices but includes moral and ethical beliefs.\textsuperscript{170} "Under the Guidelines, a belief is religious not because a religious group professes that belief, but because the individual sincerely holds that belief with the strength of traditional religious views."\textsuperscript{171} By making the definition so broad, the EEOC relieved employers of the burden of determining which of their employees' claims for accommodation satisfy the criteria for religious beliefs and observances and allows them to judge requests simply on the burden that would be caused if they were to accommodate the employee.\textsuperscript{172} The EEOC guidelines lead to the necessary balancing test between employer and employee interests for reasonable accommodation.\textsuperscript{173}

G. Possible Remedies

Title VII aims to make victims whole for their injuries suffered.\textsuperscript{174}

\begin{itemize}
\item \textsuperscript{166} See id. at 382.
\item \textsuperscript{167} Id. at 382.
\item \textsuperscript{168} Id. at 385.
\item \textsuperscript{169} See id. at 386 ("Assuming courts were to choose to follow the Guidelines, they would practically be able to avoid making a determination as to whether a plaintiff's beliefs or practices were 'religious.' The Guidelines opened up the definition of religion to encompass almost anything an individual sincerely believes as a theistic, moral, or ethical matter. In addition, they allowed for dissenting views among members of particular religions about what the obligations of that religion might be. The second part of the definition foreclosed any examination of the tenets of a particular religion. Employers are still permitted to question the sincerity of an employee's beliefs but, as already mentioned, judicial inquiries have been few and far between.").
\item \textsuperscript{170} Id.
\item \textsuperscript{171} Id. at 385.
\item \textsuperscript{172} See id. at 386.
\item \textsuperscript{173} See id. at 387.
\end{itemize}
Congress then allowed federal courts to order that employers found in violation of Title VII pay the necessary equitable relief to the plaintiff.\textsuperscript{175} Equitable remedies include but are not limited to injunctions, reinstatement, back pay, attorney's fees.\textsuperscript{176} A court may order other types of equitable relief such as, affirmative action designed to counter the effect of the discrimination.\textsuperscript{177}

In some cases a plaintiff's right to relief under Title VII is limited in mixed motive cases to declaratory relief, limited injunctive relief, and attorney's fees.\textsuperscript{178} A mixed motive is present where "discrimination based on Title VII protected classes constitutes at least one of the factors motivating actions spurring a Title VII plaintiff's claim."\textsuperscript{179} The Supreme Court even determined that a mixed-motive case does not require direct evidence to be granted relief but rather circumstantial evidence is enough.\textsuperscript{180}

As previously mentioned, compensatory and punitive damages are also available under Title VII cases where an employer has intentionally discriminated against a plaintiff.\textsuperscript{181} The amount of legal remedies has been capped depending on the employer's size.\textsuperscript{182} Furthermore, a mixed-motive plaintiff could even receive punitive damages unless "other factors motivated the disputed action in addition to eliciting discrimination."\textsuperscript{183}

\textbf{H. Employer Defenses}

Title VII allows for employers to assert defenses in discrimination claims.\textsuperscript{184} The courts have also recognized several defenses for Title VII

\begin{footnotes}
\item[175] \textit{Id.}
\item[176] \textit{Id.} at 763.
\item[177] \textit{See United States v. Paradise,} 480 U.S. 149, 166 (1987). The action was challenging the Alabama Department of Public Safety's practice of excluding African Americans from employment and the United States Government was added as a party plaintiff. \textit{Id.} The government had an "unquestionably compelling interest" in remedying past and present discrimination by a state actor. \textit{Id.} at 167.
\item[179] Koffe-Lart & Tyson, \textit{supra} note 81, at 633.
\item[180] \textit{See Dessert Place, Inc. v. Costa,} 539 U.S. 90, 99 (2003) (interpreting Congress' definition of "demonstrates" to mean Title VII plaintiffs are not required to utilize direct evidence to show discrimination, and solving a circuit split).
\item[181] Koffe-Lart & Tyson, supra note 81, at 634 ("A complainant seeking compensatory and punitive damages can also elect to have her case heard by a jury.").
\item[182] \textit{Id.}
\item[183] \textit{Id.}
\item[184] \textit{Id.} at 651.
\end{footnotes}
defendants including reductions in workforce, narrowly tailored affirmative action programs, seniority systems, selections based on particular nondiscriminatory qualifications, and other business reasons. An employer can also escape liability by showing that the employer would have reached the same conclusion without considering any of the discriminatory factors (i.e., sex or race).

Employers can implement affirmative action programs to counter past discrimination and use those programs to combat present discrimination and prevent future discrimination. The Court has held that employers can lawfully take race into account in preferring minority employees as a group. Similarly, employers may lawfully take gender into account in preferring women employees as a group as a way to combat the under-representation of women in the workforce.

I. A Recent Decision

As recent as April of 2016, a district court would not allow a victim of sexual discrimination to hold her successor owner/employer liable for the alleged sexual discrimination occurring under the previous owner/employer. Regena Robinson, a former news director at WLUC in Michigan’s Upper Peninsula, sued her new employer and succeeding company, Sinclair Broadcasting Group Inc. (“SBG”), which purchased the station she worked at from Barrington Broadcasting LLC in 2013. Ms. Robinson asserted that SBG and its subsidiary, Chesapeake Media I

185. See, e.g., Standard v. A.B.E.L. Servs., Inc., 161 F.3d 1318, 1331 (11th Cir. 1998) (referencing no Title VII violation because the plaintiff failed to show that the layoff was pretextual).
187. See Dodd v. Runyon, 178 F.3d 1024, 1026 (8th Cir. 1999).
188. See Arway v. Norwalk Dep’t of Police Serv., 125 F.3d 843 (2d Cir. 1997) (unpublished table decision).
191. Johnson, 480 U.S. at 630.
193. Koffe-Lart & Tyson, supra note 81, at 654.
LLC should be held “liable under federal and state law for WLUC’s racially and sexually hostile work environment, based on incidents dating from August 2011.” Ms. Robinson describes that the harassment occurred after SBG took over in November 2013 and before she resigned in January 2014.

Ms. Robinson’s complaint asserted specific conduct by her supervisor and the station’s general manager, Robert Jamros. While working at WLUC, Mr. Jamros made several comments alluding to Ms. Robinson’s race. For example, Mr. Jamros made comments about an Afro, he told Ms. Robinson that “you all with dark skin look the same,” and he told a news consultant that Ms. Robinson did not look like a news director but that the previous director who was a white male did actually look like a news director.

The following timeline was presented to the court as a “consistent conflict” that created the hostile work environment between Ms. Robinson and her supervisor, Mr. Jamros throughout 2012 and 2013. On April 24, 2012, Ms. Robinson notified Barrington’s human resources department of Mr. Jamros’ actions. On April 25, 2012, Mr. Jamros took it upon himself to interview members of Ms. Robinson’s staff because he felt that there was a “lack of harmony” within her department. Afterwards, Mr. Jamros met with Robinson and “completed an interim performance comment form” to keep in Ms. Robinson’s file criticizing her leadership abilities. On May 2, 2012, Mr. Jamros met with Ms. Robinson and her senior staff members to once again tell Ms. Robinson that she must improve her management of her staff. In August of 2012, Ms. Robinson complained to senior management at Barrington’s, that her predecessor was still in the newsroom a year later, when he was only supposed to be there for a month transition period. In the same month, “Jamros interviewed Robinson’s staff [again] and met with Ms. Robinson about her
management problems.”  

He filed a complaint with the company documenting that meeting.  

On January 15, 2013, Mr. Jamros filed another complaint with the company stating that Ms. Robinson was insubordinate in a staff meeting and that he threatened to fire her if she ever did it again. On February 4, 2013, “Robinson complained to Barrington’s human resources department that Jamros and Asplund were mistreating her because she was an African-American woman.” That same day, Ms. Robinson voiced the same complaint to Barrington’s President, Chris Cornelius. Mr. Cornelius held a meeting with Mr. Jamros and Mr. Asplund and where Mr. Asplund’s schedule was subsequently changed so that he would not work at the same time as Ms. Robinson.  

On February 28, 2013, “Sinclair Television Group (“STG”), a wholly owned subsidiary of SBG, entered into an asset purchase agreement to purchase WLUC assets from Barrington.” SBG then created Chesapeake to “serve as a holding company for WLUC” on March 11, 2013. In September of 2013, Mr. Jamros reversed the change to Asplund’s schedule so that he could work with Ms. Robinson again in spite of Ms. Robinson’s protests. In the same month Mr. Jamros had told Robinson to “stop being so emotional.” On November 22, 2013 STG took over WLUC but “[t]he takeover did not substantially affect business, and most employees maintained their positions and duties.”  

In December of 2013, Mr. Jamros filed another complaint with the company stating that “Robinson had put a segment on the news against Mr. Jamros’s instruction.” In the same month, Mr. Jamros spoke to SBG’s human resources director, Allison Kiniry, and SBG’s regional manager, Chris Manson about his concerns with Ms. Robinson’s
management. On January 2, 2014 Asplund submitted a complaint through SBG’s intranet site citing concerns about Ms. Robinson’s leadership abilities. On January 7, 2014, Kiniry and Manson held a phone call with Ms. Robinson and Mr. Jamros to discuss Robinson’s performance. During that call, Ms. Robinson complained that she had been harassed based on her race and gender and that she was in the process of putting together an EEOC complaint. On the same day, Ms. Robinson said she “was uncomfortable meeting with Mr. Jamros alone,” and Kiniry responded that they “should not meet without a human resources representative present.” Ms. Robinson did not discuss on the phone call that she had received an “anonymous letter earlier that morning that made hateful and threatening remarks based on Robinson’s race and gender.” On January 8, 2014 Mr. Jamros asked Ms. Robinson to discuss the previous day’s call with him in her office, but Ms. Robinson refused and reminded him that they were advised not to meet without a human resources representative present and refused to do so. That same day, Ms. Robinson then sent Kiniry and Manson numerous emails informing them that Mr. Jamros had come into her office. On January 10, 2014, Ms. Robinson sent her resignation letter to WULC. Even though Ms. Robinson said that she would stay until January 30, Ms. Kiniry told Ms. Robinson that “it would be best if she did not work after January 10,” she would however be paid until January 30. Later that month, Kiniry then conducted an investigation of the harassment and discrimination allegations and concluded that they were unsubstantiated.

The Defendants in this case argued that they could not be held liable for actions that took place under the previous owner. Ms. Robinson did not respond to that assertion but only claimed that WLUC is a separate entity that can be held liable as well. The court started its analysis on EEOC v. MacMillan Bloedel Containers, Inc. when

219. Id.
220. Id.
221. Id.
222. Id.
223. Id.
224. Id.
225. Id.
226. Id.
227. Id.
228. Id. This is not conclusive of whether the alleged harassment and discrimination did or did not create a hostile work environment for Ms. Robinson. Id.
229. Id. The successor employer insisted that the successor liability doctrine did not apply to them in this case. Id. They claimed to be unaware of the situation at the time of purchase. Id.
analyzing the issue of successor liability:

In EEOC v. MacMillan Bloedel Containers, Inc., the Sixth Circuit held that successor employers may be held liable in Title VII cases based on equitable considerations. The court listed nine factors, which essentially boil down to three factors: (1) whether there is substantial continuity of business operations, (2) whether the successor employer had notice of the predecessor’s legal obligation, and (3) the ability of the predecessor to provide adequate relief.

However, the court heavily relied upon the subsequent Sixth Circuit Case, Wiggins v. Spector Freight Sys. Inc., where the court limited the applicability of successor liability. This court held:

a successor employer may not be held liable if (1) charges were not filed with the EEOC at the time of the acquisition and (2) the successor corporation had no notice of any claim of discrimination at the time of the acquisition. Wiggins expressly held that where these two conditions exist, a case is “remove[d]... from the rationale” of MacMillan and successor liability does not attach.

The Sixth Circuit then reaffirmed that holding in Rabidue v. Osceola Refining Co. and the Michigan Supreme Court adopted the

230. Id. at 747 (citing EEOC v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086 (6th Cir. 1974)) The original nine factors included:
   1) whether the successor company had notice of the charge, 2) the ability of the predecessor to provide relief, 3) whether there has been a substantial continuity of business operations, 4) whether the new employer uses the same plant, 5) whether he uses the same or substantially the same work force, 6) whether he uses the same or substantially the same supervisory personnel, 7) whether the same jobs exist under substantially the same working conditions, 8) whether he uses the same machinery, equipment and methods of production and 9) whether he produces the same product.


233. Robinson, 182 F. Supp. 3d at 747; see Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986) (affirming the district court’s grant of summary judgment to defendant employer in
Wiggins limitation to successor liability in *Stevens v. McLouth Steel Prods. Corp.* in order to further apply it to similar cases.\(^{234}\)

In this case, Ms. Robinson did not file a charge with the EEOC until after SBG took over WLUC and SBG provided an affidavit that said they had no notice of any potential claims by Ms. Robinson.\(^{235}\) Ms. Robinson disputed that assertion, stating that she had informed Barrington’s human resources department of the alleged harassment, however, informing those employees would not give notice to SBG or its subsidiaries because they were only employed until November 2013.\(^{236}\) This court felt that they gave Ms. Robinson “ample opportunity to point to evidence that either Defendant had notice of any kind [but] she failed to do so.”\(^{237}\)

Almost all of the alleged incidents occurred before SBG took over WLUC in November 2013.\(^{238}\) The court held that “Ms. Robinson’s receipt of the letter would likely be sufficient to sustain a hostile work environment claim if she could demonstrate that Jamros (or someone else at WLUC) sent it to her.”\(^{239}\) However, “Robinson has no evidence that anyone affiliated with WLUC sent the letter” and the court did not believe that a reasonable jury could conclude that the identified incidents that occurred constitute harassment so severe that it would alter Ms. Robinson’s conditions of employment.\(^{240}\) The court said, “[t]he factors identified by the Sixth Circuit do not indicate that such actions [actions by Mr. Jamros and other WLUC employees] rose to the level of actionable harassment.”\(^{241}\)

Ms. Robinson’s prima facie case of sexual harassment and a hostile work environment failed.\(^{242}\) In accordance with case law precedent the court held:

[a] plaintiff alleging a hostile work environment claim

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\(^{234}\) *Robinson,* 182 F. Supp. 3d at 747; see *Stevens v. McLouth Steel Prods. Corp.,* 446 N.W.2d 95, 99-100 (Mich. 1989) (holding successor liability in a cause of action brought pursuant to the Michigan Civil Rights Act was foreclosed where ... the successor corporation had no notice of the discrimination claim prior to the acquisition date).

\(^{235}\) *Robinson,* 182 F.Supp 3d at 747.

\(^{236}\) *Id.* at 743-44, 748, 750.

\(^{237}\) *Id.* at 747.

\(^{238}\) *Id.* at 750.

\(^{239}\) *Id.* at 748.

\(^{240}\) *Id.*

\(^{241}\) *Id.*

\(^{242}\) See *id.* at 750.
under Title VII or [Elliot Larsen Civil Rights Act] must demonstrate that "(1) she belonged to a protected group, (2) she was subject to unwelcome harassment, (3) the harassment was based on race, (4) the harassment was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment, and (5) the defendant knew or should have known about the harassment and failed to act."243

This court followed many cases that have decided this complicated issue before.244 In particular, the court followed Harris v. Forklift Sys. Inc. in finding that only harassment that is "sufficiently severe or pervasive to alter the conditions of [the plaintiff's] employment and create an abusive working environment is actionable under Title VII."245 It is required by Bowman v. Shawnee State Univ. that "both an objective and a subjective test must be met: the conduct must be severe or pervasive enough to create an environment that a reasonable person would find hostile or abusive and the victim must subjectively regard that environment as abusive."246 It is also common for courts to look to all the circumstances in determining whether an environment is hostile or abusive, 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."247

The court granted the Defendants' motion for summary judgment because Ms. Robinson did not demonstrate that "she was subject to

243. Id. at 746 (quoting Williams v. CSX Transp. Co., 643 F.3d 502, 511 (6th Cir. 2011)) (holding further, when determining a working environment is abusive, courts consider harassment "by all perpetrators combined" with regard to the plaintiff's race. "A plaintiff may prove that harassment was based on race by either (1) direct evidence of the use of race-specific and derogatory terms or (2) comparative evidence about how the alleged harasser treated members of both races in a mixed-race workplace.").

244. See Robinson, 182 F. Supp. 3d at 746-49.

245. Id. at 746 (citing Harris v. Forklift Sys., Inc. 510 U.S. 17, 21 (1993) ("Though the District Court did conclude that the work environment was not 'intimidating or abusive to [Harris], 'it did so only after finding that the conduct was not 'so severe as to be expected to seriously affect plaintiff's psychological well-being,' and that Harris was not 'subjectively so offended that she suffered injury' . . . We therefore reverse.").


247. Harris, 510 U.S. at 17 ("The effect on the employee's psychological well-being is relevant in determining whether the plaintiff actually found the environment abusive. But while psychological harm, like any other relevant factor, may be taken into account, no single factor is required.").
harassment that was so severe or pervasive as to alter the conditions of her employment and create an abusive working environment.\textsuperscript{248} The fact that the alleged incidents mostly occurred before the defendant took over WLUC, because Ms. Robinson had not filed an EEOC claim before that time, and Defendants had no notice of a potential claim, the court refused to hold the defendants liable for any harassment that occurred before November 2013.\textsuperscript{249} The court was so bold as to say, "[e]ven if Defendants were liable for events that transpired before 2013, however, the incidents that Robinson cites are simply part of the ordinary tribulations of a workplace, and are not sufficient to sustain a claim under Title VII or ELCRA."\textsuperscript{250} The court finally summarized:

Robinson does not show that she faced harassment that was so severe or pervasive as to alter the conditions of her employment and create an abusive working environment, even if the Court considers the entirety of Robinson's tenure at WLUC. Aside from four remarks that she found offensive, she has pointed only to criticism based on her work performance. While such criticism may have caused Robinson distress, it was part of the 'ordinary tribulations of the workplace,' and not the sort of 'extreme' conduct necessary to maintain a hostile work environment claim. To find otherwise would turn Title VII into a 'general civility code,' as the Supreme Court has repeatedly warned against.\textsuperscript{251}

\textit{J. A New Category}

Today, the EEOC has had the opportunity to file Title VII suits on behalf of transgender employees and it could then be added to the successor liability analysis.\textsuperscript{252} In particular, today's society has dealt with the debate over whether denying a transgender employee equal access to common restroom corresponding to the employee's gender

\begin{itemize}
\item \textsuperscript{248} Robinson, 182 F. Supp. 3d at 750.
\item \textsuperscript{249} Id.
\item \textsuperscript{250} Id.
\item \textsuperscript{251} Id. at 749-50 (quoting Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998).
\end{itemize}
identity is sex discrimination. The EEOC defines “transgender” as referring to “people whose gender identity and/or expression is different from the sex assigned to them at birth.” The EEOC’s website reads:

In addition to other federal laws, EEOC enforces Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, national origin, religion, and sex (including pregnancy, gender identity, and sexual orientation). Title VII applies to private and state/local government employers with 15 or more employees, as well as to federal agencies in their capacity as employers.

Thankfully, contrary state law is not a defense under Title VII. In Macy v. Dep’t of Justice, the EEOC ruled that discrimination based on transgender status is sex discrimination in violation of Title VII. In Lusardi v. Dep’t of the Army, the EEOC held that denying an employee equal access to a common restroom corresponding to the employee’s gender identity is sex discrimination:

[an employer cannot] condition this right on the employee undergoing or providing proof of surgery or any other medical procedure; and, [an employer cannot] avoid the requirement to provide equal access to a

253. Id.
254. Id.

The term transgender woman typically is used to refer to someone who was assigned the male sex at birth but who identifies as a female. Likewise, the term transgender man typically is used to refer to someone who was assigned the female sex at birth but who identifies as male. A person does not need to undergo any medical procedure to be considered a transgender man or a transgender woman.

255. Id. ("Like all non-discrimination provisions, these protections address conduct in the workplace, not personal beliefs. Thus, these protections do not require any employee to change beliefs. Rather, they seek to ensure appropriate workplace treatment so that all employees may perform their jobs free from discrimination.").

256. Id.

257. Macy, EEOC Appeal No. 0120120821, 2012 WL 1435995 (Apr. 20, 2012) (holding that intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination “based on . . . sex,” and such discrimination therefore violates Title VII).

258. Lusardi, EEOC Appeal No. 0120133395, 2015 WL 1607756 (Mar. 27, 2015) (finding that that Complainant proved that she was subjected to disparate treatment on the basis of sex when she was denied equal access to the common female restroom facilities).
common [restroom] by restricting a transgender employee to a single-user restroom instead (though the employer can make a single-user restroom available to all employees who might choose to use it). 259

The court has seemed to agree with the EEOC. 260 In G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd., the United States Court of Appeals for the Fourth Circuit held that Title IX’s prohibition against sex discrimination requires educational institutions to provide transgender students restroom access consistent with their gender identity. 261 However, the question remains, how will the courts deal with such a discrimination claim when it is to be analyzed with a successor liability claim?

The EEOC is doing its part to analyze the situation and come up with solutions to make everyone protected under Title VII. The first step is always filing with the EEOC and if they are on the side of the complainant, the process is expedited and deference may be given to the agency’s expertise. However, successor liability may not necessarily be considered the agency’s expertise. Someone may be held liable but it may not be the successor.

III. SOLUTION

The successor liability doctrine has always been decided on a case-by-case basis with a heavy factual analysis. 262 This was a new concept decades ago but now after countless cases and a circuit split, victim employees with successor employers have fallen through the cracks of Title VII protection and have been left in limbo without any redress. 263 In order to reconcile these issues, Congress must enact a statute or add yet another amendment to Title VII. This law must be overarching in order to be truly effective.

261. Id. at 722.
262. EEOC v. MacMillan Bloedel Containers, Inc., 503 F.2d 1086, 1094 (6th Cir. 1974) (Courts that have considered the successorship question in a labor context have found a multiplicity of factors to be relevant.”).
263. Id. at 1091 (“Failure to hold a successor employer liable for the discriminatory practices of its predecessor could emasculate the relief provisions of Title VII by leaving the discriminatee without a remedy or with an incomplete remedy.”).
A. Congress and EEOC Solve the Problem

The foundation of this solution depends upon the action of Congress. In order to effectively help victim employees in Title VII successor liability suits Congress must enact a statute that applies across the country. This could be done with an amendment to the current Title VII that is strictly for successor liability suits; however, we have seen how difficult it can be to get an amendment approved in a timely fashion, if ever. Another option would be to empower the EEOC with the ability to promulgate a rule that would solve the national confusion about how to treat successors.

This statute would require a business that is considering a sale or merger to survey their employees anonymously about any pending Title VII suits or any possible Title VII suits that have not yet been filed. After the results of the survey are reviewed, the statute will then impose a duty upon that owner to disclose this information to possible new owners and to the EEOC. The EEOC must have proof that this process has occurred prior to the sale. It is the successor’s responsibility to make sure that this process has occurred or else they are purchasing a business at their own risk.

After the EEOC has been notified, the statute will give them the power to do a “check-in” on the businesses’ employees before any sale or purchase is made. This is meant to encourage victim employees to step forward to an unbiased entity. The EEOC needs to be more involved in the merger and acquisition process, however, there is an issue with the fact that a successor cannot be held liable unless there is a pending EEOC charge at the time of the sale or purchase. A victim employee may be unaware that the company is being purchased or

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264. Anastasia Niedrich, Removing Categorical Constraints on Equal Employment Opportunities and Anti-Discrimination Protections, 18 MICH. J. GENDER & L. 25, 58, 64 (2011) (“With the passage of Title VII in 1964, and with subsequent amendments, Congress made policy decisions and performed valuations that ratified discrimination against some in an attempt to eradicate discrimination against others.”).

265. Id. at 36, 58, 60. (discussing the complications of actually getting an amendment to Title VII passed).

266. Id. at 32 (“Congress enacted Title VII with the aim of exterminating discriminatory employment practices. The statute imposes certain obligations on employers, grants certain rights to employers and employees, and also establishes an administrative entity (the Equal Employment Opportunity Commission ("EEOC")) to enforce parties’ rights.”).

267. EEOC, 503 F.2d at 1093 (“If the charging requirement is read in light of the statute of limitations, it is reasonable to assume, at least in the case of successor companies, that Congress only intended that a discriminatee be required to name those who were known to him and could have been charged within the period of limitations.”).
merged and they just haven’t filed a claim yet.\textsuperscript{268} This is asking a victim employee to bypass any and all psychological trauma that the harassment or discrimination has caused. It is also giving the successor employer a get-out-of-jail-free card if the previous employer does not have any available assets to properly redress a victim employee. This requirement would need to be eliminated by this new statute or amendment.

Finally, this statute could also give power to the courts to interpret Title VII successor liability claims on a case-by-case basis but using the same factors as every other court is mandated to do so. This would help eliminate any confusion among the circuits and even among employees and employers. By using factors from the original nine-factor test and the condensed three-factor test,\textsuperscript{269} this analysis, in my view, would be equally fair to both parties. This new test would consist of five-factors and the court should consider the following questions: (1) whether the successor employer had prior notice of the claim or notice of the survey; (2) whether the alleged harasser or discriminator is still working there; (3) whether there is sufficient continuity in the business operations of the predecessor and the successor; (4) whether the predecessor is able to provide the proper relief; and (5) whether there is another option for the plaintiff to receive a remedy without holding the successor liable.

\textbf{B. Possible Negative Effects}

With new legislation comes the possibility of negative effects and unpopularity. This law in particular begs several questions such as, whether the right person paying the price, whether this is placing a burden on the economy and unnecessarily lengthening the merger or acquisition process, whether the law would deter businesses from wanting to engage in these types of deals, and whether the new law would allow the new claims to flood the courts.

First, a law that would give more protection to victim employees and more procedures to employers might be construed by courts to hold

\begin{itemize}
\item \textsuperscript{269} The refined three-factor test requires courts to consider: (1) whether the successor employer had prior notice of the pending claim against the predecessor; (2) whether the predecessor is able to provide the requested relief; and (3) whether there is sufficient continuity in the business operations of the predecessor and the successor to justify the imposition of liability. Brzozowski v. Correctional Physician Servs., Inc., 360 F.3d 173, 178 (3d Cir. 1974) (citing Rego v. ARC Water Treatment Co., 181 F.3d 396, 401 (3d Cir. 1999)).
\end{itemize}
successors liable more often than they used to. This law would create more requirements that need to be met in order for a successor to meet their standard of due diligence in order to escape liability. This could then cause a problem about whether the right entity/person is being held liable. A prior owner may escape liability completely when in theory they are the correct ones to hold liable.

Second, although the new requirements set out by this statute serve to make possible purchasers aware of any unlawful employment practice, it may unnecessarily lengthen the merger or acquisition process and cause that business or even the economy to suffer. The requirements would take ample time to complete and various entities to be involved.

Third, the extra requirements could even deter businesses from ever participating in a merger or acquisition because the process may become too burdensome. The new law would actually be a better way to protect successors from inheriting these lawsuits but they wouldn’t have to worry about that if they never enter into any purchase agreements.

Finally, this new federal law may flood the courts and impede judicial efficiency. By eliminating some of the requirements to go through the EEOC first, victim employees may file more suits in court that are premature or unwarranted.

IV. CONCLUSION

This Note attempted to solve the issues of the requirements victim employees are required to meet in order to recover for sexual harassment and discrimination in the workplace under the successor liability doctrine. The EEOC has guidelines and procedures that should be followed but the time constraints can prove to be hard to follow and should be amended. The requirement of a pending EEOC charge at the time of purchase in order to hold a successor liable in a Title VII suit is especially problematic. Asking a victim employee to rush the litigation process and their healing process is both a systemic problem and a psychological issue. Lastly, the courts have their own way of analyzing on a case-by-case basis that could not possibly give any victim employee a realistic expectation of what the outcome might be.270 This is portrayed further through the prevalent circuit split and it has shown to leave many victim employees without any type of redress because they are often stuck in limbo. The successor liability doctrine does not

effectively protect victim employees, as it should.

A new federal law is the best solution in an attempt to solve a problem that has lasted decades. This law would keep the business economy flowing and it would not scare businesses away from purchasing other companies. It would require a successor to do more research before purchasing a business and it would impose a new duty upon the prior owner to survey its employees before selling and a duty to then truthfully disclose the results of that survey to the new owner and to the EEOC. Before a sale is to be made, the EEOC needs to be notified in order to decide whether to “check-in” with employees about their work environment. This would eliminate the requirement of a pending EEOC claim at the time of sale, while simultaneously encouraging employees to come forward. Although there are various possible negative effects that could arise from this federal law, the additional protections for potential victim employees may outweigh those negatives. This law may also get approved because it provides a safeguard for both sides. In the end, the statute would continue the common notion of buyer-beware, rather than victim-beware, in merger or acquisition deals.

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