

## Was Sexual Harassment Law a Mistake? The Stories We Tell

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**ABSTRACT.** It may seem heresy in this #MeToo moment to ask whether sexual harassment law was a mistake—it has provided thousands of plaintiffs over the past more than thirty years their day in court, a chance to tell their stories of harassment as discrimination in violation of Title VII of the federal Civil Rights Act. But sexual harassment law as it has developed negatively affects the larger project of reducing harassment and discrimination in work in a number of ways. In this Essay, I focus on one of those ways: harassment law today constrains the stories we tell about harassment and discrimination, to ourselves and to others, and it dampens considerably our calls for meaningful reform. Drawing from publicly available court filings in several well-known Supreme Court cases, I tell the stories that the plaintiffs might have told and, in at least some of the cases, tried to tell. And I show how the Supreme Court tamped down those stories and in doing so limited their power (and the power of many other harassment stories told in courtrooms across the country since) to trigger meaningful change. It turns out that we will need to change the law, not just public perception, if the #MeToo movement is to have a lasting effect on our work environments.

### INTRODUCTION

By most accounts, *Meritor Savings Bank v. Vinson*<sup>1</sup> was a victory for workplace equality. The Supreme Court held that workplace sexual harassment is sex-based discrimination that violates Title VII of the Civil Rights Act,<sup>2</sup> and not merely the “personal” advances of a man toward the singular women to which he is attracted.<sup>3</sup> In doing so, the Court cleared the way for women and men alike to tell

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1. 477 U.S. 57 (1986).

2. 42 U.S.C. §§ 2000e to 2000e-17 (2012).

3. 477 U.S. at 63-69. Prior to *Meritor*, some lower courts rejected women’s claims of sex harassment under Title VII as being motivated by personal urges and not work related or a proper

stories of sex-based hostile work environments that make working more difficult or disagreeable for one group than for another and that are tied to employer policies and practices, and not just to the individual “proclivities” of harassers and their specific targets.

But it turns out that the individualized, “personal advances” account of harassment did not die with *Meritor*. Over time, the Court has created a harassment law that focuses inquiry on individual wrongdoers and their targeted victims and away from broader harms and sources of harassment and discrimination at work. This harassment law covers more than sexual harassment; it applies also to harassment on the basis of race, color, religion, and national origin.<sup>4</sup> Moreover, the prevailing narrative of harassment as “personal” reaches much further than workplace sexual harassment. It is undermining the capacity of Title VII to address discrimination of all kinds.

In this Essay, I explore one significant downside to the law of harassment in the age of #MeToo: it negatively affects the stories we tell about discrimination, to ourselves and to others, and it dampens considerably our calls for meaningful reform. Sexual harassment is a form of discrimination because more often than not it is tied to broader inequality in the workplace. But our law has not embraced this reality. Instead, the existing law of harassment constrains permissible narratives on both sides. On the victim side, it rewards thinking of ourselves and our experiences of harassment in isolation, when we might instead see our experiences as members of groups embedded within broader environments. On the perpetrator side, it asks whether a specific, identified harasser engaged in acts of harassment, thereby ignoring others in the organization and the organizational structure itself as causes of ongoing hostile environments.

I draw here from publicly available court filings in several well-known Supreme Court cases on harassment law to tell the stories that the plaintiffs might have told and, in at least some of the cases, tried to tell. These stories involve much broader hostile work environments than many people will recall. They involve fellow victims alongside named plaintiffs and also fellow contributors to harassment, including other harassers, silent bystanders, and the organizational leaders who make and maintain the systems, structures, and cultures that assign

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subject of company concern. *See, e.g.,* *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975) (“In the present case, Mr. Price’s conduct appears to be nothing more than a personal proclivity, peculiarity or mannerism. By his alleged sexual advances, Mr. Price was satisfying a personal urge.”); *see also* CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 83-90 (1979) (describing ways in which judges used the label “personal” to remove sexual harassment from Title VII’s purview).

4. *See* *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2442 n.3 (2013) (stating that lower courts have applied the same law in the race and sex context and assuming without deciding that the employer liability framework created in the sex harassment context applies equally to race harassment).

power, define merit, and generally determine how workers will be treated on the job. I then show how the Supreme Court has constrained these larger stories, pulling them back again and again to the “personal”: one harassed victim and his or her specific harasser or harassers. What were and should be stories of hostile environments instead become stories about individuals targeting a single individual, the plaintiff. Some judges along the way understood harassment law differently, but they lost out to the Supreme Court’s narrow view. Harassment law, in short, is keeping us from asking bigger questions, and ultimately from seeking bolder and more effective solutions.

That the law constrains the stories we tell is nothing new—lawyers regularly help plaintiffs frame their stories in ways that warrant relief under the law. But the Court’s constricting of our stories of harassment has serious implications for the law’s ability to serve its broader goal of reduced discrimination in the workplace. My aim is to illustrate this downside to harassment law as it stands today.

#### **I. THE STORIES PLAINTIFFS TELL: THE LARGER STORIES OF HARASSMENT AND DISCRIMINATION IN WELL-KNOWN CASES**

Before I tell these stories, I should point out that these are abbreviated versions of sometimes horrific tales of sexual assault and abuse involving race as well as sex. Rather than citing every moment of assault or humiliation, I emphasize here, where possible, the larger frames: allegations involving victims other than a single plaintiff as well as other contributors to a hostile work environment, including organizational ones. Some of these larger frames are difficult to discern from the allegations, arguments, and evidence available in public documents, but in each of these cases the record suggests that these broader stories were told, just in most cases not heard by the judges.

##### *The Case Brought by Mechelle Vinson Against Meritor Savings Bank*

When Mechelle Vinson, a nineteen-year-old African-American woman, applied for a job at Meritor Savings Bank in 1974, Sydney Taylor, an African-American man and a vice president of the bank and manager at the branch office,

took her application.<sup>5</sup> He hired her and became her supervisor.<sup>6</sup> Soon thereafter, he began asking her for sex, and she acquiesced for fear of losing her job. Vinson testified that Taylor forced her to have intercourse forty to fifty times over a twenty-month period, and that he also groped her and other female employees, followed them into the bathroom, and made lewd comments.<sup>7</sup> When Vinson started steadily dating someone in 1977, Taylor stopped demanding sex from her, but he continued to grope her and other women at the bank. According to Vinson, Taylor also “tampered with her personnel records, lodged false complaints about her with management, denigrated and abused her in front of other workers, entrapped her into work errors, escalated his campaign of fault-finding against her job performance, and threatened her life when she threatened to report him.”<sup>8</sup>

Two coworkers testified that they had seen Taylor abuse and grope Vinson at work.<sup>9</sup> They also testified that Taylor groped them as well. One said, “Yes, it did come a time when he would put his hands on my breasts and he would put his hands on my backside and it was just disrespectful. That just tore me down. I couldn’t stand it.”<sup>10</sup> Vinson complained to another vice president at the bank, David Burton, about Taylor’s harassment of the other women (she did not complain to Burton about Taylor’s treatment of her because Taylor had threatened to have her killed or raped if she did), but nothing was done in response.<sup>11</sup>

*The Case Brought by Teresa Harris Against Forklift Systems, Inc.*

Teresa Harris worked as a manager of leased equipment and coordinator of sales at Forklift Systems, Inc., a small equipment-rental company in Tennessee,

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5. Brief of Respondent at 3, *Meritor*, 477 U.S. 57 (No. 84-1979). Vinson had actually run into Taylor in a parking lot, when Taylor struck up a conversation with her. She asked him about working for the bank, and he replied that she should apply, which she did the next day. See *Vinson v. Meritor Sav. Bank*, No. 78-1793, 1980 WL 100, at \*1 (D.D.C. 1980). Vinson describes Taylor in her early time at the bank as a “fatherly figure.” *Id.* For more discussion of this case and a rewritten opinion that considers the facts in light of historical and social context on race and sex, see Kristen Konrad Tiscione & Angela Onwuachi-Willig, *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), in *FEMINIST JUDGMENTS: REWRITTEN OPINIONS OF THE UNITED STATES SUPREME COURT* (Kathryn M. Stanchi et al. eds., 2016).

6. *Vinson*, 1980 WL 100, at \*1.

7. *Id.* Vinson testified that she felt like she would lose her job if she did not grant sexual favors and tolerate Taylor’s behavior and that on several occasions he forcibly raped her. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* (quoting the trial transcript).

11. *Id.* at 77.

from April 1985 to October 1987.<sup>12</sup> Harris was the only woman manager besides the office manager, who was also the daughter of the company president, Charles Hardy.<sup>13</sup> Other women in the office appear to have worked predominantly in clerical positions.<sup>14</sup> Harris received smaller bonuses than two of the male managers, and she initially was not given a separate office like the male managers when the company relocated.<sup>15</sup> Hardy once directed Harris to bring coffee into a meeting, which he never directed male managers to do.<sup>16</sup> He told Harris on several occasions in the presence of other employees, “You’re a woman, what do you know,” and on at least one occasion, “You’re a dumb-ass woman.”<sup>17</sup> He also told Harris several times in front of other employees, “We need a man as the rental manager.”<sup>18</sup> One day, in front of a group of employees and a Nissan factory representative, he said to Harris, “Let’s go to the Holiday Inn to negotiate your raise.”<sup>19</sup> Hardy also asked Harris and female clerical employees to retrieve coins from his front pants pocket.<sup>20</sup> He threw objects on the ground in front of Harris and other female employees, asking them to pick up the objects and then making comments about how the women should dress to better expose their breasts.<sup>21</sup> He also commented with sexual innuendos about the clothing Harris and other female employees wore.<sup>22</sup>

*The Case Brought by Kimberly Ellerth Against Burlington Industries, Inc.*

Kimberly Ellerth worked for the national fabric and apparel company Burlington Industries from 1993 to 1994 as a merchandizing assistant and then as a sales representative in the Chicago office.<sup>23</sup> Ted Slowik, Vice President of Sales and Marketing for Burlington’s Mattress Ticking Division, interviewed Ellerth for her job and continued to interact with her in her work.<sup>24</sup> Although Slowik

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12. Brief for Petitioner at 3, *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993) (No. 92-1168).

13. *Id.*

14. *Id.* at 5-8.

15. *Harris v. Forklift Sys., Inc.*, No. 3-89-0557, 1991 WL 487444, at \*2 (M.D. Tenn. 1991).

16. *Id.*

17. Brief for Petitioner, *supra* note 12, at 4.

18. *Id.*

19. *Harris*, 1991 WL 487444, at \*2.

20. Brief for Petitioner, *supra* note 12, at 4-5.

21. *Id.* at 5.

22. *Id.*

23. Brief for Respondent at 1, *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) (No. 97-569).

24. *Id.*

did not work in Ellerth's office, he was one of her supervisors and she was required to call him once a week.<sup>25</sup> Slowik regularly made sexually suggestive comments and told sexual jokes both over the phone and in person throughout Ellerth's time at Burlington.<sup>26</sup> In one public incident at a business lunch in New York with Ellerth and Angelo Brenna, the Vice President of International Sales at Burlington, Slowik told approximately twenty sexually offensive jokes about breasts and sex acts. During one of the jokes, he reached over and grabbed Ellerth's knee. As they walked back to the office from lunch, with Ellerth walking slightly in front of Slowik and Brenna, Slowik said, "You have got great legs, Kim. What do you think Angelo [Brenna]?" Brenna responded, and Slowik went on to tell another sexual joke.<sup>27</sup> On another occasion, when Ellerth was kneeling on the floor folding fabric samples, Slowik approached her with another customer sales representative and as Ellerth rose, Slowik said, "On your knees again, Kim," which Ellerth understood to be a reference to fellatio.<sup>28</sup>

Ellerth complained to several people at Burlington about Slowik's behavior.<sup>29</sup> At least one of these people mentioned that Slowik may have also harassed another female employee, and one, upon hearing of the lunch with Brenna, said that Ellerth's complaints sounded "typical" of what occurred when Slowik and Brenna got together.<sup>30</sup>

*The Case Brought by Beth Ann Faragher Against the City of Boca Raton*

Beth Ann Faragher worked as a lifeguard for the City of Boca Raton, Florida, from September 1985 to May 1990.<sup>31</sup> Out of forty to fifty lifeguards on staff at any given time, between five and seven were women.<sup>32</sup> Bill Terry, the Marine Safety Chief, was a manager who "had a propensity to touch female employees on various parts of their anatomies, including waist, neck, and buttocks."<sup>33</sup> David Silverman, a lifeguard lieutenant and later a captain, "pantomimed cunnilingus outside Marine Safety Headquarters in front of Faragher" and between six

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25. *Id.*

26. *Id.* at 1-2.

27. *Id.* at 2.

28. *Id.* at 3.

29. *Id.* at 5.

30. *Id.*

31. Brief for Petitioner at 4, *Faragher v. City of Boca Raton*, 524 U.S. 775 (2007) (No. 97-282).

32. *Id.* at 5.

33. *Id.* at 4 (quoting *Faragher v. City of Boca Raton*, 864 F. Supp. 1552, 1556 (S.D. Fla. 1994)).

and twelve other lifeguards.<sup>34</sup> He invited Faragher to shower with him, and regularly pounded on the door to the showers in the unisex locker room, demanding to join the women who were showering.<sup>35</sup>

Both Terry and Silverman spoke of women predominantly in terms of their body parts.<sup>36</sup> Silverman commented at Marine Safety Headquarters about the size and firmness of Faragher's breasts.<sup>37</sup> Terry and Silverman also harassed the other female lifeguards in addition to Faragher. One female lifeguard testified, he "would touch you and put his hands on you and reach towards you, your breast in a crowded room right behind people that were standing there, he would reach around and laugh."<sup>38</sup> Once, he "pressed himself against [this guard's] buttocks and moved his hips simulating sexual movement."<sup>39</sup> Five female guards in addition to Faragher testified about Terry's and Silverman's sexualized and abusive conduct, including that they called the women cunts and sluts and bitches.<sup>40</sup>

*The Case Brought by Maetta Vance against Ball State University*

Maetta Vance worked at Ball State University as a catering assistant from 1991 until 2007.<sup>41</sup> For much of this time, she was the only black person working in the division.<sup>42</sup> In 2005, Saundra Davis, a white catering specialist, was given authority to direct Vance's work.<sup>43</sup> Davis and another white employee, Connie McVicker, threatened Vance, and used epithets like "Buckwheat" and "nigger" to refer to Vance and black students at the university.<sup>44</sup> McVicker openly touted her family's connections to the Ku Klux Klan.<sup>45</sup> Vance was also berated and yelled at by her immediate supervisor, a white man, Bill Kimes, who was known to "play[] favorites" and treat others terribly, but who nonetheless allegedly treated Vance worse than any of the nonblack employees.<sup>46</sup> And she was "mean-

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34. *Id.* (citation omitted).

35. *Id.*

36. *Id.* at 5.

37. *Id.*

38. *Id.* at 5-6.

39. *Id.* at 6 (quoting *Faragher*, 864 F. Supp. at 1556).

40. *Id.* at 5-7.

41. Brief for Petitioner at 6, *Vance v. Ball State Univ.*, 133 S. Ct. 2434 (2013) (No. 11-556).

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Vance v. Ball State Univ.*, No. 1:06-cv-1452-SEB-JMS, 2008 WL 4247836, at \*13 (S.D. Ind. Sept. 10, 2008).

mugged” by another white supervisor, Karen Adkins, who also stared intently at Vance when they were alone in the kitchen.<sup>47</sup>

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We can tell several important things from these brief versions of plaintiffs’ stories of harassment. First, in each of the cases, the plaintiff was unlikely the only woman who experienced a hostile work environment. Vinson, Harris, and Faragher all included testimony of other women and their experiences in their stories of the environments in which they worked. Even Ellerth’s account includes some reason to suspect that at least one other woman may also have been harassed. In each of these cases, the harassment also took place publicly as well as in private. Women who witnessed the harassment in each of the cases may have experienced a hostile work environment even if they were not directly targeted. Maetta Vance was the only black woman working in her division, but there is no reason to believe that another black woman in that workplace would experience the environment differently, or that the students whom Davis and McVickers called vile and demeaning slurs would either

The cause of the hostile environment in each of the cases, too, was larger than a single person. In at least three of the cases, the harassers acted in concert with others: Slowik and Berra telling sexual jokes and making sexual comments; Terry and Silverman harassing the female lifeguards; Davis and McVicker using racial epithets and bragging about having Klan members in their families; and Kimes and Adkins staring and berating. What’s more, people on the sidelines were complicit in these stories: men at Meritor Savings Bank who saw Sidney Taylor groping Mechelle Vinson and other women; men and other women at Forklift Industries who joined in laughing and joking when the president of the company called Teresa Harris a “dumb-ass woman” and demanded that female employees take coins from his pockets or pick tossed items off of the floor; and male lifeguards on the beach and in the lifeguard station at the City of Boca Raton who ignored or perhaps even played along with harassment by Terry and Silverman. These people were part of the broader hostile work environment that the plaintiff in each case experienced, an environment that may have been made worse and more isolating by the acquiescence of bystanders, even as some of them may have been victims as well.

And then there is the organization in each of these stories. In several of the cases, women were working in a male-dominated workplace and in a male-dominated, masculine industry: rental of heavy equipment used for construction, for example, and lifeguarding at the City of Boca Raton beaches. Women at Forklift Industries mostly held clerical positions, not managerial ones. And banking jobs

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47. *Id.*



at Meritor Savings and the sales and managerial forces at Burlington Industries may also have been sex segregated, although we don't have numbers from the cases.<sup>48</sup> "Merit" in at least several of the workplaces—Harris's rental office and Ellerth's sales job, for instance—seemed to include the ability to take a joke, and to get along.<sup>49</sup> From what we can tell from the evidence, moreover, leaders within the organizations did little to nothing to learn about the culture or behaviors in their workplaces, or to change things about which they were aware.

These are stories of more than individual plaintiffs and individual harassers—they are stories of work environments that were hostile to members of protected groups. In none of these cases would we conclude that the harassment was "personal" to the harasser in the sense that it was not work related or was unique to the plaintiff and isolated from other, nontargeted people.

## II. WHAT HAPPENS TO PLAINTIFFS' LARGER STORIES: THE SUPREME COURT'S NARROW ACCOUNT OF HARASSMENT

In *Meritor Savings Bank v. Vinson*,<sup>50</sup> Mechelle Vinson tried to introduce evidence in her principal case at the trial level of Taylor's harassment of others, but without explanation in the record, the trial judge refused to allow it.<sup>51</sup> On appeal, the D.C. Circuit held that the trial judge was wrong to exclude the evidence.<sup>52</sup> Relying on an earlier decision, *Bundy v. Jackson*,<sup>53</sup> in which the court had held that sexual harassment creating a hostile work environment violates Title VII, it determined that:

[E]vidence tending to show Taylor's harassment of other women working alongside Vinson is directly relevant to the question whether he created an environment violative of Title VII. Even a woman who was never

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48. Vance was the only black woman working in the catering division; we don't know from the case anything about the racial makeup of the rest of the food services or other services workforce at Ball State. Brief for Petitioner, *supra* note 41, at 6.

49. For example, the trial judge in Harris stated that "[s]everal clerical employees formerly employed at Forklift testified that Hardy's frequent jokes and sexual comments were just part of the joking work environment at Forklift." *Harris v. Forklift Sys., Inc.*, No. 3-89-0557, 1991 WL 487444 (M.D. Tenn. Feb. 4, 1991); *see also supra* note 27 and accompanying text (relaying a lunch with two Vice Presidents of Burlington Industries at which Slowik allegedly told over twenty jokes involving sex acts and breasts).

50. 477 U.S. 57 (1986).

51. *Vinson v. Taylor*, No. 78-1793, 1980 WL 100, at \*1 n.1 (D.D.C. Feb. 26, 1980). The judge stated that Vinson could introduce some of the evidence in rebuttal to the defendant's case, but not as part of her principal case. *Id.*

52. *Vinson v. Taylor*, 753 F.2d 141, 146 (D.C. Cir. 1985).

53. 641 F.2d 934 (D.C. Cir. 1981).

herself the object of harassment might have a Title VII claim if she were forced to work in an atmosphere in which such harassment was pervasive.<sup>54</sup>

Yet this aspect of the appellate court's opinion went unmentioned at the Supreme Court. Even as the Court brought sexual harassment into the fold of Title VII, it relegated the story of harassment to the narrow realm of individuals by failing to endorse the plaintiff's broader story, as the court of appeals had done. Instead, Justice Rehnquist, writing for the Court, merely relayed the following as part of his summary of the history of the case:

Respondent also testified that Taylor touched and fondled other women employees of the bank, and she attempted to call witnesses to support this charge. But while some supporting testimony apparently was admitted without objection, the District Court did not allow her "to present wholesale evidence of a pattern and practice relating to sexual advances to other female employees in her case in chief, but advised her that she might well be able to present such evidence in rebuttal to the defendants' cases." Respondent did not offer such evidence in rebuttal.<sup>55</sup>

In *Harris v. Forklift Systems, Inc.*,<sup>56</sup> the Supreme Court also ignored Harris's larger story of harassment. The trial judge in *Harris* found that the work environment at Forklift Systems did not violate Title VII.<sup>57</sup> First, the judge disaggregated the sexualized conduct from nonsexualized conduct, finding non-sex-based explanations for each of the disparities in treatment between Harris and the male managers.<sup>58</sup> The judge then went on to find that the sexualized conduct did not rise to a level that violated Title VII. As to the women other than Harris, the judge found that they "considered Hardy a joker."<sup>59</sup> The trial judge said it appeared these women, who were in clerical positions, "were conditioned to accept denigrating treatment," which meant that in his view the environment was

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54. *Vinson*, 753 F.2d at 146 (footnote omitted).

55. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 60-61 (1986) (quoting *Vinson*, 1980 WL 100, at \*1 n.1).

56. 510 U.S. 17 (1993).

57. *Harris v. Forklift Sys., Inc.*, No. 3-89-0557, 1991 WL 487444 (M.D. Tenn. Feb. 4, 1991).

58. For example, the judge found that a discrepancy in payment of a bonus to Harris was based on her status as a commission manager and her longevity with the company, not her sex. *Id.* at \*2. For discussion of this and similar cases disaggregating sexualized conduct from nonsexualized conduct and the negative implications of this practice, see Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998).

59. *Harris v. Forklift Sys., Inc.*, No. 3-89-0557, 1991 WL 48744, at \*6 (M.D. Tenn. Feb. 4, 1991).

less likely rather than more likely to be hostile in violation of Title VII.<sup>60</sup> Ultimately, the judge characterized Hardy's behavior toward Harris as not much more than "annoying and insensitive"<sup>61</sup> and not sufficiently severe to cause Harris psychological harm, which the judge thought was required for Title VII violation.<sup>62</sup>

Although the Supreme Court in *Harris* reversed on the issue of whether Harris needed to suffer psychological injury, it nonetheless entrenched a narrow view of harassment when it created a standard for Title VII violation that includes both objective and subjective elements. Justice O'Connor wrote for the Court:

Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.<sup>63</sup>

Scholars have critiqued the first prong of the *Harris* standard because trial court judges have used it as a tool to keep cases from juries by ratcheting up the expected degree of harassment before it can be perceived by a reasonable person as hostile or abusive.<sup>64</sup> The second prong, however, is also problematic. This prong poses a hurdle to those who experience a hostile work environment and want to pursue a collective claim, and thereby more easily present a collective story.<sup>65</sup> Plaintiffs in any lawsuit must experience harm to have standing and to recover individualized compensatory damages, but *Harris* puts the subjective element of individual offense into the plaintiff's principal case of discrimination. This makes meeting class certification requirements more difficult because whether a hostile work environment existed becomes in part a question of individual perception. Some judges have certified classes of plaintiffs who allege a systemic hostile work environment, bending the law of *Harris* in doing so,<sup>66</sup> but

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60. *Id.*

61. *Id.*

62. *Id.* at \*6-7.

63. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993).

64. See, e.g., SANDRA F. SPERINO & SUJA A. THOMAS, *UNEQUAL: HOW AMERICA'S COURTS UNDERMINE DISCRIMINATION LAW* 34-40 (2017) (relaying examples of such cases).

65. Some courts have held that individual plaintiffs cannot bring systemic cases without class certification. See, e.g., *Davis v. Coca-Cola Bottling Co.*, 516 F.3d 955, 965-69 (11th Cir. 2008).

66. See, e.g., *Sellers v. CRST Expedited, Inc.*, 321 F.R.D. 578, 613 (N.D. Iowa 2017) (certifying class and modifying *Harris* for a two-stage process); *Jenson v. Eveleth Taconite Co.*, 824 F.

others have not, holding that *Harris* and the inherently “individualized” nature of plaintiffs’ claims of harassment prevent class treatment.<sup>67</sup>

Indeed, this same view of harassment as inherently individualized has leaked into judges’ thinking about discrimination more broadly as courts, including the Supreme Court in *Wal-Mart v. Dukes*, deny plaintiffs class treatment for sex-based discrimination in pay and promotions.<sup>68</sup> According to the Court in *Wal-Mart*, in order to establish commonality needed to proceed as a class, plaintiffs had to present evidence that all or at least a substantial portion of the individual, discretionary decisions taken by managers at Wal-Mart were discriminatory.<sup>69</sup> And yet the Court found it “quite unbelievable that all managers would exercise their discretion in a common way,”<sup>70</sup> notwithstanding statistics showing substantial disparities in pay and promotion between equally qualified men and women and evidence of a work culture at Wal-Mart rife with gender stereotyping.<sup>71</sup>

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Supp. 847, 875-76 (D. Minn. 1993) (same). Some courts tie the individualized inquiry back to *Meritor*, where the Court held that the conduct at issue must be “unwelcome” to the victim. See generally Melissa Hart, *Litigation Narratives: Why Jenson v. Eveleth Didn’t Change Sexual Harassment Law, But Still Has a Story Worth Telling*, 18 BERKELEY WOMEN’S L.J. 782, 793 (2003) (describing courts’ refusal to grant certification while referring to the unwelcome requirement). Although the trial judge in the recent sex-based discrimination case against Goldman Sachs did certify a plaintiff class, she isolated plaintiffs’ evidence of a “boys’ club,” including allegations of sexual assault, harassment, stereotyping, and retaliation, as inappropriate for class certification because these allegations would raise “individualized inquiries” that would predominate over common ones. See *Chen-Oster v. Goldman, Sachs & Co.*, No. 10 Civ 6950 (AT) (RWL), 2018 WL 1609267, at \*22 (S.D.N.Y. Mar. 30, 2018).

67. See, e.g., *Elkins v. Am. Showa, Inc.*, 219 F.R.D. 414, 424 (S.D. Ohio 2002) (denying class certification on the grounds of no commonality because of individualized variation among plaintiffs’ complaints of harassment); *id.* at 426 (denying certification for lack of predominance, noting that even if plaintiffs were able to establish a plant-wide hostile environment, “[i]ssues as to whether a given individual perceived the environment to be hostile would remain”); *Adler v. Wallace Comput. Servs.*, 202 F.R.D. 666, 673 (N.D. Ga. 2001) (denying class certification of a claim of sex discrimination in terminations, promotions, pay, job assignments, and hostile work environment in part because “plaintiff-specific issues could be raised with regard to the claim of hostile work environment sexual harassment, especially since that claim requires a showing that the employee perceived the environment to be abusive”); *Int’l Union, United Auto, Aerospace, & Agric. Implement Workers of Am. v. LTV Aerospace & Def. Co.*, 136 F.R.D. 113, 130 (N.D. Tex. 1991) (denying class certification of a harassment claim because “claims raised by Plaintiffs are very individual and varied”).
68. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011).
69. *Id.* at 358.
70. *Id.* at 356.
71. Testimony of a culture of stereotyping included incidents involving senior managers referring to female store employees during executive meetings as “Janie Qs,” and “girls,” male managers insisting on holding meetings at Hooters and attending strip clubs on business trips, and a Wal-Mart companywide newsletter featuring a photograph showing Wal-Mart’s Executive

In *Burlington Industries v. Ellerth*<sup>72</sup> and *Faragher v. City of Boca Raton*,<sup>73</sup> decided as companion cases, the Supreme Court further narrowed stories of harassment by creating a defense to employer liability (in cases in which a hostile work environment has already been established) when a supervisor harasses but fails to take tangible employment action against the victim.<sup>74</sup> An employer is not liable for the hostile work environment if it can show: “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”<sup>75</sup>

This holding individualizes harassment stories in several key respects. For one thing, to determine whether the defense will apply, a court must decide whether the plaintiff was harassed by a specific supervisor, and then whether that supervisor took tangible employment action against the plaintiff. The story becomes one about two individuals rather than the broader work environment. In addition, the defense itself focuses on what the plaintiff did in response to the harassment, asking whether she unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. Although it is true that organizations must provide preventive or corrective opportunities under this law, the requirement has been construed narrowly to focus on whether the employer has an antiharassment policy and complaint process in place and not to require employers to undertake more holistic review of their workplaces.<sup>76</sup> Moreover, the legal inquiry returns in the end to the behavior of a single individual, the plaintiff. A single plaintiff alleging a broad hostile work environment affecting many people in the workplace may lose her case, in other words, leaving the employer free of liability for a hostile work environment that the plaintiff has shown existed, merely because she herself failed to complain.

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Vice President of Operations and Chief Operating Officer at the time posing at a company event in a leopard-skin stiletto high-heel shoe chair while surrounded by women singing and dancing. See Declaration of William T. Bielby, Ph.D, in Support of Plaintiffs’ Motion for Class Certification, *Dukes v. Wal-Mart Stores, Inc.*, 964 F. Supp. 2d 1115 (N.D. Cal. 2013) (No. CV 01-02252), 2003 WL 24571701 (relaying testimony). For more discussion of the evidence presented in *Wal-Mart* and the view of discrimination that drives the Court’s opinion, see TRISTIN K. GREEN, *DISCRIMINATION LAUNDERING: THE RISE OF ORGANIZATIONAL INNOCENCE AND THE CRISIS OF EQUAL OPPORTUNITY LAW* 66-84 (2017).

72. 524 U.S. 742 (1998).

73. 524 U.S. 775 (1998).

74. *Burlington Indus.*, 524 U.S. at 764-65.

75. *Id.* at 765.

76. See, e.g., *McKinney v. G4S Gov’t Sol., Inc.*, 711 F. App’x 130, 137 (4th Cir. 2017) (applying the affirmative defense and affirming a grant of summary judgment for the employer).

It should come as no surprise that the Court in *Ellerth* and *Faragher* expressly relied on the “personal-advances” story of harassment in fashioning its law. According to the Court, “a supervisor acting out of gender-based animus or a desire to fulfill sexual urges may not be actuated by a purpose to serve the employer,”<sup>77</sup> and therefore the general rule is that his conduct is not “within the scope of employment” such as would warrant employer liability for the harassment in all cases.<sup>78</sup> Thus, what should be considered discrimination reduces merely to personal advances, making it seem unjust to hold the employer responsible for the perceived rogue harasser’s wrong.

*Vance v. Ball State University*, too, illustrates this narrow, individualized view of harassment, and how it undermines the stories of harassment we might otherwise tell. The trial judge in the case granted summary judgment for the defendant, treating each of the harassers and their behavior individually. As to Kimes and Adkins, both Vance’s superiors, the judge determined that a jury could not reasonably find their behavior to be racial harassment in violation of Title VII.<sup>79</sup> Kimes’s conduct was not racially motivated, the court said, and Adkins’s behavior “fell short of the kind of conduct that might support a hostile work environment claim.”<sup>80</sup> As to McVickers and Davis, the judge held that the employer was not liable because, as the court of appeals later put it, “Ball State satisfied its obligation under Title VII by promptly investigating each of Vance’s complaints and taking disciplinary action where appropriate.”<sup>81</sup> The Court’s holding in *Burlington Industries* and *Faragher* prompted the trial judge in *Vance* to consider each harasser’s conduct in isolation.<sup>82</sup> By taking each of the harassers independently, the judge ignored that sometimes multiple incidents that may seem minor when considered in isolation can nonetheless add up to be sufficiently pervasive to violate Title VII when viewed together.

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77. *Id.* at 756.

78. *Id.* at 757.

79. *Vance v. Ball State Univ.*, No. 1:06-cv-1452-SEB-JMS, 2008 WL 4247836, at \*13 (S.D. Ind. Sept. 10, 2008).

80. *Id.*

81. *Vance v. Ball State Univ.*, 646 F.3d 461, 471 (7th Cir. 2011). The Supreme Court affirmed the lower court, holding that McVickers and Davis were both coworkers and not supervisors and that Vance had to prove that Ball State University was negligent for it to be held liable for any racial harassment. *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2454 (2013).

82. *Vance*, 2008 WL 4247836, at \*12-17 (separating analysis into categories of harassment by “supervisor” and by “co-worker”).

### III. TOWARD A LAW THAT SUPPORTS OUR LARGER STORIES

Judges have constructed an individualized harassment law that revolves around stories of “personal advances,” even though in most cases harassment is not an individualized problem. When those who experience hostile work environments try to tell their larger stories, they are shut down. And many of the larger stories are never told. We don’t know, for example, whether the female tellers and managers at Meritor Savings Bank were being paid less than their male counterparts or whether women at Burlington Industries were being steered into lower-paying sales positions over more lucrative managerial positions. Yet if our stories of harassment were tied more often to discrimination, we would want to know these things. We would want to look for patterns and causal factors within the organizations and for the broader effects of harassment, and not just into the psyches of seemingly rogue male harassers and the behaviors of the victims who decide to file a complaint.

This downside of harassment law today goes even deeper than one might first realize. A story that fails to see the ways in which harassment ties to broader work environments, environments in which work is made more disagreeable and difficult for members of some groups than for others, leads to overly narrow calls for reform. For decades now, these calls have been limited to training and implementing systems of complaint and response.<sup>83</sup> Of course, employers seeking to reduce harassment must set standards of appropriate workplace behavior that prohibit sex-based harassment of all kinds, not just the sexualized, and they must put in place systems for complaint and investigation that can be used to enforce those standards. But research increasingly shows that diversity trainings and complaint systems are not adequate and can even be problematic. Trainings can exacerbate stereotypes and generate backlash,<sup>84</sup> and internal investigations

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83. In the major harassment cases brought by the Equal Employment Opportunity Commission (EEOC) over the past several decades, for example, specific reforms have been largely limited to training and complaint processes. See, e.g., Press Release, EEOC, Mitsubishi Motor Manufacturing and EEOC Reach Voluntary Agreement to Settle Harassment Suit (June 11, 1998) (announcing consent decree requiring training and complaint processes); Press Release, EEOC, U.S. Security Associates to Pay \$1.95 million to Resolve EEOC Title VII Sexual Harassment Claim (May 31, 2011) (announcing consent decree requiring complaint and investigation processes); Press Release, EEOC, Potato Packing Companies to Pay \$450,000 to Settle EEOC Suit for Sex Harassment and Retaliation (Oct. 7, 2015) (announcing consent decree providing for “extensive training” and posting notice of employees’ rights to be free of harassment and retaliation); see generally Margo Schlanger & Pauline Kim, *The Equal Employment Opportunity Commission and Structural Reform of the American Workplace*, 91 WASH. U. L. REV. 1519, 1543-50 (2014) (showing the relatively narrow injunctive relief obtained in EEOC suits).

84. See Susan Bisom-Rapp, *Sex Harassment Training Must Change: The Case for Legal Incentives for Transformative Education and Prevention*, 71 STAN. L. REV. ONLINE 62, 70 (2018). On backlash,

are often skewed toward findings of “personal conflict” over discrimination.<sup>85</sup> Even when a hostile work environment is identified, as in some of the recent investigations pursued upon #MeToo allegations, firings and other individualized punishments follow to the exclusion of broader organizational reforms.<sup>86</sup>

Training and complaint processes may seem like the only feasible solutions when we think of harassment as an individualized problem, as current harassment law would have us do. But once we see that harassment is most often linked to problems in broader work environments, we can expand our stories – and our solutions. What may at first glance seem like an individual instance of harassment can often be linked to sex segregation and disparities in pay and promotion, unfettered decision-making by dominant groups, and notions of merit and other organizational practices that are stereotyped and inaccurate.<sup>87</sup> Women and men alike who understand themselves as operating in this larger environment will be more likely to identify patterns of discrimination and to seek more innovative solutions.

Commentators and activists who are willing to work within the individualized frame, even as they seek to tie harassment to broader patterns of sexism and segregation, are likely to be sorely disappointed in the efficacy of their efforts. The #MeToo movement presents an extraordinary moment of awareness and willingness to listen to and believe people who tell their stories of harassment. Reducing harassment in the workplace, however, will take legal reforms in addition to changes in public perception. Those reforms must be aimed at better acknowledging that stories of harassment often go well beyond isolated individuals to include others in the workplace and the environments of work shaped by organizational leaders. This is not an impossible task. The law can support larger

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see Justine E. Tinkler, *Resisting the Enforcement of Sexual Harassment Law*, 37 LAW & SOC. INQUIRY 1 (2012).

85. See generally ELLEN BERREY ET AL., *RIGHTS ON TRIAL: HOW WORKPLACE DISCRIMINATION LAW PERPETUATES INEQUALITY* (2017) (showing that the system of employment civil rights litigation under Title VII is substantially controlled by employers and involves tailoring complaints away from discrimination and toward personnel matters). For a review of research on what works and what does not work to reduce discrimination, see GREEN, *supra* note 71, at 109-14, 136-41.
86. Rank-and-file employees accordingly bear the brunt of organizational responses to sexual harassment. For an astute analysis of this reality, see Rachel Arnow-Richman, *Of Power and Process: Handling Harassers in an At-Will World*, 128 YALE L.J.F. 85 (2018).
87. For more on how sexual and other forms of harassment are tied to broader environments at work even in the #MeToo era, see Vicki Schultz, *Open Statement on Sexual Harassment from Employment Discrimination Scholars*, 71 STAN. L. REV. ONLINE 17 (2018); Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L.J.F. 22 (2018).



stories of harassment and discrimination and incentivize more effective solutions, but we need to push the law in that direction instead of sitting back and letting it push us.

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