New York's New Sexual Harassment Laws: Fixing What Wasn't Broken in the "Severe or Pervasive Standard"

by Ian-Paul A. Poulos

A few years ago, on October 15, 2017, actress Alyssa Milano delivered a tweet that sparked a social movement. She wrote, "If all the women who have been sexually ha Td[(aD)-5 (e)-1 (exw (y)Tj- (e)-128 (e)-128 (e.5 (e)h1-14muAT

[2] and twelve million posts across Facebook within the same timeframe.[3]

The "#MeToo" hashtag on social media served as a way for those who have experienced sexual harassment in various forms to unite under a single message, against what has been both a social and legal concern for decades. As *Time Magazine* put it, "Women have had it with bosses and co-workers who not only cross boundaries but don't even seem to know that boundaries exist….These silence breakers have started a revolution of refusal, gathering strength by the day, and in the past two months alone, their collective anger has spurred immediate and shocking results: nearly every day, CEOs have been fired, moguls toppled, icons disgraced. In some cases, criminal charges have been brought."[4] By October 2018, those who had been toppled included Harvey Weinstein (the former American film producer), Senator Al Franken, actor Kevin Spacey, news host Charlie Rose, New York Attorney General Eric T. Schneiderman, and at least 196 others.[5]

In New York, however, this movement helped further a legislative agenda that was already years in the making at both the state and local level. In 2005, the New York City Council passed Local Law 85 ("The Restoration Act") in an effort to "clarify[] a number of [New York City Human Rights Law] provisions and…underscor[e] that protections afforded by New York City's human rights law are not to be limited by restrictive interpretations of similarly worded state and federal statutes."[6] In the wake of the #MeToo movement, New York State and New York City subsequently passed legislation, recently amended portions of which will be discussed below, that notably altered the standard applicable in sexual harassment and other discrimination cases; expanded protections for non-employees and employees of small employers; restricted the use of non-disclosure provisions in cases involving sexual harassment and other forms of discrimination; prohibited mandatory arbitration clauses (a section which is arguably unenforceable and preempted by federal law[7]); and created mandatory notice, policy, and training requirements, among other things.

As demonstrated below, this Article focuses on the "severe or pervasive" test that courts have developed as a litmus test for determining what conduct is actionable sexual harassment. First New York City and now New York State have taken drastic steps away from this traditional standard routinely applied under federal law, and, in doing so, have turned a well-established approach upside-down. In the Author's view, adopting an entirely new analysis was unnecessary, because the traditional approach had the mechanisms necessary to accomplish the legislature'

Some Statistics: Sexual Harassment in the Workplace

In the 2018 fiscal year, the Equal Employment Opportunity Commission ("EEOC"), the federal agency empowered to enforce federal discrimination laws, fielded 90,558 charges of discrimination. About 32.3 percent of those (24,655) involved allegations of sexual discrimination or harassment.[8] In 2017, following the advent of the #MeToo movement, the EEOC experienced a 13.6 percent increase in sexual harassment allegations.[9]

The general trend was similar locally. At the New York City level, Carmelyn P. Malalis, the Commissioner of the New York City Commission on Human Rights, testified before the New York City Council that, in 2017, claims of gender-based discrimination were the most prevalent form of discrimination investigated by the NYC Commission, constituting 17 percent of all employment-related claims. The Commissioner also reported that in the two years prior to her testimony, sexual harassment complaints increased 43 percent.[10] In the same vein, independent, non-governmental studies report that roughly 38 percent of women have experienced sexual harassment in the workplace.[11]

The Federal Framework

Prohibition on Sex Discrimination—A "Congressional Joke?"

The framework that governs federal sex discrimination law is rooted in a 1964 statute enacted in the wake of ongoing civil rights protests in Birmingham, Alabama. At the time, gender discrimination was not the focus. A year before the passage of the Civil Rights Act of 1964, then-President John F. Kennedy addressed Congress, emphasizing that "[r]ace discrimination hampers our economic growth by preventing the maximum development and utilization of our manpower. It hampers our world leadership by contradicting at home the message we preach abroad…. Above all, it is wrong."[12] He urged Congress to take action: "The cruel disease of discrimination knows no sectional or state boundaries. The continuing attack on this problem must be equally broad. It must be both private and public—and it must include both legislative and executive action."[13] A few months later, the President prodded Congress again because both Houses had failed to act: "Although these recommendations were transmitted to the Congress some time ago, neither House has yet had an opportunity to vote on any of these essential measures [concerning various forms of discrimination]."144 (i)(a)4 (c)4 6nr-2 (n(de)-3es)-10 52 cdey-8.921v-6 (al)hw13 415.9b

respect to his or her "compensation terms, conditions, or privileges of employment[] because of such individual's race, color, religion, sex, or national origin."[19]

The Current State of Federal Sex Discrimination and Sexual Harassment Law

Sex discrimination law as a topic for discussion is broad. As mentioned above, Title VII prohibits an employer from discriminating against an employee based on gender, which can include sex stereotyping, making it "an unlawful employment practice…to discriminate against any individual with respect to…terms, conditions, or privileges of employment, because of such individual's…sex."[20] In its simplest form, sex discrimination includes an employment action taken against an individual because of his or her gender. But this can occur in different forms.

An employee may, for example, demonstrate that he or she has been discriminated against based on sex under a disparate treatment theory, where the argument is a female employee was qualified for the job but experienced an adverse employment action—such as being rejected for a promotion, terminated, or demoted—under circumstances that give rise to an inference of unlawful discrimination. If the employee establishes these elements—that is, puts forth a *prima facie* case—then the burden shifts to the employer to "articulate some legitimate, nondiscriminatory reason" for the alleged adverse action. Following that showing, the burden returns to the employee to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons but were a pretext for discrimination.[21] This method of proof, which is still how courts analyze disparate treatment claims today, was established in 1973 by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

As the courts continued to develop the *McDonnell Douglas* framework for analyzing discrimination cases, they realized that not every claim involves tangible employment actions. While a disparate treatment claim "requires a showing of an adverse employment action 'either because of gender or because a sexual advance was made by a supervisor and rejected,"'[22] not all instances of sex discrimination are so direct. With this realization in mind, the Supreme Court recognized in 1986 that sexual harassment in the form of a hostile work environment is also actionable. The standard used to determine whether harassment is actionable is whether it has "the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[23] According to the Supreme Court in *Meritor Sav. Bank, FSB v. Vinson*, "[t]he phrase 'terms, conditions, or privileges of employment' evinces a congressional intent to 'strike at the entire spectrum of disparate treatment of men and women' in employment."[24] Importantly, for "sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment."[25]

Understanding the "Severe or Pervasive" Standard

This Article critiques the newly enacted sexual harassment standards in New York. Understanding the federal "severe or pervasive" standard applicable in sexual harassment cases is crucial to this critique because New York State, following New York City's lead, flipped this standard on its head with its new law.

As the standard began to evolve, the Supreme Court stepped in to clarify what it meant by "severe or pervasive" in *Meritor*. A woman working for a forklift leasing company in Tennessee in the 1980s was subjected to what she viewed as a hostile work environment. Teresa Harris was a Rental Manager, and her boss and the president of the company, Charles Hardy, had a habit of making sexually charged, inappropriate comments to her during work. He would tell her, "[Y]ou're a woman, what do you know?" On numerous occasions, he stated that "we need a man as the rental manager." And his sense of humor often involved "jokes" such as, "Let's (h)-4 nm8(as)-5

"offended," it did "not believe [the inappropriate sexual comments] were so severe as to seriously affect [Harris'] psychological well-being. A reasonable woman manager under like circumstances would have been offended by Hardy, but his conduct would not have risen to the level of interfering with that person's work performance."[27] In other words, according to the Court, a reasonable woman would have just shrugged off Hardy's comments. The Supreme Court disagreed.

In a rather sharply worded reversal, the Supreme Court emphasized that "Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers."[28] The Court clarified that, although the test is not "mathematically precise," we can determine whether an environment is hostile or abusive by "looking at all the circumstances" while balancing factors such as "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."[29] The test has two prongs: "[A] sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so."[30] Therefore, conduct is "severe or pervasive" enough to alter the conditions of employment and create an abusive working environment when "the environment would reasonably be perceived, and is perceived, [by the victim,] as hostile or abusive."[31]

[in the Human Rights law] offer no basis to overlook the textual similarities between [the City law] and the federal statutes or to abandon [the] general practice of interpreting comparable civil rights statutes consistently, particularly since these broad policies are identical to those underlying the federal statutes."[36] The Court of Appeals was looking for clear direction—not policy proclamations made outside of the law. Taking the criticism to heart, the City Council reacted.

Flipping the "Severe or Pervasive" Standard Upside-down

Shortly after the decision in *McGrath*, the Council enacted the Local Civil Rights Restoration Act of 2005, which amended the New York City Human Rights Law. The Council enacted the Restoration Act to clarify that (1) some provisions of the City Human Rights Law were textually distinct from its state and federal counterparts, (2) all provisions of the City Human Rights Law required independent interpretation to accomplish the new City law's uniquely broad and remedial purposes, and (3) cases that failed to recognize these differences—such as *McGrath*—were being legislatively overruled. The Council specifically amended the construction provision of the law, adding that the City Human Rights Law should be construed liberally for the accomplishment of the "uniquely broad and remedial" purposes of the law, "regardless of whether federal or New York State civil rights law, including those laws with provisions comparably-worded…[,] have been so construed."

New York State budget, which included numerous amendments to the State Human Rights Law, some of which

The primary criticism of the "severe or pervasive" test is that it has allowed judges to dismiss otherwise viable cases. But the criticism, as demonstrated below, is misplaced. The fault lies with the judges applying the test, not in the test itself. If the legislature felt that cases were being dismissed too easily, it could have liberalized the existing analytical structure instead of redefining the approach entirely—just as Congress did with the American with Disabilities Act Amendments of 2008.

For example, in *Howley*, a female lieutenant firefighter, Ellen Howley, who was attempting to receive a promotion, was exposed to a tirade of sexual comments from her co-worker. During a firefighters' benevolent association meeting, William Holdsworth used explicit, offensive, and derogatory language to denigrate Howley and to express his views that she was not promoted to chief based on her withholding or poorly performing sexual favors.[49] Although the district court held that one instance of verbal harassment, standing alone, could not support a hostile environment claim under the "severe or pervasive" standard, the Second Circuit disagreed. The Court engaged in a detailed analysis, explaining that there is no magic threshold number of harassing incidents that give rise to a hostile environment. The "severe or pervasive" test has the flexibility to adjust to various situations—even those where the alleged conduct only occurred once. With this in mind, the court held that "[a]lthough Holdsworth made his obscene comments only on one occasion, the evidence is that he did so at length, loudly, and in a large group in which Howley was the only female and many of the men were her subordinates. And his verbal assault included charges that Howley had gained her office of lieutenant only by [granting sexual favors]. It cannot be concluded as a matter of law that no rational juror could view such a tirade as humiliating and resulting in an intolerable alteration of Howley's working conditions."[50]

This case demonstrates that the traditional criticism that the "severe or pervasive" test is inflexible and *requires* the dismissal of viable cases is misplaced. It is certainly the case that the "severe or pervasive" test is sometimes misapplied or misstated as "severe *and* pervasive," but the test itself is viable. Occasional misapplications of law are not unique to the "severe or pervasive" test; they occur in all contexts where human value judgments play a role, which is essentially everywhere.

Consider another example: the *Schiano* case. Nicole Schiano was hired as an administrative assistant and promoted to corporate financial assistant. When she asked for a raise, one of her supervisors responded that she was "sleeping with the wrong employee." He repeated this comment in the presence of her co-

In the past decade or so, we have seen first New York City and subsequently New York State expend significant effort to differentiate themselves from federal law. The goal—for both the City and State—has been to establish a strong departure from what the

[1] Alyssa Milano (@Alyssa_Milano), Twitter (Oct. 15, 2017, 3:21 PM), <https://twitter.com/alyssa_milano/status/919659438700670976?lang=en>.

[2] Lisa Respers France, *#MeToo: Social Media Flooded with Personal Stories of Assault*, CNN.COM (Oct. 16, 2017), *availaS 43 56 24 33 3 BDC 9 (*

C.P.L.R. § 7515….Under the terms of the Arbitration Agreement, Latif's sexual harassment claims are subject to mandatory arbitration….The [Federal Arbitration Act] sets forth a strong presumption that arbitration agreements are enforceable and this presumption is not displaced by § 7515.").

[8] Press Release, *EEOC Releases Fiscal Year 2018 Enforcement and Litigation Data*, EEOC (April 10, 2019), *available at* https://www1.eeoc.gov/eeoc/newsroom/release/4-10-19.cfm.

[9] *What You Should Know: EEOC Leads the Way in Preventing Workplace Harassment*, EEOC (last visited September 20, 2019), *available at* https://www.eeoc.gov/eeoc/newsroom/wysk/preventing-workplace-harassment.cfm?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=.

[10] Testimony of Carmelyn P. Malalis, Commissioner & Chair of the New York City Commission on Human Rights, *Committee on Women and Civil and Human Rights* (Feb. 28, 2018), *available at* https://www1.nyc.gov/assets/cchr/downloads/pdf/SexualHarassmentHearing_Testimony.pdf.

[11] Rhitu Chatterjee, *A New Survey Finds 81 Percent of Women Have Experienced Sexual Harassment*, NPR.ORG. (Feb. 21, 2018), *available at* https://www.npr.org/sections/thetwo-way/2018/02/21/587671849/a-new-survey-finds-eighty-percent-of-women-have-experienced-sexual-harassment.

[12] President John F. Kennedy, Special Message to the Congress on Civil Rights (Feb. 28, 1963),- K-

[30] *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998) (citing *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993)).

[31] *Harris*, 510 U.S. at 22.

[32] *Paul v. Postgraduate Center for Mental Health*, 97 F. Supp. 3d 141, 168 (E.D.N.Y. 2015).

[33] *Schiano v. Quality Payroll Systems, Inc.*, 445 F.3d 597, 606 & 608 (2d Cir. 2006) (noting that "of course, [there are] cases in which it is clear…that after assessing the frequency of the misbehavior in light of the seriousness, the facts cannot, as a matter of law, be the basis of a successful hostile work environment claim.").

[34] *Estate of Hamilton v. City of New York*, 627 F.3d 50, 55 (2d Cir. 2010) ("Our consideration of claims brought under the state and city human rights laws parallels the analysis used in Title VII claims."), *superseded by legislation*, *Mihalik v. Credit Agricole Cheuvreux North America, Inc.*, 715 F.3d 102 (2d Cir. 2013).

[35] Craig Gurian, *A Return to Eyes on the Prize: Litigating Under the Restored New York City Human Rights Law*, 33 FORDHAM URB. L. J. 255, 262 (2006).

[36] *McGrath v. Toys "R" Us, Inc.*, 3 N.Y.3d 421, 433 (2004), *superseded by statute*, The Restoration Act of 2005, Local Law No. 85 of the City of New York (2005).

[37] The Restoration Act of 2005, Local Law No. 85 of the City of New York (2005).

[38] Comm. On Gen. Welfare. Report on P(ht)6.82rL P(ht (on)1 R)10. (o.)2.9 (85 of22 ()10 Tc 0 Tw (F)Tj-.006 Tc -0.003 Tw 0.25320 Td( )Tj.6