2-2021

Plausible Harassment

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Recommended Citation
Joseph A. Seiner, Plausible Harassment, 54 U.C. Davis L. Rev. 1295 (2021).

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Joseph A. Seiner[*]

Despite the overwhelming public awareness of sexual harassment in the workplace, many federal courts still apply an unnecessarily stringent evidentiary burden to these claims. Following the Supreme Court's lead in Bell Atlantic Corp. v. Twombly, *550 U.S. 544 (2007), and* Ashcroft v. Iqbal, *556 U.S. 662 (2009), the lower courts have imposed a heightened plausibility pleading standard on harassment cases, preventing these claims from proceeding at the nascent stages of the case.*

Workplace harassment is an undeniable fact of our society, and the courts should accept this fact when it is pled in a discrimination complaint, rather than prematurely eviscerating these claims on dismissal. This Article argues that, given the current public awareness of harassment, along with the concomitant social science research and data supporting its prevalence in the workplace, any individual claim of harassment is inherently plausible. Thus, Twombly *and* Iqbal *are largely irrelevant for harassment cases, and these claims are better vetted after discovery.*

This Article reviews the existing research on harassment and proposes a new framework for pleading hostile work environment claims. Navigating the procedural rules and Supreme Court precedent, this Article explains how the proposed model can be used by the courts to more fully analyze sexual harassment cases.

 Professor of Law and Oliver Ellsworth Professor of Federal Practice, University of South Carolina School of Law. The author would like to thank the Notre Dame Law School for providing me the opportunity to present on the topic of the appropriate pleading standards in federal employment discrimination cases, and for their helpful feedback. The author would also like to thank those participants at the 14th Annual Colloquium on Current Scholarship in Labor & Employment Law, held at the UNLV William S. Boyd School of Law, for their comments on the appropriate pleading standards of Title VII. This Article benefited greatly from the extraordinary research and drafting efforts of Adair Patterson, Michael Parente, Madison Guyton, Ryan Romano, Anna Smith, Kelly Taylor, and Matthew Turk. A very special thanks to Vanessa McQuinn for her superb assistance with this piece. Thanks as well to Derek Black and Ned Snow for their helpful suggestions as this Article and topic developed. Finally, I would like to recognize the excellent efforts of The UC Davis Law Review in helping to prepare this Article for publication.

TABLE OF CONTENTS

> Sexual violence & harassment can happen to anyone at anytime anywhere . . . . Ppl remain silent 4 many different very personal reasons . . . . Sexual or physical violence, harassment, demeaning language [are] NOT the price one should pay for seeking or maintaining employment. Period.
>
> — Gabrielle Union, Twitter, Oct. 15, 2017[1]

INTRODUCTION

The thesis of this Article is straightforward: sexual harassment in the workplace is a fact. When properly pled, this fact of workplace harassment should be accepted in an employment discrimination complaint brought under federal law. Given the widespread nature of sexual harassment in the employment context, any individual allegation of harassment is plausible, and should — in most instances — survive the Supreme Court's standard for dismissal.

This Article provides a new lens through which to view the Supreme Court decisions in *Bell Atlantic Corporation v. Twombly*[2] and *Ashcroft v. Iqbal*.[3] These two cases abrogated decades of well-established pleading precedent, creating a new test which requires that a federal complaint include enough facts to state a *plausible* claim to relief.[4] Despite arising outside of the employment discrimination context, the plausibility standard has generated enormous confusion for workplace plaintiffs, and has created an unrealistically high bar for sexual harassment claims. Given what we now know about the prevalence of sexual harassment in our society, through social science research and other data, it is a fair conclusion that any individual claim of harassment is plausible. This is not to say that any specific harassment allegation is probable, likely, or should even proceed to trial. Rather, this Article makes the relatively simple — yet important — assertion that any individual claim of sexual harassment in the workplace is on its face plausible unless proven otherwise.

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[1] Gabrielle Union (@itsgabrielleu), TWITTER (Oct. 15, 2017, 9:15 AM), https://twitter.com/itsgabrielleu/status/919597648679759872 [https://perma.cc/UZ8N-2L8C]; Gabrielle Union (@itsgabrielleu), TWITTER (Oct. 15, 2017, 9:19 AM), https://twitter.com/itsgabrielleu/status/919598577508380673 [https://perma.cc/Z76T-FJWV]; Gabrielle Union (@itsgabrielleu), TWITTER (Oct. 15, 2017, 9:25 AM), https://twitter.com/itsgabrielleu/status/919600216420093952 [https://perma.cc/BPU8-W8VL].

[2] 550 U.S. 544 (2007).

[3] Ashcroft v. Iqbal, 556 U.S. 662 (2009).

[4] *See, e.g.*, *id.* at 678 (discussing the plausibility pleading standard).

Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits employment discrimination in the workplace on the basis of race, color, sex, national origin, and religion.[5] This federal law has also been interpreted by the Supreme Court to prohibit workplace sexual harassment that is unwelcome, severe or pervasive, and imputable to an employer.[6] The plausibility standard articulated in *Twombly* and *Iqbal* applies to employment discrimination and sexual harassment plaintiffs, and victims of harassment are now required to plead sufficient facts to articulate a plausible claim.[7] Employment discrimination claimants (as well as all civil rights plaintiffs) have faced difficulty in overcoming this new pleading bar.[8]

The problem is easily identifiable — it is one of intent. To successfully plead a sexual harassment claim, the plaintiff must typically show that the employer *intended* to discriminate.[9] At the pleading stage of a case, intent is quite difficult to establish, as a worker will not have access to important information that is in the employer's control — such as personnel files, correspondence, or the statements of other employees. This information is usually gathered as part of the discovery process which follows the filing of a federal complaint.[10]

This Article identifies the startling consequences that the plausibility standard has had for sexual harassment plaintiffs. This Article details some of the egregious allegations of sexual harassment that have recently been dismissed by the federal courts — including cases that have alleged threatening remarks, sexual comments, and physical touching.[11] Despite the severity of the conduct involved, however, these cases were not allowed to proceed to discovery in light of the plausibility standard. Unfortunately, this has occurred in more than one or two isolated incidents — indeed, the *Twombly/Iqbal* standard has routinely

[5] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2018).

[6] *See infra* Part I.A (outlining elements of federal sexual harassment claim under workplace law).

[7] *See generally Iqbal*, 556 U.S. 662 (applying the plausibility standard to all civil claims).

[8] *See infra* Part I.D (describing research which shows that employment discrimination plaintiffs have encountered difficulty satisfying the plausibility standard).

[9] *See infra* Part I.C (discussing the intent requirement in federal employment discrimination cases).

[10] *See infra* Part I.C.

[11] *See infra* Part I.D.

been used by the judiciary to dismiss what otherwise appear to be viable sexual harassment allegations in the workplace.[12]

In light of the overwhelming social science data firmly establishing the ongoing nature of sexual harassment in the workplace, it is now appropriate to revisit how the courts have applied the plausibility standard to these claims. The #MeToo movement has performed a critical function in bringing allegations of sexual assault and harassment to light.[13] This movement has provided our society with a new understanding of the prevalence and true nature of this improper and often disgusting conduct.[14] The evidence that we now have of harassment in the workplace is convincing, and the fact of workplace harassment is well-supported by social science research, governmental data, litigation statistics, and other related information.[15] Too often there is a gap between this type of social science research and the legal profession — this Article attempts to bridge that divide in the area of sex discrimination in the workplace.

Indeed, the social science research reflects clear evidence of sex discrimination and workplace sexual harassment. Studies have shown that women have been discriminated against during the hiring process, as part of their employment, and when seeking promotions.[16] Moreover,

[12] *See infra* Part I.D (discussing cases where federal courts have applied the plausibility standard to sexual harassment claims in an overly rigid way).

[13] *See, e.g.*, Lesley Wexler, Jennifer K. Robbennolt & Colleen Murphy, *#MeToo, Time's Up, and Theories of Justice*, 2019 U. ILL. L. REV. 45, 51-52 ("Alyssa Milano's #MeToo was not styled as a social movement and '[wa]sn't a call to action or the beginning of a campaign, culminating in a series of protests and speeches and events. It [wa]s simply an attempt to get people to understand the prevalence of sexual harassment and assault in society. To get women, and men, to raise their hands.'" (alterations in original) (quoting Sophie Gilbert, *The Movement of #MeToo: How a Hashtag Got Its Power*, ATLANTIC (Oct. 16, 2017), https://www.theatlantic.com/entertainment/archive/2017/10/the-movement-of-metoo/542979/ [https://perma.cc/VSD8-WFBP])).

[14] L. Camille Hébert, *Is "MeToo" Only a Social Movement or a Legal Movement Too?*, 22 EMP. RTS. & EMP. POL'Y J. 321, 324 (2018) ("The 'MeToo' Movement has taught the public that sexual harassment and sexual assault are pervasive in our society, and that millions of women can be counted among its targets."); *see also* Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 U. PA. L. REV. 399, 458 (2019) ("The #MeToo moment represents the beginning of a shift in cultural understanding and good will. The floodgate of stories from blue collar workers to Hollywood A-listers has forced society to face the realities encountered by so many women in the American workplace."). *See generally* Wexler et al., *supra* note 13 (discussing origins of the #MeToo movement).

[15] *See infra* Part II.A (addressing recent studies on sex discrimination in the workplace).

[16] *See infra* Part II.A.

recent studies by social scientists and other researchers reflect the pervasive nature of sexual harassment in the workplace and further reveal some of the egregious conduct that is still taking place in this environment. For example, one study revealed that almost ten million workers in this country have been subjected to some form of sexual harassment at their place of employment.[17] And research has established that anywhere between 25% and 75% of women report having been sexually harassed at some point in their careers, depending upon how the term is defined and the particular industry involved.[18] One study concluded that "[h]arassing behaviors are committed by blue-collar and white-collar workers, Democrats and Republicans, the young and the old, the married and the unmarried, high earners and low ones, people who feel powerful at work and those who do not."[19]

Similarly, consistent with the social science research, data gathered by the U.S. Equal Employment Opportunity Commission ("EEOC") reflects that this government agency has found cause to believe that sexual harassment has occurred hundreds of times each year over the past decade.[20] Indeed, during fiscal year 2018 alone, the government recovered close to $70 million for workplace harassment victims.[21] The private litigation numbers are just as alarming, and there have been numerous multi-million dollar verdicts in sexual harassment cases across the country in recent years.[22] And of course, while often anecdotal, media and other investigative reports and other high-profile journalism have uncovered continuing harassment in the employment context.[23]

Together, the social science research, governmental data, and litigation statistics paint a clear picture of the fact of ongoing sexual

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[17] Carolyn Crist, *Almost 10 Million in U.S. Have Faced Sexual Violence at Work*, REUTERS (Dec. 26, 2019, 2:01 PM), https://www.reuters.com/article/us-health-workplace-sexual-violence/almost-10-million-in-u-s-have-faced-sexual-violence-at-work-idUSKBN1YU188 [https://perma.cc/6EXM-HJU2].

[18] *See infra* Part II.A.2 (discussing existing research on sexual harassment in the employment setting).

[19] Jugal K. Patel, Troy Griggs & Claire Cain Miller, *We Asked 615 Men About How They Conduct Themselves at Work*, N.Y. TIMES (Dec. 28, 2017), https://www.nytimes.com/interactive/2017/12/28/upshot/sexual-harassment-survey-600-men.html [https://perma.cc/7DJX-GFL4].

[20] *See infra* Part II.A.3 (discussing governmental data on sexual harassment and discrimination).

[21] *See infra* Part II.A.3.

[22] *See infra* Part II.A.4 (addressing and collecting data on successful private litigation verdicts and settlements in the sexual-harassment context).

[23] *See infra* Part II.B (outlining newspaper reports and other accounts of workplace sexual harassment in recent years).

harassment in the workplace. As a fact, sexual harassment in employment can be pled in a federal complaint, and this Article proposes a new framework for how to properly place this information before the federal courts. This Article identifies a four-part model that allows plaintiffs to plead the fact of sexual harassment in the workplace, and it explains how this allegation can properly be supported with the relevant social science research and other data.[24]

Relying on Federal Rule of Civil Procedure 10(c),[25] which permits attachments to the complaint that are central to the allegations and are specifically referenced in the complaint, the model proposed in this Article articulates a clear path for litigants to use when navigating the unnecessarily difficult pleading process for harassment claims. The proposed model also offers defendants the opportunity to properly rebut the plaintiff's claims, and to explain why the facts of the instant case present the unusual situation where dismissal is appropriate.

The proposed pleading framework suggested here reflects the ongoing fact of sexual harassment in our society, making clear that any individual allegation of sexual harassment is plausible. In the vast majority of cases, then, *Twombly* and *Iqbal* are largely irrelevant to sexual harassment claims, as the plausibility standard will be satisfied in most instances. The proposed pleading model will thus help streamline the caselaw with respect to sexual harassment cases, clarify what is necessary for individual harassment pleadings, and enhance certainty in the entire process.

This Article proceeds as follows: Part I of this Article discusses the difficulty plaintiffs face pleading discriminatory intent in workplace cases. This Part further outlines the basis for sexual harassment under Title VII, setting forth the elements necessary under Supreme Court case law to prevail on a workplace harassment claim. This Part also explains the plausibility pleading standard, exploring its negative impact on sexual harassment cases in the federal courts. This Part specifically examines some of the more alarming district court decisions

[24] *See infra* Parts III.B, III.C (discussing proposed pleading model for harassment claims and an example of its use). The analysis and model discussed here are similar to what I proposed in my prior work. *See generally* Joseph A. Seiner, *The Discrimination Presumption*, 94 NOTRE DAME L. REV. 1115 (2019). However, unlike my prior work, this piece focuses exclusively on the complex issue of sexual harassment discrimination under federal law. This Article thus takes the next step in addressing the pleading requirements for this specific subset of sex discrimination claims. *See id.* at 1129 n.88 ("Sexual harassment, a special subset of gender discrimination claims, has also garnered widespread attention recently . . . . The growing amount of evidence in this area suggests that harassment is widespread and pervasive in our society as well.").

[25] FED. R. CIV. P. 10(c).

that have rejected Title VII sexual harassment allegations even in the face of disturbing facts found in the complaint.

Part II of this Article bridges the gap between the social science research and the law of harassment. This Part details some of the voluminous recent studies performed by social scientists and other research groups revealing the existence of ongoing harassment in the workplace. This Part also summarizes the litigation statistics that exist on the issue, as well as the current EEOC data on workplace harassment. Part III of this Article proposes a pleading model for workplace claims. This section explains how, pursuant to Federal Rule of Civil Procedure 10(c), the fact of workplace harassment — along with the corresponding studies and other data — can properly be introduced in the federal complaint. The four-part framework proposed in this Part, along with a detailed explanation of how it complies with the federal rules, is carefully explained in this section. Part IV explores some of the implications of adopting the proposed pleading framework, detailing the benefits and potential drawbacks of this approach.

I. THE PLAUSIBILITY STANDARD

A. Elements of Harassment

The standards for bringing a claim of sexual harassment are now well-established under Supreme Court case law.[26] First, a plaintiff must establish that she was subjected to unwelcome hostile conduct on the basis of sex that rose to the level of being both subjectively and objectively severe or pervasive.[27] The offensive conduct is often either

[26] *See* Mary Ann Connell & Donna Euben, *Evolving Law in Same-Sex Sexual Harassment and Sexual Orientation Discrimination*, 31 J.C. & U.L. 193, 195-200 (2004) (citing Ellison v. Brady 924 F.2d 872, 879 (9th Cir. 1991); then citing Yates v. Avco Corp., 819 F.2d 630, 636-37 (6th Cir. 1987); and then citing Patricia H. v. Berkeley Unified Sch. Dist., 830 F. Supp. 1288, 1296 (N.D. Cal. 1993)) ("To constitute sexual harassment, the underlying conduct must be unwelcome to the victim, as well as objectively offensive to the public at large. Some courts have recognized that men and women may experience the same conduct differently and have adopted a 'reasonable woman' or 'reasonable person of the same gender' standard.").

[27] *See* Meritor Sav. Bank v. Vinson, 447 U.S. 57, 67-68 (1986); David Smith & Ryan T. Williams, *Sexual Harassment*, 4 GEO. J. GENDER & L. 639, 658 (2002) (citing Faragher v. City of Boca Raton, 524 U.S. 775, 787 (1998)) ("In evaluating severity and pervasiveness, the fact finder must conclude both that the victim subjectively perceived the environment to be and that it was, indeed, objectively offensive from the perspective of a reasonable person."); *see also* Camille Gear Rich, *What Dignity Demands: The Challenges of Creating Sexual Harassment Protections for Prisons and Other Nonworkplace Settings*, 83 S. CAL. L. REV. 1, 17 (2009) ("Taken together, the severe or pervasive

sexual in nature, or abusive toward a particular sex.[28] The discrimination must be intentional.[29]

Once a plaintiff establishes a hostile work environment, it must still be imputed to the employer.[30] This is accomplished through traditional agency principles.[31] Where a supervisor is perpetrating the harassment, the employer may still show — by way of an affirmative defense — that it took appropriate action under the circumstances.[32] Where a co-worker is implicated, the plaintiff must demonstrate that the employer knew or should have known of the harassment and failed to take

standard and the unwelcomeness doctrine are two of the most significant hurdles a plaintiff must overcome in order to bring a Title VII sexual harassment claim.").

[28] *See* Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80-81 (1998); *see also* Linda Kelly Hill, *The Feminist Misspeak of Sexual Harassment*, 57 FLA. L. REV. 133, 160 (2005) ("The Court explained that, in addition to sexual desire, same-sex cases also could be based on sexual conduct caused by a 'general hostility' toward a particular sex or specifically directed at one sex in a mixed-sex environment." (quoting *Oncale*, 523 U.S. at 80-81)).

[29] *See* Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 153 (2000) ("The ultimate question in every employment discrimination case involving a claim [under Title VII] is whether the plaintiff was the victim of intentional discrimination."); Stephanie Bornstein, *Reckless Discrimination*, 105 CALIF. L. REV. 1055, 1077 (2017) ("[F]ederal case law interpreting Title VII disparate treatment currently requires proof of 'intentional discrimination.'" (quoting Charles A. Sullivan, *Tortifying Employment Discrimination*, 92 B.U. L. REV. 1431, 1450-51 (2012))). *See generally* Seiner, *supra* note 24, at 1124-28 (discussing the requirement that intent be shown and subsequent difficulties in doing so); Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 YALE L.J. 1566, 1596-1600 (2019) (discussing disparate impact law).

[30] *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 807-08 (1998); *see also* Theresa M. Beiner, *Sex, Science and Social Knowledge: The Implications of Social Science Research on Imputing Liability to Employers for Sexual Harassment*, 7 WM. & MARY J. WOMEN & L. 273, 281 (2001) ("The element of imputing liability is just one of several an employee must establish in order to make out a prima facie claim of sexual harassment.").

[31] *See Ellerth*, 524 U.S. at 764-65; *Faragher*, 524 U.S. at 807-08; *see also* Louis P. DiLorenzo & Laura H. Harshbarger, *Employer Liability for Supervisor Harassment After* Ellerth *and* Faragher, 6 DUKE J. GENDER L. & POL'Y 3, 24 (1999) ("The Court clearly articulated that the standard for employer liability is based in traditional agency principles, and, more particularly, agency principles under the Restatement." (citing *Ellerth*, 524 U.S. at 755-56; *Faragher*, 524 U.S. at 796-98)).

[32] *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807-08; *see also* Heather S. Murr, *The Continuing Expansive Pressure to Hold Employers Strictly Liable for Supervisory Sexual Extortion: An Alternative Approach Based on Reasonableness*, 39 UC DAVIS L. REV. 529, 535 (2006) ("[T]he Court in *Ellerth* and *Faragher* held that the employer is vicariously liable but may assert and prove a two-prong affirmative defense to liability or damages. The first prong of the affirmative defense is based on negligence principles and requires the employer to prove that it 'exercised reasonable care to prevent and promptly correct any sexually harassing behavior.'" (footnote omitted) (first citing *Faragher*, 524 U.S. at 807-08; and then citing *Ellerth*, 524 U.S. at 765)).

corrective action.[33] If the employer takes a tangible action on the basis of sex — such as firing the worker — there is no affirmative defense and the defendant is subject to vicarious liability.[34]

B. The Plausibility Requirement

A sexual harassment claim brought under Title VII is subject to the same procedural rules as any other civil claim. For decades, the civil pleading standards were well established, following the Supreme Court's oft-cited decision in *Conley v. Gibson*[35] that a plaintiff's claim should be allowed to proceed except where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[36] This standard supported the relaxed notice pleading requirement inherent for years in the federal rules.[37] Pursuant to notice pleading, as long as the defendant was given basic

[33] *Ellerth*, 524 U.S. at 759-60 (discussing the negligence standard in sexual harassment cases); *Faragher*, 524 U.S. at 799-800 (same); *see also* B. Glenn George, *If You're Not Part of the Solution, You're Part of the Problem: Employer Liability for Sexual Harassment*, 13 YALE J.L. & FEMINISM 133, 139 (2001) ("[E]mployers can be held responsible for co-worker harassment only if they 'knew (or should have known) of the harassment and failed to take appropriate remedial action.'" (citations omitted)).

[34] *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 808; *see also* DiLorenzo & Harshbarger, *supra* note 31, at 14 ("Where the plaintiff demonstrates a tangible job detriment, the employer's liability is automatic. Where there has been no tangible job detriment, the employer may avoid liability by successfully asserting the affirmative defense." (footnote omitted) (first citing *Ellerth*, 524 U.S. at 763-64; and then citing *Faragher*, 524 U.S. at 805-09)).

[35] Conley v. Gibson, 355 U.S. 41 (1957), *abrogated by* Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

[36] *Id.* at 45-46.

[37] *See id.* at 47; Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 7 (2010) ("[T]he Supreme Court's ruling in *Conley v. Gibson*, in which it famously stated, '[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim . . . .' That philosophy was recited by the Court on several occasions during *Conley*'s fifty-year reign." (second alteration in original) (footnotes omitted) (citations omitted)); Emily Sherwin, *The Jurisprudence of Pleading: Rights, Rules, and* Conley v. Gibson, 52 HOW. L.J. 73, 73 (2008) ("For fifty years, *Conley v. Gibson* stood as the landmark decision on pleading under the Federal Rules of Civil Procedure (the 'Rules'), establishing that a complaint is sufficient to initiate a lawsuit if it gives fair notice of the plaintiff's claim." (footnote omitted) (citing *Conley*, 355 U.S. 41)); *see also* Michael R. Huston, Note, *Pleading with Congress to Resist the Urge to Overrule* Twombly *and* Iqbal, 109 MICH. L. REV. 415, 434-35 (2010) ("*Conley*'s commitment to notice pleading served as the dominant pleading rhetoric for fifty years.").

notice of the allegations against it, the claim was permitted to proceed into discovery where the plaintiff could gather additional evidence.[38]

In the employment discrimination context, the procedural rules were applied by the Supreme Court in a similarly relaxed way. In *Swierkiewicz v. Sorema, N.A.*,[39] the Court examined the appropriate pleading standards in an employment discrimination matter. In that case, the plaintiff alleged both age and national origin discrimination in violation of the Age Discrimination in Employment Act ("ADEA"), as well as Title VII.[40] The Court rejected the dismissal of the complaint, holding expressly that the plaintiff need *not* allege a prima facie case to advance the claim to discovery.[41] Following the guidance it had set forth in *Conley*, the Court opined that the lower courts "may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations."[42]

Thus, for decades in both civil cases generally and in employment discrimination cases specifically, the Court applied a relaxed notice pleading standard that allowed claims to be evaluated after discovery had taken place, and after the relevant facts had been gathered by the

[38] *Conley*, 355 U.S. at 47-48; *see also* William H.J. Hubbard, *A Fresh Look at Plausibility Pleading*, 83 U. CHI. L. REV. 693, 695 (2016) ("As originally envisioned by the drafters of the FRCP, and as affirmed in the seminal case *Conley v Gibson*, the gatekeeping function of federal judges was minimal: they used a standard of notice pleading, which required only that a pleading give the defendant notice of the plaintiff's grievance." (footnote omitted) (citing *Conley*, 355 U.S. 41)); A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 3-4 (2009) (footnote omitted) (first citing *Conley*, 355 U.S. at 47; and then citing Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 1011-59 (2003)) ("Though the Supreme Court had indicated that Rule 8 required only simple notice pleading with no need for factual detail, lower federal courts developed and imposed their own more stringent pleading standards for certain claims that required increased levels of factual detail before . . . discovery.").

[39] Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002).

[40] *Id.* at 509.

[41] *Id.* at 515; *see also* Charles A. Sullivan, *Plausibly Pleading Employment Discrimination*, 52 WM. & MARY L. REV. 1613, 1626 (2011) ("*Swierkiewicz* rejected any requirement that the plaintiff plead a prima facie case of discrimination under the *McDonnell Douglas* formula in order to survive a motion to dismiss." (footnote omitted)); Tanvir Vahora, Note, *Working Through a Muddled Standard: Pleading Discrimination Cases After* Iqbal, 44 COLUM. J.L. & SOC. PROBS. 235, 242-43 (2010) ("[In *Swierkiewicz*,] [t]he Court emphasized that an employment discrimination complaint need not plead a prima facie case in the complaint and reversed the lower courts' application of heightened pleading to the case.").

[42] *Swierkiewicz*, 534 U.S. at 514 (quoting Hishon v. King & Spalding, 467 U.S. 69, 73 (1984)).

parties.[43] Notice pleading was the dominant approach to federal pleading.[44] The Court would dramatically change these well-established standards in *Bell Atlantic Corp. v. Twombly*,[45] where it reversed course on its liberal approach to pleading. In *Twombly*, the Court revisited the pleading standards in the context of a complex antitrust case.[46] As the facts of *Twombly* and *Iqbal* are now well traveled ground, this Article only briefly summarizes the background and holdings of those decisions.

The plaintiffs in *Twombly* brought a class action lawsuit, alleging in the complaint that the defendant, along with other telecommunication companies, violated antitrust law — more specifically Section 1 of the Sherman Act — by engaging in "parallel conduct."[47] The Court concluded that the complaint filed in the case was insufficient, and that pleading more than a "formulaic recitation of the elements" of the claim was necessary to proceed.[48] Indeed, the Court concluded that pleading more than "labels and conclusions" are needed in the complaint,[49] and

[43] *See generally* Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117, 2126 (2015) ("Until *Iqbal* and [*Twombly*], the Supreme Court maintained a consistent commitment to *Conley*'s notice pleading rule, twice unanimously rejecting heightened pleading standards that lower courts had introduced in civil rights and employment discrimination cases . . . ."); Vahora, *supra* note 41, at 238 ("In *Conley*, the Supreme Court established 'notice pleading' as the standard for Rule 8 complaints. This standard set a low bar for plaintiffs, comporting with the Rules' goal of allowing greater access to the courts." (footnote omitted) (citing *Conley*, 355 U.S. at 45-46)).

[44] *See* Scott Dodson, *Comparative Convergences in Pleading Standards*, 158 U. PA. L. REV. 441, 452 (2010) ("Until very recently, the Court never wavered in reaffirming *Conley*'s liberal notice pleading standard and its 'no set of facts' language, even in antitrust cases."); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1300 (2010) ("For more than a half-century, the Federal Rules of Civil Procedure were read as adopting an approach to pleading known as notice pleading."). *See generally Conley*, 355 U.S. at 45-46 ("In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.").

[45] Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

[46] *Id.* at 553; Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 527 (2010) ("In *Twombly*, a 2007 antitrust case, the Court wrote an opinion that started a revolution in pleading and the federal civil litigation system.").

[47] *Twombly*, 550 U.S. at 550 (quoting Amended Complaint at 47, Twombly v. Bell Atl. Corp., 313 F. Supp. 2d 174 (S.D.N.Y. 2003) (No. 02 Civ. 10220)).

[48] *Id.* at 555, 570.

[49] *Id.* at 555 (citing Papasan v. Allain, 478 U.S. 265, 286 (1986)).

that any viable claim must suggest a "right to relief above the speculative level."[50]

Most importantly, the Court abrogated the "puzzling" language from *Conley* that the lower courts could only dismiss the pleadings if it was clear that there were "no set of facts" that would support the allegations,[51] noting that this standard is one that should be "forgotten."[52] In place of the *Conley* standard, the Court adopted a *plausibility* requirement, holding that plaintiffs must allege "enough facts to state a claim to relief that is plausible on its face."[53] Successful claims are thus ones that sufficiently "nudg[e] their claims across the line from conceivable to plausible."[54] This standard, according to the Court, would help avoid the "potentially enormous expense of discovery in cases with no 'reasonably founded hope that the [discovery] process will reveal relevant evidence' to support" a claim.[55] Thus, the Court in *Twombly* replaced the relaxed "any set of facts language" from *Conley* — which had dominated pleading standards for years — with a more rigid standard which now requires the pleading of sufficient facts in the complaint to establish a plausible claim.[56] There was initially a robust academic debate as to whether this plausibility requirement would apply only to antitrust claims (like the one in *Twombly*), or whether the standard would apply outside of this context

[50] *Id.* (citing CHARLES ALAN WRIGHT & ARTHUR RAPHAEL MILLER, FEDERAL PRACTICE AND PROCEDURE § 1216 (3d ed. 2004)).

[51] *Id.* at 562-63 (citing Conley v. Gibson, 355 U.S. 41 (1957), *abrogated by Twombly*, 550 U.S. 544).

[52] *Id.* at 563.

[53] *Id.* at 570.

[54] *See id.*

[55] *Id.* at 559-60 (alteration in original) (quoting Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 347 (2005)).

[56] *See id.* at 563, 570; Victor E. Schwartz & Christopher E. Appel, *Rational Pleading in the Modern World of Civil Litigation: The Lessons and Public Policy Benefits of* Twombly *and* Iqbal, 33 HARV. J.L. & PUB. POL'Y 1107, 1121 (2010) ("The Court, with little fanfare or warning, retired *Conley*'s broad 'no set of facts' standard and announced a new, more exacting standard for pleading 'plausibility.'" (citing *Twombly*, 550 U.S. at 560-64)); *see also* Robin J. Effron, *The Plaintiff Neutrality Principle: Pleading Complex Litigation in the Era of* Twombly *and* Iqbal, 51 WM. & MARY L. REV. 1997, 2010 (2010) ("The *Twombly* decision moved pleading requirements from the realm of the possible to the realm of the plausible.").

as well.[57] This question was quickly resolved by the Court in *Ashcroft v. Iqbal*.[58]

In *Iqbal*, the Court addressed whether the plaintiff, a Pakistani citizen and Muslim, had properly alleged a Bivens and Section 1983 claim against former Attorney General John Ashcroft and FBI director Robert Mueller.[59] The plaintiff in the case, Javaid Iqbal, maintained that he had been harshly confined because of his race, religion and national origin.[60] Iqbal was considered a "high interest" detainee, and had been arrested on criminal charges following the terrorist attacks on September 11, 2001.[61]

Considering these allegations, the Court held that Iqbal had failed to assert a plausible claim.[62] Noting that while the federal rules do not mandate "detailed factual allegations," the Court nonetheless advised that a federal complaint must include more than simply an "unadorned, the-defendant-unlawfully-harmed-me accusation."[63] Here, the Court concluded that the plaintiff was unable to "'nudge[] [his] claims' of invidious discrimination 'across the line from conceivable to plausible.'"[64] Rather, the allegations presented simply a "'formulaic recitation of the elements' of a constitutional discrimination claim."[65]

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[57] *See, e.g.*, Mary Kay Kane, *Pretrial Procedural Reform and Jack Friedenthal*, 78 GEO. WASH. L. REV. 30, 36 n.27 (2009) ("*Twombly* itself was an antitrust case and several lower courts initially indicated that its heightened pleading standards might apply only in the complex business litigation setting."); Schneider, *supra* note 46, at 528 ("Discussion initially focused on whether the Supreme Court intended the case to reach pleading generally or whether it was limited to antitrust cases." (footnote omitted)); Schwartz & Appel, *supra* note 56, at 1124 ("Justice Stevens's dissent and numerous commentators expressed uncertainty about whether the Court in *Twombly* intended its interpretation of the Federal Rules of Civil Procedure to apply to all civil cases or to be limited to antitrust matters." (footnote omitted)).

[58] 556 U.S. 662 (2009).

[59] *Id.* at 666. The Court noted that to succeed the allegations must provide "sufficient factual matter to show that [defendants] adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin." *Id.* at 677.

[60] *Id.* at 669.

[61] *Id.* at 667. The allegations further provided that the defendants "'each knew of, condoned, and willfully and maliciously agreed to subject' [the plaintiff] to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national origin for no legitimate penological interest.'" *Id.* at 669 (second alteration in original).

[62] *Id.* at 682. Just like in *Twombly*, the Court here applied the plausibility standard to the facts of the case. *Id.* at 684.

[63] *Id.* at 678 (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

[64] *Id.* at 680.

[65] *Id.* at 681.

Perhaps most importantly, the Court clarified any dispute over the breadth of the plausibility standard it had announced previously. Indeed, the Court made completely clear in its decision that the new standard would apply not only to complex antitrust cases, but to all federal pleadings. The Court, then, specifically held that the plausibility test should apply to "all civil actions,"[66] including "antitrust and discrimination suits alike."[67]

Following the *Twombly* and *Iqbal* decisions, it was clear that the *Conley* relaxed pleading standard had been abrogated with respect to *all* federal pleading in civil cases.[68] Discrimination cases like *Iqbal* should now be analyzed under the new plausibility standard.[69] Just like other federal civil litigants, then, employment discrimination plaintiffs must also assert sufficient facts in the complaint to allege a *plausible* claim to relief.[70] And, as a subset of employment discrimination law, sexual harassment plaintiffs must similarly plead sufficient facts to satisfy the plausibility standard. There remains an ongoing debate in the appellate courts over whether *Iqbal* and *Twombly* have also abrogated the Supreme Court's employment discrimination pleading decision in *Swierkiewicz v. Sorema*, discussed earlier.[71]

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[66] *Id.* at 684.

[67] *Id.*

[68] *See id.*; Nathan Pysno, *Should* Twombly *and* Iqbal *Apply to Affirmative Defenses?*, 64 VAND. L. REV. 1633, 1645 (2011) ("[T]he standards espoused in *Twombly* and *Iqbal* apply to 'all civil actions,' including antitrust and discrimination cases."); Reinert, *supra* note 43, at 2127 ("*Iqbal* resolved this short-lived dispute by making it clear that plausibility pleading applied in all civil cases, not just antitrust claims."); Schneider, *supra* note 46, at 528 ("The 2009 Iqbal decision makes clear that Twombly set out a general pleading standard and is not limited to antitrust cases."); Steinman, *supra* note 44, at 1296 ("Concerns about *Twombly* have been exacerbated by *Iqbal*, which eliminated any hope that *Twombly* might be narrowly confined to complex antitrust cases.").

[69] *Iqbal*, 556 U.S. at 684.

[70] *See* Benjamin P. Cooper, Iqbal*'s Retro Revolution*, 46 WAKE FOREST L. REV. 937, 974-75 (2011) ("[T]he plausibility standard is too subjective, gives judges too much discretion, has a chilling effect on plaintiffs, and is disproportionately harming plaintiffs with certain kinds of disfavored claims (civil rights and employment discrimination cases in particular)."); Sullivan, *supra* note 41, at 1621 ("Several scholars have warned that plausible pleading poses a particular threat to plaintiffs in employment discrimination cases . . . .").

[71] *Compare* Fowler v. UPMC Shadyside, 578 F.3d 203, 211 (3d Cir. 2009) ("[B]ecause *Conley* has been specifically repudiated by both *Twombly* and *Iqbal*, so too has *Swierkiewicz*, at least insofar as it concerns pleading requirements and relies on *Conley*."), *with* Serrano v. Cintas Corp., 699 F.3d 884, 897 (6th Cir. 2012) ("*Swierkiewicz* remains good law after the Supreme Court's decision in *Twombly*." (citations omitted)), *and* Luevano v. Wal-Mart Stores, Inc., 722 F.3d 1014, 1028 (7th

C. Intent, a Difficult Pleading Hurdle

The plausibility standard has created tremendous difficulty for workers bringing employment discrimination claims, and for civil-rights plaintiffs more generally. While the plausibility standard has created complexity in this area, the reason for the difficulty is relatively straightforward — the problem of establishing intent. Employment discrimination plaintiffs pursuing claims under Title VII must establish that their employers *intended* to discriminate against them.[72] This intent requirement applies not only to workplace claims generally, but to harassment allegations specifically.[73]

Cir. 2013) ("Neither *Iqbal* nor *Twombly* overruled *Swierkiewicz*, and it is our duty to apply the Supreme Court's precedents unless and until the Supreme Court itself overrules them."). *See generally* Cicalese v. Univ. of Tex. Med. Branch, 924 F.3d 762, 768 (5th Cir. 2019) (holding plaintiffs only need to "plausibly allege facts . . . to survive a motion to dismiss"); Woods v. City of Greensboro, 855 F.3d 639, 648 (4th Cir. 2017) (noting "the more stringent pleading standard established in *Iqbal* and *Twombly* applies"); Gordon v. U.S. Capitol Police, 778 F.3d 158, 162 (D.C. Cir. 2015) (noting *Iqbal* said nothing on *Swierkiewicz* and *Twombly* reaffirmed *Swierkiewicz*); Garayalde-Rijos v. Mun. of Carolina, 747 F.3d 15, 24 (1st Cir. 2014) ("We have explicitly held that plaintiffs need not plead facts in the complaint that establish a prima facie case under Title VII nor must they 'allege every fact necessary to win at trial.'" (citation omitted)); Equal Emp't Opportunity Comm'n v. Port Auth. of New York and New Jersey, 768 F.3d 247, 254 (2d Cir. 2014) ("[A]long with several of our sister circuits, we recognize that *Swierkiewicz* has continuing viability, as modified by *Twombly* and *Iqbal*."); Levitt v. Yelp! Inc., 765 F.3d 1123, 1135 (9th Cir. 2014) (discussing pleading standards after *Twombly* and *Iqbal*); McCone v. Pitney Bowes, Inc., 582 F. App'x 798, 801 (11th Cir. 2014) ("*Swierkiewicz* cannot be read in a vacuum; the district court must also consider whether the complaint satisfies *Iqbal*'s 'plausible on its face' standard and whether the allegations are sufficient to 'raise a right to relief above the speculative level' under *Twombly*."); Hager v. Ark. Dep't of Health, 735 F.3d 1009, 1014-15 (8th Cir. 2013) (applying *Swierkiewicz* analysis to gender discrimination claim); Khalik v. United Air Lines, 671 F.3d 1188, 1191-92 (10th Cir. 2012) (discussing pleading standards after *Twombly* and *Iqbal*).

[72] Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 153 (2000) ("The ultimate question in every employment discrimination case involving a claim [under Title VII] is whether the plaintiff was the victim of intentional discrimination."); Bornstein, *supra* note 29, at 1077-83; *cf.* Stephanopoulos, *supra* note 29, at 1596-1600 (addressing disparate impact law). *See generally* Seiner, *supra* note 24 (discussing intent requirement).

[73] *See* David S. Schwartz, *When is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 U. PA. L. REV. 1697, 1711 (2002) ("[P]revailing law requires that the plaintiff prove discriminatory intent, understood in terms of the motive of the decisionmaker or harasser."); Noah D. Zatz, *Managing the Macaw: Third-Party Harassers, Accommodation, and the Disaggregation of Discriminatory Intent*, 109 COLUM. L. REV. 1357, 1379 (2009) ("[C]ourts analyze whether the hostile work environment was discriminatory by asking whether the harasser acted with discriminatory intent . . . ."); *cf.* Bornstein, *supra* note 29, at 1080 ("Over time, as courts continued to

For sexual harassment plaintiffs, "there are indications that courts are less willing [than in the racial discrimination context] to resolve ambiguities in favor of the plaintiff"[74] and many courts "have held that even the most coarse sexual discourse or behavior does not result in conduct that is sex-based."[75] Indeed, to even be covered by Title VII, a business must have fifteen or more employees.[76] Employers of this size are often "sophisticated enough to avoid creating the proverbial smoking gun that would easily establish unlawful intent."[77] Most plaintiffs must therefore establish intentional discrimination by means of circumstantial rather than direct evidence.[78] This type of evidence may not be in the worker's control, and could include things like emails, worker files, personnel data, or access to other employees.[79] As one federal appellate court observed, "[p]roof of [intentional] discrimination is always difficult. Defendants of even minimal sophistication will neither admit discriminatory animus nor leave a paper trail [demonstration][.]"[80]

Establishing state of mind is thus an extraordinarily difficult endeavor, particularly in the employment discrimination context — of

interpret and apply Title VII, two additional theories of proof developed — harassment (considered a sub-type of disparate treatment) and accommodation — neither of which require proof of discriminatory intent to establish entity-level liability.").

74 Robert J. Gregory, *You Can Call Me A "Bitch" Just Don't Use the "N-Word": Some Thoughts on* Galloway v. General Motors Service Parts Operations *and* Rodgers v. Western-Southern Life Insurance Co., 46 DEPAUL L. REV. 741, 746 (1997).

75 *Id.* (internal quotation omitted).

76 42 U.S.C. § 2000e(b) (2018) ("The term 'employer' means 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 in the current or preceding calendar year . . . .").

77 David Sherwyn & Michael Heise, *The Gross Beast of Burden of Proof: Experimental Evidence on How the Burden of Proof Influences Employment Discrimination Case Outcomes*, 42 ARIZ. ST. L.J. 901, 906 (2010).

78 *See* Angela K. Herring, *Untangling the* Twombly-McDonnell *Knot: The Substantive Impact of Procedural Rules in Title VII Cases*, 86 N.Y.U. L. REV. 1083, 1088 (2011); Miguel Ángel Méndez, *Presumptions of Discriminatory Motive in Title VII Disparate Treatment Cases*, 32 STAN. L. REV. 1129, 1130 (1980); *see also* Campbell v. Nat'l Fuel Gas Distrib. Corp., No. 13-CV-00438-W(F), 2016 WL 8929078, at *5 (W.D.N.Y. July 26, 2016) ("[D]irect evidence of discriminatory intent [with regard to employment] is rare and such intent often must be inferred from circumstantial evidence found in affidavits and depositions." (internal quotations omitted) (citations omitted) (alteration in original)); Stephanopoulos, *supra* note 29, at 1605 ("In the absence of smoking guns, discriminatory intent must be inferred from circumstantial evidence.").

79 *See* Méndez, *supra* note 78, at 1130; *see also* Newcomb v. Kohler Co., 222 S.W.3d 368, 399 (Tenn. Ct. App. 2006) ("[A]ccess to . . . employment records . . . were proper aspects of . . . circumstantial proof . . . .").

80 Riordan v. Kempiners, 831 F.2d 690, 697 (7th Cir. 1987).

which sexual harassment is included.[81] Employees will often not have direct access to the alleged discriminatory decision-making process itself, which will usually have taken place outside of their presence.[82] Indeed, such decisions may also involve unconscious bias, and the employers themselves may not even be aware of their own discriminatory animus.[83]

Providing evidence of the element of discriminatory intent in any harassment claim thus creates unique challenges for workers.[84]

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[81] *See Title VII - Burden of Persuation* [sic] *in Disparate Treatment Cases*, 107 HARV. L. REV. ASS'N 342, 349 (1993).

[82] *See* Leigh A. Van Ostrand, *A Close Look at ADEA Mixed-Motives Claims and* Gross v. FBL Financial Services, Inc., 78 FORDHAM L. REV. 399, 440 (2009); *see also* Heather S. Dixon, *Revisiting Title VII After 50 Years: The Need for Increased Regulatory Oversight of Employers' Personnel Decisions*, 59 HOW. L.J. 441, 454 (2016) ("[A]n individual plaintiff has only limited information based on his or her observations and interactions with the employer and is usually not privy to evidence of patterns of discriminatory or retaliatory conduct against other employees.").

[83] *See* D. Don Welch, *Removing Discriminatory Barriers: Basing Disparate Treatment Analysis on Motive Rather Than Intent*, 60 S. CAL. L. REV. 733, 772 (1987) (noting that it will be difficult to gather evidence "whether the responsible individuals are conscious of their bias, and therefore likely to try to hide it, or whether they are expressing unconscious bias through some discretionary decision making process"); *see also* Bornstein, *supra* note 29, at 1095 ("[T]ens of thousands of studies have been published on cognitive, implicit, or unconscious bias, over 1,200 of which focus on cognitive bias in employment discrimination alone."); Chad Derum & Karen Engle, *The Rise of the Personal Animosity Presumption in Title VII and the Return to "No Cause" Employment*, 81 TEX. L. REV. 1177, 1181 (2003) ("[U]nconscious bias . . . challenges Title VII's search for specific discriminatory intent, arguing that the changing nature of discrimination and the contemporary understanding of the psychology of discrimination suggest that intent is often undiscoverable by plaintiffs, defendants, or courts."); Dixon, *supra* note 82, at 455 ("In fact, academic research has confirmed the lingering existence of subtle and even 'unconscious' — but nonetheless pernicious — bias that continues to exist in our society (including in employment decisions) despite the drastic decrease in overt discrimination that existed at the time Title VII was enacted."). *See generally* Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741 (2005) (discussing unconscious bias in employment discrimination); Audrey J. Lee, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 481, 483 (2005) (explaining "specific strategies to apply the theory of unconscious bias to employment discrimination litigation"); Michael Selmi, *The Paradox of Implicit Bias and a Plea for a New Narrative*, 50 ARIZ. ST. L.J. 193, 197-98 (2018) ("Rather than defining implicit bias as unconscious and uncontrollable . . . it should be treated as one possible step, usually the initial step, in a more elaborate deliberative process.").

[84] *See* Tristin K. Green, *Work Culture and Discrimination*, 93 CALIF. L. REV. 623, 654-56 (2005) (discussing element of intent when proving employment discrimination); Martin J. Katz, *The Fundamental Incoherence of Title VII: Making Sense of Causation in Disparate Treatment Law*, 94 GEO. L.J. 489, 515-16 (2006) ("[I]n these cases, the defendant generally has control over most of the evidence that might be used to prove

Establishing intent is difficult even without the addition of new procedural hurdles. However, by rejecting many of these claims in advance of discovery, workplace plaintiffs are finding it increasingly difficult to pursue these cases, even where the action is otherwise viable.[85] Much of the critical information will be in the control of the employer, which will not be required to reveal emails, personnel files, and other employment-related data and information in advance of discovery.[86] The plausibility standard, then, unfairly disposes of these cases too frequently and too early — not allowing them to even get out of the starting gates.

D. Federal Harassment Cases

Federal district courts have been rigid in their application of the plausibility standard, particularly with respect to employment discrimination cases. Following *Twombly* and *Iqbal*, it has been quite difficult for plaintiffs to successfully bring discrimination claims.[87]

this fact."); Katherine V.W. Stone, *Procedural Justice in the Boundaryless Workplace: The Tension Between Due Process and Public Policy*, 80 NOTRE DAME L. REV. 501, 514 (2005) ("It is difficult for a plaintiff to prove that the employer acted with a discriminatory intent in today's workplace."); Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1179 (1999) ("The Supreme Court and others have recognized that subjective bias is notoriously difficult to demonstrate to the satisfaction of the fact-finder. That observation applies regardless of whether the bias is inadvertent or quite deliberate."). *See generally* Daniel Leigh, *The Cat's Paw Supervisor:* Vance v. Ball State University*'s Flexible Jurisprudence*, 109 NW. U. L. REV. 1053, 1055-56 (2015) (discussing harassment claims in a "complex and changing workplace"); Michael J. Zimmer, *The New Discrimination Law:* Price Waterhouse *is Dead, Whither* McDonnell Douglas*?*, 53 EMORY L.J. 1887 (2004) (discussing disparate treatment litigation).

[85] *See infra* Part I.D (addressing difficulty of successfully satisfying plausibility standard in employment discrimination cases).

[86] *See* Rafael Gely & Leonard Bierman, *The Law and Economics of Employee Information Exchange in the Knowledge Economy*, 12 GEO. MASON L. REV. 651, 668 (2004) ("[W]ithout the ability to discuss employment information with co-workers, employees affected by discriminatory practices will find it increasingly difficult to obtain the necessary information to evaluate their particular situations."); Méndez, *supra* note 78, at 1158 & n.146 ("To prove improper motive, plaintiffs have to rely on evidence — direct or circumstantial — that is often within the control of employers. . . . [A]n employer is more likely to have access to employment records, gross employment statistics, or written statements of policy for employment decisions." (footnote omitted)).

[87] *See* Sullivan, *supra* note 41, at 1639-40 ("While it is too early to be confident, there are indications that *Twombly* and *Iqbal* have already had a significant effect on the rate of dismissals generally and in employment discrimination cases in particular." (footnotes omitted)). *See generally* Kendall W. Hannon, *Much Ado About* Twombly*? A Study on the Impact of* Bell Atlantic Corp. v. Twombly *on 12(B)(6) Motions*, 83 NOTRE DAME L. REV. 1811 (2008) (discussing impact of *Twombly* in civil rights cases); Joseph

Studies have shown that the plausibility standard has had a particularly negative effect on workers seeking to bring both civil rights and employment discrimination litigation.[88]

A review of the case law reveals numerous instances where the federal courts have specifically applied a heightened pleading standard to claims of sexual harassment. These cases seem to fly in the face of the basic concept of notice pleading, clearly demonstrating how the plausibility standard is overly subjective and can be used by some courts to clear their docket of harassment claims that should be viable and permitted to procced to discovery. A review of some of these cases can be instructive on how the pleading standards have been heightened by the federal courts for victims of harassment. Though not exhaustive, these examples provide important anecdotal information on the rigidity used by several courts in their application of the *Twombly* and *Iqbal* decisions.

For example, in *Johnson v. Hix Corp.*,[89] the plaintiff alleged in the complaint that she had been successfully employed by the company as a janitor, and had properly met the expectations of the job.[90] The plaintiff further alleged that over the course of her employment, her supervisor told her that she should not speak with other employees without first obtaining his permission "because she was a married woman."[91] The same supervisor also "yelled at Plaintiff and told her not to talk to any male employees because all men have sexual thoughts in the back of their heads."[92] And, this manager advised another worker at the company "that the only reason other employees would want to talk to her was because they were 'trying to sniff that.'"[93] The plaintiff also alleged that management was informed of this conduct, and that she

A. Seiner, *The Trouble with* Twombly*: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011 (discussing application of *Twombly* in employment discrimination cases).

[88] *See, e.g.*, Hannon, *supra* note 87, at 1835-38 (addressing impact of plausibility standard in civil rights cases); Seiner, *supra* note 87 (discussing the difficulty of the plausibility standard for employee plaintiffs); Sullivan, *supra* note 41 (discussing plausibility standard in discrimination cases); *cf.* Hébert, *supra* note 14, at 325 ("Even when targets assert legal claims for workplace sexual harassment, it has been difficult for women to prevail on those claims. This difficulty is largely caused by the showing that courts have required to satisfy the various elements of a claim of sexual harassment, in part because of the reluctance of courts to allow women to recover money damages and other remedies for what the courts often view as relatively trivial harm.").

[89] No. 15-CV-07843, 2015 WL 7017374 (D. Kan. Nov. 10, 2015).

[90] *Id.* at *1.

[91] *Id.*

[92] *Id.*

[93] *Id.*

further requested that this type of behavior should stop.[94] Finally, the plaintiff alleged that after bringing this complaint to the company, she was subsequently fired.[95]

Despite the specificity of these sexual harassment allegations, the federal court found the pleading insufficient to proceed.[96] The court granted the defendant's motion to dismiss the sexual harassment claim because it did "not provide details as to the frequency of the comments, whether they were made in front of fellow employees, or whether these comments or other actions interfered with her work performance."[97] Applying the plausibility standard the court concluded that the plaintiff failed to provide sufficient "facts to raise her right to relief above the speculative level."[98] The court also granted the dismissal motion with respect to the sexual discrimination claim in the case, because the assertion that "[p]laintiff was treated differently than similarly situated male employees when she was unfairly disciplined and terminated for alleged offenses"[99] was "not plausible under the *Twombly/Iqbal* standard."[100] The plaintiff's allegation that she "would not have been terminated but for her gender"[101] was too conclusory and was thus disregarded by the court.[102]

Another federal district court recently applied the plausibility standard in a rigid way in dismissing a sexual harassment claim with arguably even more egregious facts. In *Looney v. Simply Aroma LLC*,[103] the plaintiff set forth in the complaint that she was subjected to a co-worker who "would rub his penis against Looney's buttocks, grab her waist when he walked by her, and commit other unwelcomed advances and touching."[104] In one instance, this employee also "grabbed [the plaintiff's] buttocks with both hand[s] and pulled her to his body."[105] The plaintiff further alleged that her complaints were specifically rebuffed by the owner of the company.[106] Despite these facts, the federal

94 *Id.*
95 *Id.*
96 *Id.* at *3.
97 *Id.*
98 *Id.*
99 *Id.* at *4.
100 *Id.*
101 *Id.* at *4 n.32.
102 *Id.*
103 No. CV 1:17-00294-N, 2018 WL 1002622 (S.D. Ala. Feb. 21, 2018).
104 *Id.* at *2.
105 *Id.*
106 *Id.*

court held that the employee had "not alleged sufficient factual matter, accepted as true, to plausibly show the harassment she endured . . . was objectively severe or pervasive enough to sustain a Title VII sexual harassment claim."[107] Thus, the employee "fails offer [sic] sufficient factual detail that would allow the Court to reasonably infer the frequency in which [the employee's] actions occurred over the course of her employment with [the employer]."[108] And, the plaintiff "failed to offer any specific factual allegations demonstrating how [the] conduct interfered with her job performance, unreasonably or otherwise. Her allegation that his conduct 'materially affected the terms and conditions of [her] employment' is a legal conclusion that the Court need not accept as true."[109] Thus, the court did not find that enough facts had been alleged in the case to support a plausible showing of severity/pervasiveness under *Twombly*.[110]

Similarly, in *Pastoriza v. Keystone Steel & Wire*, a worker brought a claim alleging sexual harassment and unlawful termination.[111] The facts alleged in the complaint included that plaintiff's co-workers, "including the re-entry hires, the Union representatives, his supervisors and others, called Plaintiff a 'snitching b . . . ', told him to perform sex acts, and announced their dissatisfaction of him by stating 'I don't like weak ass homosexual[ ] acting n . . . '. . . . These employees allegedly also 'played with their private parts' and blew kisses at Plaintiff."[112] Again, the court — even with these facts — found insufficient evidence to allow the case to proceed under the *Twombly/Iqbal* standard.[113] The court concluded that the "submissions to the Court contain factual allegations that do not allow the Court to conclude it is plausible Plaintiff was harassed because of his gender."[114]

And, in *Kleehammer v. Monroe*,[115] a federal court in New York dismissed a hostile work environment claim brought under Title VII where the plaintiff, a female deputy sheriff jailor, "was subject to graphic live sex in the workplace" when she was "compelled to watch" as "a female visitor masturbated in front of a male inmate in violation

107 *Id.* at *3.

108 *Id.* at *4.

109 *Id.*

110 *Id.* at *5.

111 Pastoriza v. Keystone Steel & Wire, No. 15-cv-1174, 2015 WL 8490902, at *2 (C.D. Ill. Dec. 10, 2015).

112 *Id.*

113 *Id.* at *5.

114 *Id.* at *5.

115 743 F. Supp. 2d 175 (W.D.N.Y. 2010).

of well established jail policies."[116] While the plaintiff observed the conduct, she was instructed by other employees not to intervene while these co-workers made detailed and offensive comments about personal feminine hygiene.[117] Despite these egregious facts, the court could not find the existence of "a plausible hostile environment claim," in part because no evidence was alleged showing that this conduct was taken "because of Plaintiff's sex."[118]

These cases are obviously only a sampling, but there can be little doubt that many federal courts are applying the plausibility standard in a heightened way.[119] These cases show not only how strict some federal courts have been in applying this standard, but also in the unpredictability of the litigation process. Defining precisely what facts are necessary to bring a sexual harassment claim is now a difficult, if not impossible, endeavor. If the facts outlined in the cases above do not satisfy the standard, it is hard to imagine exactly what facts would be necessary to guarantee a viable sexual harassment claim. *Twombly* and *Iqbal* removed the certainty of the notice pleading standard that was well-established by *Conley* for decades, and now plaintiffs are left guessing as to whether they will even get to discovery — sometimes with the type of alarming results described here.

There may be some reassurance that certain federal appellate courts have rebuffed lower courts that have too stringently looked to *Twombly/Iqbal* to reject a sexual harassment claim.[120] Nonetheless, the

[116] *Id.* at 178.

[117] *Id.*

[118] *Id.* at 184-85.

[119] *See, e.g.*, Gray v. Onondaga-Cortland-Madison BOCES, No. 5:16-cv-973, 2018 WL 1804694, at *2 (N.D.N.Y. Apr. 13, 2018) ("[Employee] cannot affix a conclusory label of 'sexual harassment' on unspecified conduct without alleging facts that, if accepted as true, allow the court to draw a reasonable inference that [employer] is liable."); Curasco v. Calabrese, No. 2:15-3963, 2016 WL 5219583, at *5 (D.N.J. Sept. 20, 2016) (dismissing a sexual harassment claim on the grounds that "threadbare recitals of the elements of a cause of action . . . are insufficient to state a claim" (quoting Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009))); Harris v. Thomas, No. 15-cv-02510, 2015 WL 4735179, at *4 (N.D. Cal. Aug. 10, 2015) (finding that "allegations of sexual harassment and 'whitewashing' . . . without more," were insufficient under the *Iqbal* pleading standard); McDermott v. GMD-100, LLC, No. 14-2296, 2014 WL 6895922 at *1, *4 (D. Kan. Dec. 5, 2014) (dismissing the plaintiff's claim despite allegations that "[d]uring the course of her employment with Defendants, Plaintiff was subjected to severe and unwelcome conduct of a sexual nature because of Plaintiff's sex, including but not limited to, sexual comments and innuendo and offensive bodily contact").

[120] *See, e.g.*, Feminist Majority Found. v. Hurley, 911 F.3d 674, 689 (4th Cir. 2018) ("The district court also ruled that the sex discrimination claim fails because the Complaint does not sufficiently allege UMW's deliberate indifference to sexual harassment. We again disagree. Simply put, the Complaint demonstrates that —

district court cases described here provide strong anecdotal support for the argument that the judiciary has overreached in many instances when rejecting sexual harassment complaints. Many viable cases will never successfully be appealed for a variety of reasons; financial or otherwise. And, the cases discussed above likely only scratch the surface. It is also impossible to know how many seemingly viable harassment claims have been unnecessarily dismissed with a more cursory decision or even in an unpublished format. And, the published decisions described here provide a strong deterrent to others contemplating sexual harassment litigation.

II. SOCIAL SCIENCE RESEARCH AND SUPPORTING DATA

Sexual harassment in the workplace is a fact. This fact should be the starting point for any Title VII litigation in the federal courts. As a fact, the existence of sexual harassment in the employment context is easily provable. Litigants must know where to look, however, to establish this fact as part of the pleadings. They must further be aware of the procedural mechanisms to follow to properly establish this fact in a discrimination complaint. Initially, it is important to explore the existing social science research and data that provide support for the fact that sex discrimination is pervasive in our current society.

There are four primary categories that can be used to help support the fact of harassment. These categories are not exhaustive, and there may be other evidence that can be used to help establish these claims. Nonetheless, it is worth providing these basic pigeonholes for litigants to use when examining their individual allegations in the case. In sum, allegations of harassment can typically be supported by (1) the overwhelming amount of social science evidence which exists in this area, (2) the governmental data which would support the fact of harassment, (3) the litigation statistics which show the ongoing nature of this discrimination, and (4) more anecdotal media reports and investigations of these claims. The social science component of this analysis is undoubtedly the most persuasive, but collectively, this information paints a clear picture of the ongoing nature of

although UMW was not entirely unresponsive to allegations of harassment — the University did not engage in efforts that were 'reasonably calculated to end [the] harassment.'" (alteration in original) (quoting Zeno v. Pine Plains Cent. Sch. Dist., 702 F.3d 655, 669 (2d Cir. 2012))); Estabrook v. Safety & Ecology Corp., 556 F. App'x 152, 155-56 (3d Cir. 2014).

discrimination in our society, and it helps to support the argument that any individual claim of harassment is plausible.[121]

A. Social Science Research and Studies

Sexual harassment has been recognized for decades by the Supreme Court as a form of gender discrimination.[122] This Part discusses the social science research that exists on gender discrimination more broadly, and then examines the research establishing sexual harassment specifically.

1. Studies on Gender Discrimination Generally

Over the decades, there have been countless studies outlining the prevalence of gender discrimination.[123] Discrimination against women on the basis of pay, promotion, and in employment generally have been well established and this Article cannot perform an exhaustive review of this research.[124] However, it is worth examining a few of the more recent studies exploring discrimination in this area to highlight the ongoing nature of all forms of sex discrimination in the workplace.

For example, one study published by the National Academy of Sciences looked specifically at the difficulty of recruiting females in the

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[121] *See generally* Seiner, *supra* note 24 (discussing a similar analysis for claims more broadly brought under Title VII).

[122] *See* Meritor Sav. Bank, FSB v. Vinson, 447 U.S. 57, 66-67 (1986).

[123] *See, e.g.*, Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1204 n.91 (1989) (citing W. VANCE GRANT & THOMAS D. SNYDER, NAT'L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS, 1983-84, at 103 tbl.92 (1983)); Earl F. Mellor, *Investigating the Differences in Weekly Earnings of Women and Men*, 107 MONTHLY LAB. REV. 17, 17-18 (1984). *See generally* Sean W. Colligan, *In Good Measure: Workforce Demographics and Statistical Proof of Discrimination*, 23 LAB. LAW. 59 (2007) (analyzing "cases in which statistical studies of workforce data were offered as evidence of discrimination (or nondiscrimination) and challenged by the opposing party").

[124] *See generally* Sebawit G. Bishu & Mohamad G. Alkadry, *A Systematic Review of the Gender Pay Gap and Factors That Predict It*, 49 ADMIN. & SOC'Y 65 (2017) (examining the gender pay gap); Marianne DelPo Kulow, *Beyond the Paycheck Fairness Act: Mandatory Wage Disclosure Laws — A Necessary Tool for Closing the Residual Gender Wage Gap*, 50 HARV. J. ON LEGIS. 385, 387 (2013) (exploring "the history of the gender wage gap, the various explanations that have been proffered for it, and recent data/studies that indicate which of these explanations are obsolete and which remain valid"); Sylvia A. Law, *Income Disparity, Gender Equality, and Free Expression*, 87 FORDHAM L. REV. 2479 (2019) (discussing "economic disparity and gender equality in the United States").

academic sciences, and tested existing gender biases.[125] More precisely, in a randomized double-blind analysis, the study examined how science faculty rated the application information from students at research-based institutions of higher learning.[126] The study concluded that "faculty participants rated the male applicant as significantly more competent and hireable than the (identical) female applicant. These participants also selected a higher starting salary and offered more career mentoring to the male applicant."[127] The study further found that both men and women demonstrated a similar bias against applicants on the basis of gender.[128]

Similarly, a study performed by researchers at the Harvard Business School and The Harvard Kennedy School of Government examined how gender impacts the hiring process.[129] The study included over 600 participants, with 100 acting as prospective candidates and the other individuals as employers.[130] The study found the existence of gender bias when selecting candidates, [131] and that "[i]ndividual evaluations also seemed to lead to poor hiring decisions."[132] In addition, there have

[125] Corinne A. Moss-Racusin, John F. Dovidio, Victoria L. Brescoll, Mark J. Graham & Jo Handelsman, *Science Faculty's Subtle Gender Biases Favor Male Students*, 109 PROC. NAT'L ACAD. SCI. 16474, 16475 (2012). In a much more well-known study from 1997, researchers at Princeton and Harvard looked at how blind auditions have impacted performers in orchestras. Claudia Goldin & Cecilia Rouse, *Orchestrating Impartiality: The Impact of "Blind" Auditions on Female Musicians* 2 (Nat'l Bureau of Econ. Research, Working Paper No. 5903, 1997). The researchers concluded that "[u]sing data from actual auditions in an individual fixed-effects framework, we find that the [use of blind auditions] increases — by 50% — the probability a woman will be advanced out of certain preliminary rounds . . . [u]sing data on orchestra personnel, the switch to 'blind' auditions can explain between 30% and 55% of the increase in the proportion female among new hires and between 25% and 46% of the increase in the percentage female in the orchestras since 1970." *Id.*

[126] Moss-Racusin et al., *supra* note 125, at 16475.

[127] *Id.* at 16474.

[128] *Id.* at 16477. The study then concluded that "[t]he dearth of women within academic science reflects a significant wasted opportunity to benefit from the capabilities of our best potential scientists, whether male or female. Although women have begun to enter some science fields in greater numbers . . . , their mere increased presence is not evidence of the absence of bias." *Id.* at 16478.

[129] Rachel Emma Silverman, *Study Suggests Fix for Gender Bias on the Job*, WALL ST. J. (Jan. 8, 2013, 6:56 PM ET), https://www.wsj.com/articles/SB10001424127887323706704578229891743848414 [https://perma.cc/FL23-Q9F8].

[130] *Id.*

[131] *Id.*

[132] *Id.* Another interesting study looked at the importance of published pay rates. Marlene Kim, *Pay Secrecy and the Gender Wage Gap in the United States*, 54 INDUS. REL. 648, 648-49 (2015). The study suggested that "prohibiting pay secrecy in . . . states is

been numerous recent discussions of the potential role of blind hiring in the employment process,[133] even examining the use of artificial intelligence in hiring.[134]

Another discussion of these studies published in the *Harvard Business Review* noted the existence of gender discrimination "not just in hiring but in promotion rates, performance evaluations, getting credit for good work, and project assignments."[135] This analysis also looked at the difference in participation rates of the genders in Science, Technology, Engineering, and Mathematics ("STEM") fields in college, exploring the possible rationales to explain the higher male participation rates.[136]

From these studies, then, we see the ongoing nature of sex discrimination in the workplace. While hiring and pay tend to be among the more common fields researchers have looked at to determine the extent of this type of improper workplace discrimination,[137] there are countless other studies which have explored these and other areas when

likely to benefit college-educated women, increasing their pay and lowering the gender wage gap." *Id.* at 656, 664.

133 *See, e.g.*, MICHAEL J. HISCOX, TARA OLIVER, MICHAEL RIDGWAY, LILIA ARCOS-HOLZINGER, ALASTAIR WARREN & ANDREA WILLIS, BEHAVIOURAL ECON. TEAM OF THE AUSTL. GOV'T, GOING BLIND TO SEE MORE CLEARLY: UNCONSCIOUS BIAS IN AUSTRALIAN PUBLIC SERVICE SHORTLISTING PROCESSES 6-10 (2017) (examining impact of "the de-identification of job applications" for the Australian Public Service); Henry Belot, *Blind Recruitment Trial to Boost Gender Equality Making Things Worse, Study Reveals*, ABC NEWS (June 29, 2017, 12:15 PM), https://www.abc.net.au/news/2017-06-30/bilnd-recruitment-trial-to-improve-gender-equality-failing-study/8664888 [https://perma.cc/DKL4-GDGN] (warning that blind recruitment, a measure often intended to increase diversity, may have the opposite effect); Jeffrey Dastin, *Amazon Scraps Secret AI Recruiting Tool that Showed Bias Against Women*, REUTERS (Oct. 10, 2018, 4:04 PM), https://www.reuters.com/article/us-amazon-com-jobs-automation-insight/amazon-scraps-secret-ai-recruiting-tool-that-showed-bias-against-women-idUSKCN1MK08G [https://perma.cc/69A7-WUNH] (discussing gender bias in Amazon's "experimental recruiting engine").

134 *But see* Ben Dattner, Tomas Chamorro-Premuzic, Richard Buchband & Lucinda Schettler, *The Legal and Ethical Implications of Using AI in Hiring*, HARV. BUS. REV. (Apr. 25, 2019), https://hbr.org/2019/04/the-legal-and-ethical-implications-of-using-ai-in-hiring [https://perma.cc/9CY9-FR4C] (examining impact of using artificial intelligence in hiring process).

135 Stefanie K. Johnson, *What the Science Actually Says About Gender Gaps in the Workplace*, HARV. BUS. REV. (Aug. 17, 2017), https://hbr.org/2017/08/what-the-science-actually-says-about-gender-gaps-in-the-workplace [https://perma.cc/6AAQ-QRAS].

136 *Id.*

137 *See generally* Law, *supra* note 124, at 2483 ("The [pay] gap compounds over a lifetime, follows women into retirement, and impacts Social Security and pensions.").

determining how our society currently treats women in the employment context.[138]

2. Studies on Workplace Sexual Harassment

In addition to gender discrimination research, numerous other social science studies have looked at the existence of sexual harassment in the workplace. These recent studies[139] and surveys show the startling prevalence of harassment in the employment context. The studies discussed here are only a small representation of this research, which is far from exhaustive.[140]

There can be little doubt that women in our society routinely experience harassment and assault. Alarmingly, in a study published in

[138] *See, e.g.*, Elizabeth H. Gorman, *Gender Stereotypes, Same-Gender Preferences, and Organizational Variation in the Hiring of Women: Evidence from Law Firms*, 70 AM. SOC. REV. 702 (2005) (examining gender discrimination in law firm hiring); Gretchen Gavett, *What Research Tells Us About How Women Are Treated at Work*, HARV. BUS. REV. (Dec. 27, 2017), https://hbr.org/2017/12/what-research-tells-us-about-how-women-are-treated-at-work [https://perma.cc/GV4T-BJKF] (discussing research on treatment of women in employment).

[139] Research on the topic of sexual harassment remains robust, and other recent published studies continue to demonstrate the ongoing nature of this problem in the workplace. *See, e.g.*, UC SAN DIEGO CTR. ON GENDER EQUITY AND HEALTH & STOP STREET HARASSMENT, MEASURING #METOO: A NATIONAL STUDY ON SEXUAL HARASSMENT AND ASSAULT 25 (2019), http://www.stopstreetharassment.org/wp-content/uploads/2012/08/2019-MeToo-National-Sexual-Harassment-and-Assault-Report.pdf [https://perma.cc/E3FL-J7PJ] ("Around one-third of all women reported experiencing sexual harassment in their workplace . . . .").

[140] It is important to note that how sexual harassment is defined will certainly impact the rate at which it is uncovered by researchers. This Article does not attempt to define sexual harassment precisely, other than outlining above what the courts have required when submitting a Title VII claim. Irrespective of the exact definition of harassment, however, the alarming research presented here unquestionably demonstrates some of the improper sexual conduct still taking place in the workplace, and should be more than sufficient to illustrate the plausibility of any individual claim. *See generally* CHAI R. FELDBLUM & VICTORIA A. LIPNIC, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE, REPORT OF CO-CHAIRS (2016), https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf [https://perma.cc/7XZB-LJU7] (discussing impact of varying definitions of sexual harassment in survey results); James E. Gruber, *Methodological Problems and Policy Implications in Sexual Harassment Research*, 9 POPULATION RES. & POL'Y REV. 235, 236, 247 (1990) ("These definitions, or ones which are very similar, have influenced . . . studies . . . . There are, however, differences among the studies in how these definitions are employed methodologically . . . . The definitions . . . provide an objective basis for determining types or instances of sexual harassment which are distinct from recipient's *subjective* definitions."); Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2095-97 (2003) (addressing sexual harassment in the workplace and its definition).

September 2019 in the Journal of American Medicine, researchers found that for one out of every sixteen women, their first sexual experience is "unwanted [and] physically forced or coerced."[141] Our culture, which has for too long tolerated this type of illegal behavior, often extends to the treatment of women at work. In perhaps the most well-known examination of harassment in the workplace, a select task force at the Equal Employment Opportunity Commission looked at the prevalence of this type of unlawful discrimination, issuing a report in 2016.[142] The report prepared by the co-chairs of this committee, Chai Feldblum and Victoria Lipnic, was sweeping in scope, and specifically examined the prevalence of this problem.[143]

The report noted that approximately 25% of women have experienced sexual harassment during their employment.[144] While that number alone is startling, it increases more dramatically when women are asked specifically about their exposure to sexual-type behavior at the workplace,[145] irrespective of how it is defined. Indeed, about 40% of surveyed women reported exposure to "unwanted sexual attention or sexual coercion" in the workplace.[146]

The report thus found that women commonly experience sexually harassing behavior in the workplace, even if they do not characterize it as "sexual harassment" under societal or legal standards.[147] As noted in the report, researchers found that the unwanted conduct has a negative impact on women (regardless of the way the conduct is defined), and women "experience[] similar negative psychological, work and health consequences" as a result of the behavior.[148]

In a related survey, the Harris Poll, conducted in late 2017, a diverse group of over 800 workers across industries in the private sector were interviewed with respect to their exposure to harassment.[149] That

[141] Laura Hawks, Steffie Woodhandler, David U. Himmelstein, David H. Bor, Adam Gaffney & Danny McCormick, *Association Between Forced Sexual Initiation and Health Outcomes Among U.S. Women*, 179 JAMA INTERNAL MED. 1551, 1552, 1555 (2019).

[142] FELDBLUM & LIPNIC, *supra* note 140.

[143] *See id.* at 5-8.

[144] *Id.* at 8.

[145] *Id.* at 8-9.

[146] *Id.* at 9-10.

[147] *See id.* at 8-10.

[148] *Id.* at 10 (quoting Vicki J. Magley, Charles L. Hulin, Louise F. Fitzgerald & Mary DeNardo *Outcomes of Self-Labeling Sexual Harassment*, 84 J. APPLIED PSYCHOL. 390, 399 (1999)).

[149] Press Release, CareerBuilder, New CareerBuilder Survey Finds 72 Percent of Workers Who Experience Sexual Harassment at Work Do Not Report It (Jan. 19, 2018), http://press.careerbuilder.com/2018-01-19-New-CareerBuilder-Survey-Finds-72-

survey revealed that 17% of women and 7% of men believed that they had been subjected to harassment as part of their employment.[150] These workers reported that the harassment came from all levels of the company, with co-workers and management representing the largest source of harassment.[151]

Similar surveys confirming the results of the Harris Poll are common. For example, in the *International Encyclopedia of the Social and Behavioral Sciences*, one researcher found that "[e]xperts estimate that between 35% and 50% of all working women have had at least one such [harassing] experience."[152] Similarly, in the *International Journal for Management Reviews*, another researcher concluded that "American estimates indicate that 40–75% of women and 13–31% of men have experienced workplace [sexual harassment]."[153] And, studies performed by the U.S. Merit Systems Protection Board, as well as the Department of Defense, show that "[p]revelance of [sexually harassing] experiences ranged between 42% and 64% for women and from 14% to 19% for men" although only "between 10% and 48% of women and about 7% of men actually label their experiences as [sexual harassment]."[154] Reviewing the data, yet another researcher found that "[a]mong those aged 18–60 reporting ever having worked, 41% of women . . . reported any workplace harassment over their lifetime, with men's harassment prevalence significantly lower, at 32% . . . ."[155]

Percent-of-Workers-Who-Experience-Sexual-Harassment-at-Work-Do-Not-Report-it [https://perma.cc/94WF-QJZE]. This survey was performed by Harris for CareerBuilder. *Id.*

150 *Id.*

151 *Id.*

152 Anna-Maria Marshall, *Sexual Harassment: United States and Beyond*, 21 INT'L ENCYCLOPEDIA SOC. & BEHAV. SCI. 721, 722 (2015).

153 Paula McDonald, *Workplace Sexual Harassment 30 Years on: A Review of the Literature*, 14 INT'L J. MGMT. REVIEWS. 1, 3 (2012).

154 Kathleen M. Rospenda, Judith A. Richman & Candice A. Shannon, *Prevalence and Mental Health Correlates of Harassment and Discrimination in the Workplace: Results from a National Study*, 24 J. INTERPERSONAL VIOLENCE 819, 822 (2009) (citing studies by the United States Merit Systems Board and the U.S. Department of Defense); s*ee also* Afroditi Pina, Theresa A. Gannon & Benjamin Saunders, *An Overview of the Literature on Sexual Harassment: Perpetrator, Theory, and Treatment Issues*, 14 AGGRESSION & VIOLENT BEHAV. 126, 128 (2009) (discussing a U.S. Merit Systems Protection Board survey of federal employees in which "44% of women . . . reported sexual harassment").

155 Aniruddha Das, *Sexual Harassment at Work in the United States*, 38 ARCHIVES SEXUAL BEHAV. 909, 909 (2009).

Similarly, the Pew Research Center conducted a national study on sexual harassment in 2018.[156] This study included a representative sample of over 6,000 adult age individuals.[157] In all, "[s]ome 44% of Americans say they have received unwanted sexual advances or verbal or physical harassment of a sexual nature." When these results are broken down by gender, just under 60% of women acknowledge that they have been subjected to this improper conduct, as well as 27% of men.[158] Women with more advanced educations also reported harassment at higher levels.[159] The study also found a racial divide — with white women reporting the highest levels of harassment.[160] This analysis also looked specifically at the workplace, and close to 70% of all women who reported harassment further indicated that they were exposed to this conduct at work or in a professional setting.[161]

And, ABC News and *The Washington Post* performed a well-known analysis of 1,260 adults in a randomized national survey of sexual harassment and assault.[162] The study found that "[m]ore than half of American women have experienced unwanted and inappropriate sexual advances from men, three in 10 have put up with unwanted advances from male co-workers and a quarter have endured them from men who had influence over their work situation."[163] The study also looked at the lack of accountability for the perpetrators of this type of conduct in the employment setting, finding that "among women who've personally

156 Nikki Graf, *Sexual Harassment at Work in the Era of #MeToo*, PEW RES. CTR. (Apr. 4, 2018), https://www.pewsocialtrends.org/2018/04/04/sexual-harassment-at-work-in-the-era-of-metoo/ [https://perma.cc/B69P-SZY7].

157 *Id.*

158 *Id.*

159 *Id.* ("Seven-in-ten women with a bachelor's degree or more education and 65% of women with some college but no bachelor's degree say they have been sexually harassed, compared with 46% of women with a high school education or less.").

160 *Id.* (finding that 63% of white women indicated that they had experienced sexual harassment compared to approximately 50% of Hispanic women and 50% of Black women).

161 *Id.* The study also revealed that a "relatively small share of Americans think the increased focus on sexual harassment and assault will lead to more opportunities for women in the workplace in the long run. Roughly three-in-ten (28%) expect this outcome, while 20% believe this will lead to *fewer* opportunities for women and 51% say it won't make much difference. Men and women express similar views on this question." *Id.* (emphasis in original).

162 ABC NEWS, UNWANTED SEXUAL ADVANCES: NOT JUST A HOLLYWOOD STORY 3 (Oct. 17, 2017), https://www.langerresearch.com/wp-content/uploads/1192a1SexualHarassment.pdf [https://perma.cc/4HEK-Q7QM] (presenting results of a ABC News/Washington Post poll produced by Langer Research Associates).

163 *Id.* at 1.

experienced unwanted sexual advances in the workplace, nearly all, 95 percent, say male harassers usually go unpunished."[164] The study also revealed that women frequently report anger, intimidation, humiliation, and shame as a result of the unlawful conduct, thus establishing the devastating emotional impact that can result for the victims involved.[165]

Moreover, the Morning Consult/*New York Times* performed a study which looked at the extent to which males have conceded to having exposed females to improper sexual conduct.[166] The analysis was startling, as around 10% of males admitted to such conduct as "touching, making comments about someone's body and asking colleagues on dates after they've said no."[167] And 2% of males even admitted to recent coercive acts like "pressuring people into sexual acts by offering rewards or threatening retaliation."[168] The study concluded that harassment is perpetrated by individuals across the political spectrum, in all age groups, and at all wage levels.[169]

Other studies have had similar findings. For example, the *American Bar Association Journal* and the Working Mother Institute performed a survey of over 3,000 individuals in March 2018, on their experiences with sexual harassment in the employment setting.[170] A full 68% of women who responded to the survey acknowledged personal exposure to sexual harassment during employment.[171] This survey also found that 30% of these same women actually reported the workplace harassment, and slightly more than a quarter of the women, "reported [that their] complaints about sexual harassment were taken seriously."[172] The study also looked at male exposure and response to harassment,[173] concluding that "women and men see their organizations very differently, even down to acknowledging that a problem exists."[174]

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164 *Id.*

165 *Id.* at 2.

166 Patel et al., *supra* note 19.

167 *Id.*

168 *Id.*

169 *See id.*

170 Barbara Frankel & Stephanie Francis Ward, *Little Agreement Between the Sexes on Tackling Harassment, Working Mother/ABA Journal Survey Finds*, A.B.A. J. (July 24, 2018, 6:10 AM CDT), http://www.abajournal.com/news/article/tackling_harassment_survey_women_men [https://perma.cc/RRP9-2PNR].

171 *Id.*

172 *Id.*

173 *See id.* ("Of the male respondents, 19 percent reported that they had experienced sexual harassment, and 42 percent indicated that their sexual harassment complaints were taken seriously.").

174 *Id.* The survey results specifically showed:

In addition, the Edison Research group performed a national survey of over 1,000 adults with respect to sexual harassment and found similar results.[175] Indeed, "[o]nly 32% of women agreed that the harassment was something they could report to their employer without fear . . . [and] [o]nly 30% of women strongly agree that their employer handled the harassment situation properly."[176] Like the ABA study, the results of this survey found strong concerns over reporting the harassment and how it would be addressed by the employer.[177] The study further found sexual harassment across all age categories, as well as across income levels.[178] Those workers living in a household earning less than $25,000 were less likely to report exposure to sexual harassment during employment, however.[179] Geographical differences can also impact experiences with sexual harassment, and the study concluded that employees "in rural communities and in the South are more likely to experience sexual harassment at work."[180]

> Fifty-two percent of the women said they didn't report their complaint because it would negatively impact their job (versus 27 percent of the men); 47 percent of the women said the behavior was tolerated in their organization (versus 30 percent of the men); and 45 percent of the women said they had no confidence their senior leadership would address the issue (versus 24 percent of the men).

Id.

[175] *See* EDISON RESEARCH, SEXUAL HARASSMENT IN THE WORKPLACE: #METOO, WOMEN, MEN, AND THE GIG ECONOMY 1 (2018), http://www.edisonresearch.com/wp-content/uploads/2018/06/Sexual-Harassment-in-the-Workplace-metoo-Women-Men-and-the-Gig-Economy-6.20.18-1.pdf [https://perma.cc/R98N-ZMTE] (discussing worker view "that the harassment was not properly handled by their employers and had a negative effect on their careers").

[176] *Id.* at 7.

[177] *See id.*

[178] The survey found "little difference between the higher income categories ($25-50k, $50k-100k, and $100k or more)." *Id.* at 9.

[179] *Id.*

[180] *Id.* at 10. A number of studies have explored the prevalence of sexual harassment in specific geographical areas. *See, e.g.*, NICOLE E. JOHNS, ANITA RAJ, DAVID S. LEE & HOLLY KEARL, MEASURING #METOO IN CALIFORNIA: A STATEWIDE ASSESSMENT OF SEXUAL HARASSMENT AND ASSAULT 8 (2019), http://www.calcasa.org/wp-content/uploads/2019/05/CAMeTooReport_052419.pdf [https://perma.cc/8ZK6-4JPJ] (looking at harassment in the state of California); UNITE HERE LOCAL 1, HANDS OFF, PANTS ON: SEXUAL HARASSMENT IN CHICAGO'S HOSPITALITY INDUSTRY (2016), https://www.handsoffpantson.org/wp-content/uploads/HandsOffReportWeb.pdf [https://perma.cc/RT8D-YPFY] (examining harassment in the hospitality industry in Chicago); *Results: 2019 Workplace Harassment Survey*, MAINECANDO (2019), https://www.mecando.org/research.html (last visited Nov. 8, 2020) [https://perma.cc/K9TR-3HC6] (examining workplace harassment in Maine).

Particular industries have also been studied for the likelihood of sexual harassment. The Edison study discussed above examined platform-based workers and found that "[t]he gig economy, where workers participate in a series of short-term assignments or freelance work as independent contractors, sees a much higher percentage of . . . sexual harassment . . . [with] 30% report[ing] having been harassed in the workplace, compared to 21% of the total population."[181] Other research has examined potential harassment in the fast food industry.[182] This survey focused specifically on non-managerial workers in this industry, and looked only at women who were at least sixteen years of age.[183] The survey, which included over 1,200 females, concluded that "[f]orty percent (40%) of women in the fast food industry have experienced unwanted sexual behaviors on the job, including 28% who have experienced multiple forms of harassment."[184] The types of harassment reported in the results included "unwanted sexual teasing, jokes, remarks or questions (27%), unwanted hugging or touching (26%), and unwanted questions about workers' sexual interests or information about others' sexual interests (20%), with 2% of women even reporting sexual assault or rape on the job."[185] Like many of the other studies, this analysis also found that the harassment often went unreported at work.[186]

The results of this study for fast food workers are truly startling, with "one in eight" female employees exposed to "extensive sexual harassment" but feeling "trapped and unable to leave."[187] A related national study performed a survey involving hundreds of workers in the restaurant industry.[188] Again, the results in this specific type of

[181] EDISON RESEARCH, *supra* note 175, at 3.

[182] *See* HART RESEARCH ASSOCS., KEY FINDINGS FROM A SURVEY OF WOMEN FAST FOOD WORKERS 1 (2016), https://hartresearch.com/wp-content/uploads/2016/10/Fast-Food-Worker-Survey-Memo-10-5-16.pdf [https://perma.cc/FL6S-JTK7].

[183] *Id.*

[184] *Id.*

[185] *Id.*

[186] "Forty percent (40%) of women who have been subjected to sexual harassment at their fast food job report the behavior to their employer. Thirty-three (33%) percent reported the behavior to a superior within their own store, while 5% reported it to corporate headquarters or HR, and 2% called their company's sexual harassment hotline." *Id.* at 3. This is most likely because "[m]any workers feel that they are on their own when it comes to dealing with unwanted sexual behavior . . . [and] feel that they have no choice but to put up with it." *Id.*

[187] *Id.* at 4.

[188] THE REST. OPPORTUNITIES CTRS. UNITED & FORWARD TOGETHER, THE GLASS FLOOR: SEXUAL HARASSMENT IN THE RESTAURANT INDUSTRY 2 (Oct. 7, 2014),

workplace revealed widespread harassment. The survey found that extraordinarily high numbers of restaurant employees were subjected to harassment "from restaurant management (66%), co-workers (80%), and customers (78%)."[189] Indeed, 30% of females in the study "reported that being touched inappropriately was a common occurrence in their restaurant."[190]

There are numerous studies outside of the food industry as well. One analysis performed by the National Park Service revealed that 10.4% of over 9,000 employees responding to a survey reported having been exposed to sexual harassment, with 19.3% of workers reporting gender harassment.[191] And still other recent reports (detailed in the notes below) have summarized testimony, research and data demonstrating the prevalence of harassment in the U.S workplace.[192]

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https://forwomen.org/wp-content/uploads/2015/09/The-Glass-Floor-Sexual-Harassment-in-the-Restaurant-Industry.pdf [https://perma.cc/6ACD-TB7Q].

189 *Id.*

190 *Id.*

191 NAT'L PARK SERV., 2017 WORK ENVIRONMENT SURVEY TECHNICAL REPORT, at ii-iii (2017), https://www.nps.gov/aboutus/upload/NPS-WES-Technical-Report-20170929-Accessible.pdf [https://perma.cc/RWA7-4RQ3]. Interestingly, the study provided:

> Meta-analytic results suggest that anywhere between 24%-84% of women report having experienced sexual harassment in the U.S. workplace; among private sector organizations these rates range from 24%-58%; and within governmental organizations their rates range from 31%-43%. Direct comparison involving rates of harassment and/or assault behaviors to other studies and organizations must be made with due considerations to methodological (e.g., assessment approach – direct vs. indirect assessment of harassing and/or assault behaviors; sampling strategies, and weighting procedures used to estimate rates), and contextual/organizational factors (e.g., academic, private, military, and government organizations).

Id. at iii n.3 (citation omitted).

192 *See, e.g.*, Heather Antecol, Vanessa E. Barcus & Deborah Cobb-Clark, *Gender-Biased Behavior at Work: Exploring the Relationship Between Sexual Harassment and Sex Discrimination*, 30 J. ECON. PSYCHOL. 782, 784-85 (2009) ("[A previous 1999 study], for example, concludes that the enormous disparity in the estimated proportion of women experiencing sexual harassment at some point in their lifetime (from 16% to 90%) is attributable in some part to survey measurement issues . . . Moreover, there is a great deal of ambiguity about what constitutes sexual harassment making the exact phrasing of survey questions important. While many women report experiencing unwanted sexual behavior, they often do not label their experiences as sexual harassment per se . . . [Using] data drawn from the 2002 General Social Survey . . . [which is] the only data set . . . that includes detailed questions on overall job satisfaction, a respondent's intentions to quit their current job, and whether respondents have experienced sex discrimination and/or sexual harassment." (citations omitted)); Tanya Kateri Hernandez, *Sexual Harassment and Racial Disparity: The Mutual Construction of Gender and Race*, 4 J. GENDER RACE & JUST. 183, 189 (2001) ("Thus, given the known difficulties

3. Data from Equal Employment Opportunity Commission

The governmental data gathered by the EEOC further demonstrates that the fact of sexual harassment continues to be a pervasive problem in our society. The prevalence of sex-based claims generally is startling, with a large percentage of the charges of harassment filed with the EEOC involving a sex component.[193] Indeed, the number of harassment claims involving sex increased by over 13% during fiscal year 2018. And

of pursuing a sexual harassment claim, using EEOC charge statistics and federal court sexual harassment allegations as a rough indicator of the existing patterns of sexual harassment in society may very well underestimate rather than overestimate the actual rate of sexual harassment."); Joni Hersch & Beverly Moran, *He Said, She Said, Let's Hear What the Data Say: Sexual Harassment in the Media, Courts, EEOC, and Social Science*, 101 KY. L.J. 753, 765 (2013) ("Yet, estimates of the prevalence of sexual harassment vary considerably even among studies based on representative samples. Further, very few sexual harassment studies have been conducted recently."); Nancy Krieger, Pamela D. Waterman, Cathy Hartman, Lisa M. Bates, Anne M. Stoddard, Margaret M. Quinn, Glorian Sorensen & Elizabeth M. Barbeau, *Social Hazards on the Job: Workplace Abuse, Sexual Harassment, and Racial Discrimination — A Study of Black, Latino, and White Low-Income Women and Men Workers in the United States*, 36 INT'L J. HEALTH SERVS. 51, 51 (2006) (noting that "[s]exual harassment at work in the past year was reported by 26 percent of the women and 22 percent of the men" in a study of "1,202 predominately black, Latino, and white women and men low-income union workers in the Greater Boston area"); Heather McLaughlin, Christopher Uggen & Amy Blackstone, *Sexual Harassment, Workplace Authority, and the Paradox of Power*, 77 AM. SOC. REV. 625, 628 (2012) (explaining "why and how gender, sex, and power shape harassment experiences and workplace interactions more broadly"); *Testimony of Fatima Goss Graves Vice President for Education and Employment National Women's Law Center*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/meetings/1-14-15/graves.cfm#sdendnote10sym (last visited July 23, 2020) [https://perma.cc/UP35-G6TP] ("Sexual harassment remains a serious problem affecting one out of every four working women in the United States, and particularly for women in some of the lowest paid fields and those in many high-wage, traditionally male fields, there are consistent reports of sexual harassment that go unaddressed."); *Women in the American Workforce*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/statistics/reports/american_experiences/women.cfm (last visited July 23, 2020) [https://perma.cc/9G6M-BTKH] ("We heard testimony that one in four women face harassment in the workplace, and many are loath to report it.").

193 *See* ELYSE SHAW, ARIANE HEGEWISCH, M. PHIL. & CYNTHIA HESS, INST. FOR WOMEN'S POLICY RESEARCH, SEXUAL HARASSMENT AND ASSAULT AT WORK: UNDERSTANDING THE COSTS 2 (2018), https://iwpr.org/wp-content/uploads/2020/09/IWPR-sexual-harassment-brief_FINAL.pdf [https://perma.cc/ST4L-C9VC]. *See generally Charges Alleging Sex-Based Harassment (Charges filed with EEOC) FY 2010 - FY 2019*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/statistics/charges-alleging-sex-based-harassment-charges-filed-eeoc-fy-2010-fy-2019 (last visited Feb. 3, 2021) [https://perma.cc/5XB3-SU6M].

the government initiated over forty lawsuits against businesses alleging sexual harassment during this time.[194]

It is common for the government to receive thousands of charges involving workplace harassment, with over 12,500 in the most recent fiscal year alone.[195] The number of cases where the EEOC finds cause varies, but was between 3.0% and 7.6% during fiscal years 2010–2019.[196] In pure numerical terms, this means that the government finds cause to believe that workplace harassment occurs *hundreds* of times each year in varied employment settings across the country.[197]

These numbers have also translated into large monetary recoveries. During fiscal year 2018, the government recovered $68.2 million for victims of harassment.[198] And, "[i]n appeals of sexual harassment cases involving federal employees, awards increased by more than 180 percent . . . ."[199] In one high profile recent case, ride sharing giant Uber agreed to settle a claim with the EEOC that alleged widespread sexual harassment by establishing a $4.4 million fund for current and former workers.[200]

4. Private Litigation Statistics

Beyond the government, private sexual harassment litigation has also proven successful during this same timeframe. For example, a jury recently awarded $11 million to two female workers who were retaliated against after complaining of inappropriate sexual comments and

194 *What You Should Know: EEOC Leads the Way in Preventing Workplace Harassment*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/newsroom/wysk/preventing-workplace-harassment.cfm (last visited July 23, 2020) [https://perma.cc/E2D6-B69K] [hereinafter *What You Should Know*].

195 *See Charges Alleging Sex-Based Harassment (Charges Filed with EEOC) FY 2010 - FY 2019*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm (last visited July 23, 2020) [https://perma.cc/7VZY-QU5X].

196 *See All Charges Alleging Harassment (Charges Filed with EEOC) FY 2010 - FY 2019*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/statistics/enforcement/all_harassment.cfm (last visited July 23, 2020) [https://perma.cc/Z55T-DVXX].

197 *See id.*

198 *What You Should Know*, *supra* note 194.

199 *Id.*

200 Kate Conger, *Uber Settles Federal Investigation into Workplace Culture*, N.Y. TIMES (Dec. 30, 2019), https://www.nytimes.com/2019/12/18/technology/uber-settles-eeoc-investigation-workplace-culture.html [https://perma.cc/AGJ2-QMNT].

touching by their manager.[201] In a similar case, an employee was recently awarded $3 million by a jury where the worker was offered job benefits in exchange for sexual favors.[202] In yet another recent case, a female firefighter was awarded over $3 million after she reported sexually hostile comments and pranks, and was subsequently terminated.[203]

This is just a small sampling of the cases, and there are numerous other examples that also exist where a jury has recently returned a large verdict in a case alleging, at least in part, sexual harassment or improper sexual conduct.[204] There have also been a substantially large number of recent reported settlements in these cases.[205] In perhaps the most high

[201] *See* Jury Verdict, Meadowcroft v. Silverton Partners Inc., No. BC633239 (Cal. Super. Ct. Sept. 11, 2018), 2018 Jury Verdicts LEXIS 36835.

[202] *See* Jury Verdict, Roosa v. Cent. Motors, Inc. of Norwood, No. 16-2369 (Mass. Super. Ct. Aug. 28, 2018), 2019 MA Jury Verdicts Review LEXIS 2.

[203] *See* Jury Verdict, Morningstar v. Circleville Fire Dep't, No. 2:15-3077 (S.D. Ohio Aug. 22, 2018), 2018 Federal Jury Verdicts Rptr. LEXIS 149.

[204] *See, e.g.*, Jury Verdict, Mayo-Coleman v. American Sugar Holding, Inc., No. 14-cv-79 (S.D.N.Y. June 15, 2018), 2018 NY Jury Verdicts Review LEXIS 58 ($13,400,000 jury award); Jury Verdict, Equal Emp't Opportunity Comm'n v. Aaron Rents, Inc., No. 3:08-cv-00683 (S.D. Ill. Mar. 26, 2012), 2012 Jury Verdicts LEXIS 3682 ($95 million jury award); Jury Verdict, U.S. Equal Emp't Opportunity Comm'n v. Moreno Farms, Inc., No. 1:14-cv-23181 (S.D. Fla. Sept. 11, 2015), 2015 Jury Verdicts LEXIS 7389 ($17.4 million jury award); Jury Verdict, Rennenger v. Manley Toy Direct LLC, No. 4:10-cv-00400 (S.D. Iowa Aug. 5, 2015), 2015 Jury Verdicts LEXIS 7326 ("Iowa Federal Jury Awards Over $11 Million To Female Customer Service Representative On Her Sexual Harassment Claims Against Toy Company."); Jury Verdict, Bouveng v. NYG Capital LLC, No. 1:14-cv-05474 (S.D.N.Y. June 25, 2015), 2015 Jury Verdicts LEXIS 4689 ("New York Federal Jury Awards Over $18 Million To Former Employee In Retaliation And Defamation Action Alleging CEO Fired Her And Defamed Her In Articles After She Resisted His Sexual Advances."); Jury Verdict, Robertson v. Hunter Panels LLC, No. 2:13-cv-01047 (W.D. Pa. Apr. 17, 2015), 2015 Jury Verdicts LEXIS 2892 (providing a jury award of $13,420,000 where the "[employers] discriminated against [the employee] because of her gender, . . . subjected her to a hostile work environment because of her gender, and . . . unlawfully retaliated against her when they terminated her employment"); Jury Verdict, Taylor v. David, No. BC640925 (Cal. Super. Ct. Apr. 25, 2019), 2019 Jury Verdicts LEXIS 11865 ($4.6 million jury award); Jury Verdict, Martinez v. Rite Aid Corp., No. BC401746 (Cal. Super. Ct. Mar. 27, 2018), 2018 Jury Verdicts LEXIS 8819 ($6 million jury award); Jury Verdict, Hudson v. Beverly Fabrics, Inc., No. CV182035 (Cal. Super. Ct. Mar. 7, 2018), 2018 Jury Verdicts LEXIS 1829 ($2.6 million jury award).

[205] *See, e.g.*, U.S. Equal Emp't Opportunity Comm'n v. Alorica, Inc., No. 17-1270 (E.D.C.A. July 31, 2018), 2018 LexisNexis Jury Verdicts & Settlements 59 ($3.5 million settlement); *Flash Market to Pay $100,000 to Settle EEOC Sexual Harassment and Retaliation Lawsuit*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (Jan. 29, 2019), https://www.eeoc.gov/eeoc/newsroom/release/1-29-19a.cfm [https://perma.cc/6QBN-5K6F] ($100,000 settlement); *Pancake Chain IHOP to Pay $700,000 to Settle Sexual*

profile of such settlements, former Fox News anchor, Gretchen Carlson, settled a case involving egregious sexual harassment by the chairman and CEO of the company, Roger Ailes, for $20 million.[206] In another recent, high-profile settlement, Hollywood producer Harvey Weinstein came to a $25 million agreement with over thirty women who had raised sexual misconduct allegations against him.[207] Obviously, many settlements go unreported in claims involving sexual harassment, where companies often try to avoid any negative publicity through arbitration clauses or nondisclosure agreements.

B. News Media and Other Reports

While not as persuasive as empirical social science research or governmental data, numerous media reports have revealed the extent of the sexual harassment problem. Of the more notable and high-profile news stories, a *New York Times* piece detailed the account of a former engineer at ride-sharing giant Uber, who sued the company alleging that the business improperly responded to complaints of sexually harassing conduct.[208] Another *New York Times* report examined allegations of sexual harassment in the front office of the Dallas Mavericks, which resulted in a $10 million payment.[209] And, *Bloomberg* recently reported

Harassment and Retaliation Lawsuit, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (Feb. 20, 2019), https://www1.eeoc.gov/eeoc/newsroom/release/2-20-19.cfm [https://perma.cc/FXD6-AFJ5] ($700,000 settlement); *Sys-Con, LLC to Pay $70,000 to Settle Sexual Harassment Lawsuit*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N (Mar. 11, 2019), https://www.eeoc.gov/eeoc/newsroom/release/3-11-19a.cfm [https://perma.cc/ZN29-4CHQ] ($70,000 settlement).

206 *See* Jury Verdict, Carlson v. Ailes, No. 2:16-cv-04138 (D.N.J. Mar. 7, 2018), 2016 Jury Verdicts LEXIS 6653.

207 Deanna Paul, *Harvey Weinstein May Have Arranged a $25 Million Settlement, But He Still Faces Criminal Charges*, WASH. POST (Dec. 14, 2019, 6:37 AM PST), https://www.washingtonpost.com/arts-entertainment/2019/12/14/harvey-weinstein-may-have-arranged-million-settlement-he-still-faces-criminal-charges/ [https://perma.cc/X7MK-UP9X].

208 Daisuke Wakabayashi, *Former Uber Engineer's Lawsuit Claims Sexual Harassment*, N.Y. TIMES (May 21, 2018), https://www.nytimes.com/2018/05/21/technology/uber-sexual-harassment-lawsuit.html [https://perma.cc/BZF2-K9PJ].

209 Scott Cacciola, *Mavericks and Mark Cuban Sanctioned by N.B.A. Over Handling of Sexual Harassment*, N.Y. TIMES (Sept. 19, 2018), https://www.nytimes.com/2018/09/19/sports/mark-cuban-mavericks-nba.html [https://perma.cc/W58M-D7JK]; *cf.* Jacob Bogage, *NBA, Kings Drop Luke Walton Sexual Assault Investigation, Cite Insufficient Evidence*, WASH. POST (Aug. 23, 2019), https://www.washingtonpost.com/sports/2019/08/23/nba-kings-drop-luke-walton-sexual-assault-investigation-cite-insufficient-evidence/?arc404=true [https://perma.cc/22RK-KB9J] (discussing investigation of sexual conduct in the NBA).

on the termination of Barnes and Noble's CEO as a result of a sexual harassment complaint by a company employee.[210] Presidential candidates have also raised sexual harassment as an issue of important concern — in one instance joining McDonald's workers to protest the company's treatment of hostile work environment claims.[211] And of course, in the #MeToo era, the news has been routinely flooded in recent months with stories of the inappropriate sexual conduct of high-profile individuals.[212] While all anecdotal, these reports nonetheless lend support to the argument that sexual harassment remains a pervasive problem, and the media has helped raise public awareness of this ongoing issue.

Indeed, there has even been a discussion in the media of the so-called concern over a #MeToo backlash against men, a concern that males will too carefully guard their behavior to prevent allegations against them.[213] Researchers in 2019 found that 27% of male workers "avoided one-on-

[210] Matthew Townsend, *Barnes & Noble Details Alleged Harassment by Ousted CEO*, BLOOMBERG (Oct. 30, 2018, 7:29 PM PDT), https://www.bloomberg.com/news/articles/2018-10-30/barnes-noble-lays-out-alleged-sexual-harassment-of-fired-ceo [https://perma.cc/487X-48KJ].

[211] Yuki Noguchi, *Protests Over Sexual Harassment at McDonald's Grow as Shareholders Meet*, NPR (May 23, 2019, 6:13 PM ET), https://www.npr.org/2019/05/23/726071587/mcdonalds-protests-over-sexual-harassment-grow-as-shareholders-meet [https://perma.cc/B4XE-75XX].

[212] *See, e.g.*, Emily Cochrane, *Negotiators Strike Deal to Tighten Sexual Harassment Rules on Capitol Hill*, N.Y. TIMES (Dec. 12, 2018), https://www.nytimes.com/2018/12/12/us/politics/sexual-harassment-capitol-hill.html [https://perma.cc/E643-GD6G] ("The move toward tougher standards began this year after multiple lawmakers resigned amid accusations of sexual misconduct and taxpayer-funded settlements."); John Koblin, *The Year of Reckoning at CBS: Sexual Harassment Allegations and Attempts to Cover Them Up*, N.Y. TIMES (Dec. 17, 2018), https://www.nytimes.com/2018/12/14/business/media/cbs-sexual-harassment-timeline.html [https://perma.cc/XP4K-6XYT] ("Three powerful men at [CBS] — Leslie Moonves, its chief executive; Charlie Rose, its morning show anchor; and Jeff Fager, the executive producer of "60 Minutes" — have all lost their jobs because of workplace conduct."); *Google Paid $35 Million to Former Executive Accused of Sexual Harassment*, CBS NEWS (Mar. 12, 2019, 1:51 PM), https://www.cbsnews.com/news/google-paid-35million-former-executive-amit-singhal-accused-sexual-harassment/ [https://perma.cc/PZ9T-X5RQ] ("Google paid former search executive Amit Singhal $35 million in an exit package when he was reportedly forced to resign after a sexual assault investigation . . . ."); *see also* Christopher Mele, *Sexual Assault on Flights: Experts Recommend Ways to Stay Safe and Combat It*, N.Y. TIMES (Mar. 23, 2019), https://www.nytimes.com/2019/03/23/travel/airline-flights-sexual-assault.html [https://perma.cc/F4BF-KX7N] ("Airplanes, with their cramped quarters and crowded conditions, would seem improbable settings for sexual assaults, but recent news accounts show they do happen.").

[213] *See* Tim Bower, *The #MeToo Backlash*, HARV. BUS. REV. (Sept.-Oct. 2019), https://hbr.org/2019/09/the-metoo-backlash [https://perma.cc/5YQ2-T85N].

one meetings with female colleagues" in an effort to reduce potential exposure to sexual harassment allegations.[214] And, there has been a recent focus on the potential defamation suits some women have faced after making sexual harassment allegations.[215]

III. A NEW MODEL

The social science research, governmental data, litigation statistics and other information discussed above paint a clear picture of the ongoing nature of sexual harassment in the workplace. Properly placing this information before the federal courts, however, is a much more difficult endeavor. While it is true that any individual claim of sexual harassment is itself plausible, litigants must be cautious in how they present the fact of harassment to a particular court. This Part outlines a new model for bringing claims of sexual harassment in the workplace under Title VII, detailing the specifics of the proposed framework in this Article.

The framework proposed by this Article relies on the pleading requirements of the federal rules.[216] It is thus important to have a clear understanding of the precise mechanism under the Federal Rules of Civil Procedure that can be used to share the relevant social science data and other harassment-related information with the federal courts. Fortunately, there is a relatively straightforward approach to attaching this type of information to a federal complaint, which is specifically authorized under Rule 10(c).

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[214] *Id.*

[215] *See, e.g.*, Kara Fox & Antoine Crouin, *Men Are Suing Women Who Accused Them of Harassment. Will It Stop Others from Speaking Out?*, CNN (June 5, 2019, 4:24 PM ET), https://www.cnn.com/2019/06/05/europe/metoo-defamation-trials-sandra-muller-france-intl/index.html [https://perma.cc/Q79U-M56U] ("A series of high-profile defamation cases have been brought against women in response to the outpouring of sexual misconduct allegations in the wake of #MeToo, and women's rights activists say they could have a chilling effect on the movement's future."); Sui-Lee Wee & Li Yuan, *They Said #MeToo. Now They Are Being Sued.*, N.Y. TIMES (Dec. 26, 2019), https://www.nytimes.com/2019/12/26/business/china-sexual-harassment-metoo.html [https://perma.cc/XGX2-AJHV] ("As the #MeToo movement has spread, men in the United States, in France, in India and elsewhere have turned to the courts, sometimes successfully arguing that they were defamed by their accusers or by the media.").

[216] *See generally* Seiner, *supra* note 24 (discussing similar, broader framework for Title VII litigation).

A. Rule 10(c)

The most straightforward way of presenting social science data on sexual harassment to the federal courts would be attaching such information to the complaint in the case. Indeed, the Federal Rules of Civil Procedure permit the attachment of documents to a pleading in certain specified situations. More precisely, including documents along with the complaint can be accomplished through Federal Rule of Civil Procedure 10(c). That Rule provides:

> Adoption by Reference; Exhibits . . .
>
> A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion. A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes.[217]

Thus, the federal rules specifically provide for the attachment of documents to the complaint, and the courts have consistently interpreted this provision of the rules to allow for such attachments.[218] The two necessary critical components for attaching this type of "written instrument"[219] are that the attachment must be specifically referenced in the complaint, and the document must be central to the allegations.[220]

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[217] FED. R. CIV. P. 10(c).

[218] *See, e.g.*, L-7 Designs, Inc. v. Old Navy, LLC, 647 F.3d 419, 422 (2d Cir. 2011) (citations omitted) ("[T]he court considers 'the complaint, the answer, any written documents attached to them, and any matter of which the court can take judicial notice for the factual background of the case.' 'A complaint is [also] deemed to include any written instrument attached to it as an exhibit, materials incorporated in it by reference, and documents that, although not incorporated by reference, are "integral" to the complaint.'"); Bank of N.Y. Mellon Tr. Co. v. Morgan Stanley Mortg. Capital, Inc., No. 11 Civ. 0505, 2011 WL 2610661, at *3 (S.D.N.Y. June 27, 2011) ("[T]his Court may consider the full text of documents that are quoted in or attached to the complaint, or documents that the plaintiff either possessed or knew about and relied upon in bringing the suit."); *see also* CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1326 (4th ed. 2020); Aimee Woodward Brown, *Pleading in Technicolor: When Can Litigants Incorporate Audiovisual Works into their Complaints?*, 80 U. CHI. L. REV. 1269, 1269-70 (2013) (citing Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 322 (2007)) (discussing why courts should additionally "examine 'documents incorporated into the complaint by reference, and matters of which a court may take judicial notice,' in addition to the complaint in its entirety").

[219] FED. RULE CIV. P. 10(c).

[220] Brown, *supra* note 218, at 1274 (first citing Venture Assocs. Corp. v. Zenith Data Sys. Corp., 987 F.2d 429, 431 (7th Cir. 1993); and then citing Cortec Indus., Inc. v. Sum Holding LP, 949 F.2d 42, 47 (2d Cir. 1991)) (permitting documents to be

The federal courts and procedural rules thus provide a basic framework for attaching documents to a complaint, explaining when such attachments are appropriate.[221] The lower courts have more fully explored when these types of attachments are allowed, looking to the circumstances of the particular case. Some courts have applied a more relaxed interpretation of Rule 10(c) to employment discrimination cases, permitting attachments to be considered as part of the allegations of workplace discrimination.

For example, in the employment discrimination context, many courts have allowed plaintiffs to attach the charge of discrimination (initially filed with the EEOC) to the complaint. In *Blazek v. United States Cellular Corp.*, the federal court permitted the attachment of a state administrative charge form to the complaint[222] in a workplace discrimination suit.[223] Looking to the case law in other jurisdictions, as well as its own, the court noted that "[c]ourts have specifically held that an administrative charge, attached to a complaint, is considered part of the pleading for Rule 10(c) purposes and the factual allegations therein may be considered in determining whether or not the complaint states a claim."[224] The court therefore concluded that the charge in this case, which included allegations of sexual harassment, could "undeniably [be] 'attached to the pleadings' as an exhibit."[225] This result is consistent with how many other courts have ruled on the issue.[226]

With respect to attaching supporting information to sexual harassment claims specifically, the courts have generally been

"incorporated by reference if they are 'referred to in the plaintiff's complaint and are central to her claim'").

[221] Cortec Indus., Inc. v. Sum Holding LP, 949 F.2d 42, 47 (2d Cir. 1991); Brown, *supra* note 218, at 1274.

[222] Blazek v. U.S. Cellular Corp., 937 F. Supp. 2d 1003, 1017 (N.D. Iowa 2011).

[223] *Id.* at 1006.

[224] *Id.* at 1016 (first citing Amini v. Oberlin Coll., 259 F.3d 493, 503 (6th Cir. 2001); then citing Gant v. Wallingford Bd. of Educ., 69 F.3d 669, 674 (2d Cir. 1995); and then citing Danik v. Hous. Auth. of Balt. City, 396 F. Appx. 15, 16 (4th Cir. 2010)).

[225] *Id.* at 1017 (quoting Mills v. City of Grand Forks, 614 F.3d 495, 498 (8th Cir. 2010)).

[226] *See, e.g.*, Mays v. Bd. of Comm'rs Port of New Orleans, No. 14-1014, 2015 WL 4097109, at *1, *5 (E.D. La. July 6, 2015) (allowing state discrimination charge to be attached under rule 10(c) in harassment case and noting Fifth Circuit approach that when "a plaintiff attaches and fully incorporates an EEOC Charge into his complaint, it becomes part of his complaint for all purposes"); *see also* Evans v. Md. State Highway Admin., No. JKB-18-935, 2018 WL 4733159, at *1 n.1 (D. Md. Oct. 1, 2018) (allowing attachment of charge of discrimination to federal complaint); Ewing v. Moore, No. 7:17-cv-00743, 2018 WL 282297, at *3 (N.D. Ala. Aug. 13, 2018) (same); McDaniel v. Elgin, No. 209-CV-119, 2010 WL 339082, at *1 n.1 (N.D. Ind. Jan. 22, 2010) (same).

permissive where the materials are referenced in the complaint and central to the allegations. For example, in *Gagliano v. Cytrade Financial, LLC*,[227] the court looked at whether an employment agreement could be attached to the complaint in a case involving allegations of sexual harassment.[228] The court concluded that the agreement should be allowed, holding that the document was central to the allegations involved.[229]

Similarly, in *Williams v. Pennridge School District*,[230] another federal court considered whether the handwritten notes of the alleged victim's mother — which detailed and catalogued the incidents of sexual harassment — could be attached under Rule 10(c).[231] The court specifically incorporated this document into the complaint in ruling on the defendant's motion for dismissal.[232]

Plaintiffs can go too far in trying to attach various items to the complaint, however, and must make sure that the information is central to the allegations involved. For example, in *Perkins v. Silverstein*,[233] the Seventh Circuit Court of Appeals rejected certain documents that an employment discrimination plaintiff sought to attach under Rule 10(c).[234] The court held that "newspaper articles, commentaries, cartoons, and miscellaneous other exhibits" were not appropriately before the court as they were "not the type of documentary evidence or 'written instruments' which [Federal Rule of Civil Procedure] 10(c) intended to be incorporated into, and made a part of the complaint."[235]

There is not enough caselaw in this area to specifically quantify and detail the exact types of documents permitted under Rule 10(c) in employment discrimination and sexual harassment cases. Generally speaking, however, where the attachments are central to the claim, and where the plaintiff does not overreach, the additional documents have largely been permitted by the courts.[236]

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227 No. 09-4185, 2009 WL 3366975 (N.D. Ill. Oct. 16, 2009).

228 *See id.* at *2.

229 *Id.*

230 Civil Action No. 15-4163, 2016 WL 6432906 (E.D. Pa. Oct. 31, 2016).

231 *See id.* at *2, *4.

232 *See id.* at *4.

233 Perkins v. Silverstein, 939 F.2d 463 (7th Cir. 1991).

234 *See id.* at 467.

235 *Id.* at 467 & n.2.

236 In an interesting (and related) decision, a magistrate judge recommended that references to sexual harassment statistics and research (which included hyperlinks) should be struck from a federal complaint. *See* Nabors v. Lewis, No. 6:17-2887, 2018 WL 7118008, at *2-3 (D.S.C. Feb. 16, 2018). The magistrate judge found the information immaterial to the case. *Id.* at *3.

B. The Proposed Framework

In essence, the courts have held that information relevant to a sexual harassment complaint can properly be attached to the pleadings pursuant to Rule 10(c).[237] Certainly, individual courts may be more or less permissive as to these attachments, but this broad general rule seems applicable to workplace harassment claims.

As shown by the current social science research on sexual harassment, governmental data, litigation statistics, and other information, harassment in the workplace is a persistent problem. It seems appropriate, then, that when litigating these cases, the courts should take a relaxed view of the claims and hesitate before rejecting a case too early in the proceedings. As seen above, however, the plausibility standard has had a particularly negative impact on employment discrimination plaintiffs when bringing claims. Indeed, there have been numerous instances of the federal courts applying an overly rigid pleading standard to sexual harassment cases after *Twombly* and *Iqbal*.[238]

Much of the problem with the plausibility standard for pleading is that it creates a subjective standard for the courts to apply. This is particularly troublesome for many civil rights plaintiffs who often face an uphill battle in establishing those claims. Employment discrimination victims, who must also prove intent, face an additional hurdle in these cases. The existing uncertainty and difficulty in bringing these claims is unnecessary. As seen in the studies and analyses performed by countless independent groups and researchers, sexual

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[237] *See* Giambra v. Zeller Corp., No. 11-CV-6308, 2014 WL 2519740, at *5 (W.D.N.Y. Mar. 31, 2014) ("Complaint with the New York State Division of Human Rights ('NYDHR') alleging that [the plaintiff] suffered 'sexual harassment/hostile workplace' [was attached to the complaint]."); Blazek v. U.S. Cellular Corp., 937 F. Supp. 2d 1003, 1017 (N.D. Iowa 2011) (indicating that the court allowed plaintiff to "incorporate the allegations in her administrative charge by reference as part of her pleading of factual allegations to support the substance of her sexual harassment and retaliation claims"); Delk v. ArvinMeritor, Inc., 179 F. Supp. 2d 615, 621 (W.D.N.C. 2002) (allowing attachment of EEOC complaint claiming, in part, harassment); *see also* Doe v. Columbia Coll. Chi., 299 F. Supp. 3d 939, 949 (N.D. Ill. 2017) (noting attachment of investigation documents to the complaint), *aff'd*, 933 F.3d 849 (7th Cir. 2019). *See generally* Bates v. City of Bristol, No. 3:17-CV-01066, 2018 WL 1472523, at *3 (D. Conn. Mar. 26, 2018) (considering documents attached to the complaint when evaluating a 12(b)(6) motion); Alex v. Gen. Elec. Co., No. 1:12-CV-1021, 2014 WL 12754934, at *9 (N.D.N.Y. Mar. 31, 2014) (same), *on reconsideration in part*, No. 1:12-CV-1021, 2014 WL 2510561 (N.D.N.Y. June 4, 2014); WRIGHT & MILLER, *supra* note 218, § 1326 (discussing adoption pursuant to Rule 10(c)).

[238] *See supra* Part I (discussing application of plausibility standard to sexual harassment claims by federal courts).

harassment is a fact. Any individual claim of sexual harassment should thus be considered plausible on its face, and allowed to advance to discovery with the employer. *Twombly* and *Iqbal*, then, should be considered largely irrelevant for claims of harassment, as plausibility is no longer at issue in this subset of workplace cases.

There are two major caveats to this argument that are worth noting. First, the statement that a claim of harassment should generally survive dismissal does not equate with the conclusion that the claim will eventually survive summary judgment, let alone be victorious at trial. Indeed, the argument here is simply that — given our vast knowledge of persistent harassment in the workplace — any specific claim brought on this basis should be plausible enough to allow the worker access to discovery and the documentation and information often in the employer's exclusive control. Second, the argument here is not necessarily that *all* claims of sexual harassment should survive dismissal. Rather, as detailed below, the employer should be given the opportunity to explain why the facts of a particular case present the unusual situation where plausibility does not exist, and the case should be dismissed.

Given these caveats, it is important to consider how the relevant information and studies discussed above should be presented to the federal courts, and how sexual harassment claims should generally be treated in litigation. This Part provides a new model for *all* sexual harassment claims that can be used in cases brought under Title VII. This model is not intended to serve as an exclusive approach to bringing these cases, but it rather provides a helpful framework to be considered when litigating harassment claims. This framework can be broken down into four discrete parts:

1. The complaint should state that the plaintiff was subjected to severe or pervasive harassment in the workplace that is imputable to the employer.
2. The complaint should state the general fact of pervasive workplace sexual harassment in our society.
3. The complaint should attach, under Rule 10(c), the relevant social science research studies, governmental data, and litigation statistics supporting the fact of harassment.
4. The employer should be given an opportunity to rebut the fact of sexual harassment.

Each part of this proposed framework will be discussed in turn below.

Alleging Elements of Harassment. As discussed earlier, the Supreme Court has clearly articulated the standards necessary to establish a Title VII harassment claim.[239] More specifically, harassment can be defined as improper conduct that occurs because of sex, is unwelcome, and is both objectively and subjectively severe or pervasive.[240] The plaintiff in the case should clearly state that she has been subjected to this type of conduct, and provide any additional factual detail to support these elements.[241] The facts will obviously vary substantially depending upon the particular case, but could include any acts by the employer that are sexual in nature or derogatory toward women, as well as any efforts the plaintiff may have made to complain about the conduct. The plaintiff here should provide specific factual detail about these events, including as appropriate, the names and titles of those involved, and the dates/times of the occurrences.

The plaintiff must also assert that this conduct is imputable to the employer. Thus, the plaintiff could state that a supervisor was involved in the harassment, or that a co-worker was involved and that the employer knew (or should have known) of the acts but failed to respond. The Supreme Court has clearly articulated that agency principles must be followed to impute harassment to the employer, and the plaintiff should thus articulate any facts here that would help support the employer's liability.[242] This would include any facts showing that a supervisor was directly involved in the conduct, that the employer was aware of a co-worker's improper conduct, and/or that the

[239] *See supra* Part I (discussing elements of sexual harassment claim brought in federal court). *See generally* Burlington Indus. v. Ellerth, 524 U.S. 742 (1998) (setting forth elements of workplace sexual harassment claim brought under Title VII); Faragher v. City of Boca Raton, 524 U.S. 775 (1998) (same); Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986) (same).

[240] *See Meritor*, 477 U.S. 57; *supra* Part I.A. *See generally* Gerald v. Univ. of P.R., 707 F.3d 7, 17-19 (1st Cir. 2013) ("To prevail on a hostile work environment sexual harassment claim, a plaintiff must establish in essence: (1) membership in a protected class and (2) unwelcome sexual harassment, (3) which was based on sex, (4) was sufficiently severe or pervasive, (5) was objectively and subjectively offensive, and finally (6) that some basis for employer liability has been established." (citing Forrest v. Brinker Int'l Payroll Co., 511 F.3d 225, 228 (1st Cir. 2007))); *Burlington Indus.*, 524 U.S. 742; *Faragher*, 524 U.S. 775.

[241] *See supra* Part I.B. *See generally Burlington Indus.*, 524 U.S. 742; *Faragher*, 524 U.S. 775; Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 82 (1998) (Thomas, J., concurring) ("[T]he Court stresses that in every sexual harassment case, the plaintiff must plead and ultimately prove Title VII's statutory requirement that there be discrimination 'because of . . . sex.'"); *Meritor*, 477 U.S. 57.

[242] *See Burlington Indus.*, 524 U.S. at 754-58 (applying agency principles to question of whether sexual harassment liability should be imputed to the employer); *Faragher*, 524 U.S. at 784 (same); *Meritor*, 477 U.S. at 72.

employer failed to take proper measures to prevent the harassment or to appropriately respond to a complaint.

Alleging the Harassment Fact. The second element of the proposed framework is the most easily identifiable. In any harassment complaint brought under Title VII, the plaintiff should allege that sexual harassment is a fact in our society, and that it occurs every day in workplaces across the country. As an undeniable fact, harassment can thus properly be alleged in the complaint.

Attaching Social Science Studies. The third stage of the proposed pleading framework requires the plaintiff to reference and attach any relevant social science research, studies, governmental data, or litigation statistics that support the allegation that harassment is a fact in our society. As discussed earlier, this information can properly be attached to the complaint under Rule 10(c) where it is referenced in the complaint itself and central to the allegations involved. As the claim at issue would involve harassment under Title VII, information related to ongoing harassment in our society would be directly central to the allegations in the complaint.

To further bolster these allegations, the plaintiff should attempt to attach studies and analyses that are performed in geographical areas as close in proximity to the workplace involved as possible, as well as studies that may be directly related to the industry involved. While broad national studies performed on sexual harassment are undoubtedly powerful, research directly related to the particular industry and in the same geographical area as the employer implicated in the case can be particularly persuasive.

Thus, to properly satisfy this third element of the proposed framework, the plaintiff should reference the social science studies and other relevant data supporting harassment, and attach this information to the complaint where possible. The plaintiff should further make these attachments as relevant to the particular industry, company, and geographical area involved as possible. As relevant information referenced in the complaint and central to the allegations, these attachments would thus satisfy the requirements found under Rule 10(c).

Employer Rebuttal. The proposed framework does not establish a per se rule that all claims of sexual harassment should survive dismissal. Rather, it is an acknowledgment that — given the overwhelming evidence of this type of misconduct in the workplace — the vast majority of sexual harassment claims should proceed to discovery. Employees should thus typically be allowed to gather sufficient

evidence from the employer for a judge to then determine whether the case is strong enough to go to trial.

There will nonetheless be instances where dismissal in a Title VII case is appropriate, and employers should be given the opportunity to explain why the facts of the case present the unusual circumstance where the harassment claim should be rejected early in the proceeding. Employers should thus be given a formal opportunity to rebut the allegations in support of a dismissal motion.

While most claims of sexual harassment are at least plausible, there will undoubtedly be numerous instances where plaintiffs bring claims that are appropriate for dismissal. For example, the particular case at issue may present a plaintiff who has previously made frivolous and unsubstantiated claims against the employer.[243] Or, it is possible that the plaintiff may not have followed the necessary administrative prerequisites to bring a plausible claim.[244] Or, the time limits on the

[243] *Cf.* Alexander A. Reinert, *Screening Out Innovation: The Merits of Meritless Litigation*, 89 IND. L.J. 1191, 1202 (2014) ("[I]n an ideal procedural system frivolous claims are not successful. Nor should frivolous claims proceed to trial. And they typically should be resolved before summary judgment and discovery. The hardest line to draw, however, may be between frivolous claims and those that do not meet a pre-discovery threshold. . . . Many, if not all, frivolous complaints will not state a claim for relief, but a complaint that fails to state a claim is not by definition frivolous." (footnote omitted) (citing Neitzke v. Williams, 490 U.S. 319, 326 (1989))). *Compare* Greene v. Dalton, 164 F.3d 671, 673, 676 (D.C. Cir. 1999) (denying summary judgment despite the fact that plaintiff "had in the past filed a number of frivolous sexual harassment complaints"), *with* Reid v. Insuramerica Corp., No. 1:06-CV-1039, 2007 U.S. Dist. LEXIS 105360, at *32 (N.D. Ga. July 3, 2007) ("Plaintiff's sexual harassment and retaliation claims were frivolous, and the maintenance of this lawsuit in the face of such frivolous claims amounted to bad faith.").

[244] *See, e.g.*, 42 U.S.C. § 2000e(b) (2018) ("The term 'employer' means 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 in the current or preceding calendar year . . . ."); *see also, e.g.*, Arbaugh v. Y & H Corp., 546 U.S. 500, 516 (2006) ("[T]he threshold number of employees for application of Title VII is an element of a plaintiff's claim for relief, not a jurisdictional issue."); Norris v. Salazar, 885 F. Supp. 2d 402, 417 (D.D.C. 2012), *aff'd*, No. 12-5288, 2013 WL 1733645 (D.C. Cir. Apr. 10, 2013) ("All of the plaintiff's claims arising from the EEOC proceedings must be dismissed for failure to exhaust administrative remedies in a timely manner . . . . Under Title VII, a plaintiff must exhaust all administrative remedies." (citation omitted) (first citing Peters v. District of Columbia, 873 F. Supp. 2d 158, 180; and then citing McKeithan v. Boarman, 803 F. Supp. 2d 63, 67 n.3 (D.D.C. 2011))). *See generally* Pamela A. Mann, *Federalism Issues and Title VII:* Kremer v. Chemical Construction Corp., 13 N.Y.U. REV. L. & SOC. CHANGE 411, 413-14 (1984-85).

harassment claim (which, at most are 300 days from the last incident of discriminatory harassment),[245] may have already run.[246]

It is impossible to list all possible reasons that would justify dismissal in a harassment case, and these represent just a few examples.[247] The employer should properly be allowed to show that there is a reason that makes the allegation implausible. Given the overwhelming evidence of ongoing harassment in the workplace, however, the employer will likely only be able to satisfy this rebuttal burden in a minority of cases. Nonetheless, giving the employer the opportunity to make this showing is a critical part of the analysis.

C. Example of Proposed Framework

The four elements of the proposed test are straightforward and easily applied. It may be useful, however, to examine how these particular elements would come together. For example, a typical individual claim of sexual harassment might involve allegations that a worker at a fast food restaurant in a small town was exposed to improper touching and comments by customers, and the restaurant took no action when they were informed of the conduct. This is the exact common type of harassment claim anticipated by this framework. Applying the framework set forth above, the proposed model would proceed with the plaintiff alleging the following:

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[245] *See* Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 103 (2002) (discussing time limits for filing employment discrimination claims and harassment claims under Title VII).

[246] *See, e.g.*, Ismail v. Univ. of Portland, No. 00-35354, 2000 U.S. App. LEXIS 33648, at *2 (9th Cir. Dec. 15, 2000) ("Because the [sexual harassment] complaint admitted that the jurisdictional prerequisite to suit had not been met due to untimeliness, and because the same claim had been dismissed for lack of subject matter jurisdiction in Ismail's prior action, the district court did not abuse its discretion by dismissing the action without leave to amend." (first citing Santa Maria v. Pac. Bell, 202 F.3d 1170, 1176 (9th Cir. 2000); and then citing Noll v. Carlson, 809 F.2d 1446, 1448 (9th Cir. 1986))).

[247] *Cf.* Deborah Zalesne, *Sexual Harassment Law: Has It Gone Too Far, or Has the Media?*, 8 TEMP. POL. & C.R. L. REV. 351, 366-67 (1999) ("The common perception based on the cases the media chooses to report is that most sexual harassment cases being brought are frivolous. While frivolous claims are possible in any area of the law, the number of frivolous sexual harassment lawsuits is actually lower than the media would have us think. Frivolous harassment claims are minimal because of the economic and emotional cost of bringing a lawsuit and because of the effects such drastic action has on an employee's life." (footnote omitted)).

> Between January 10, 2020, and January 10, 2021, the plaintiff was exposed to improper sexual comments and sexual touching by customers, and the restaurant took no action despite the repeated complaints of the employee. Sexual harassment in the workplace is a fact in our country generally and in the town of Canton, Georgia, where these allegations take place. This fact is supported by the social science research, surveys, governmental data, and litigation statistics. [Attached to this complaint pursuant to Federal Rule of Civil Procedure 10(c)].

The corresponding attachments to the complaint could include some of the most recent social science research discussed in this Article. More specific to this hypothetical case, the attachments could include the analysis performed showing the strong prevalence of sexual harassment in the fast food industry.[248] Additionally, the attachments could also include the research establishing that sexual harassment is particularly prevalent in rural Southern communities, like the one implicated in the complaint.[249] The most recent EEOC statistics could further be attached to the complaint, showing the commonality of harassment claims. And, any litigation statistics relevant to the particular restaurant, industry, or geographical area could also be attached.

This example thus demonstrates the relative ease of pleading a claim of harassment, and also shows the type of information that could be attached to the complaint.[250] It is more than plausible to believe that a fast food worker in this particular region was harassed in the workplace.

The employer would still have the opportunity to rebut the allegations, however. For example, perhaps the employer could support a dismissal motion on the basis that the business was too small to be covered by Title VII.[251] If the employer is unable to meet its rebuttal burden, however, the plaintiff would be allowed to gather further evidence in discovery and the case would proceed like any other federal civil claim.

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[248] *See* HART RESEARCH ASSOCS., *supra* note 182, at 1 (noting high percentage of women subjected to "unwanted sexual behaviors" in the fast food industry).

[249] *See* EDISON RESEARCH, *supra* note 175, at 10 (finding sexual harassment more common "in rural communities and in the South").

[250] *Cf.* Seiner, *supra* note 24 (discussing application of similar, broader framework for Title VII litigation).

[251] *See* 42 U.S.C. § 2000e(b) (2018) ("The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees . . . . "). *See generally* Arbaugh v. Y & H Corp., 546 U.S. 500, 509-16 (2006) ("The dispute now before us concerns the proper classification of Title VII's statutory limitation of covered employers to those with 15 or more employees.").

IV. IMPLICATIONS OF PROPOSED FRAMEWORK

The analytical framework proposed here simply acknowledges one basic fact: sexual harassment is so common in the workplace that any individual claim is at least plausible, unless proven otherwise. The proposed framework provides one straightforward way for plaintiffs to plead this fact of harassment pursuant to the Federal Rules of Civil Procedure. Adopting the pleading model proposed here for sexual harassment claims would have numerous implications, which are more fully considered in this Part. It is worth exploring some of the potential benefits and drawbacks of this particular framework.

One of the primary benefits of the proposed model is the educational function that it provides.[252] As discussed throughout this Article, there is overwhelming support for the existence of the fact of harassment — through studies, governmental data, and existing litigation.[253] Many judges and parties may simply be unaware of the prevalence of this information. Most judges likely do not specialize in employment discrimination claims, so providing this information to a court allows the judge to be more fully informed of the frequency of this type of harassment in a particular industry and geographical region. The educational function and importance of this information is thus substantial. Too often parties become overly entrenched in their area of the law and lose sight of the fact that the decisionmaker may not have the most up-to-date information in a specific field. This is particularly true with workplace claims, which continue to evolve over time.[254] Indeed, the nature and parameters of the workplace itself has changed dramatically in recent years.[255] And, the way that we perceive sexual

[252] *Cf.* Hébert, *supra* note 14, at 336 ("Whether the 'MeToo' movement realizes that potential would seem to depend on whether the courts that are asked to judge the validity of sexual harassment claims can understand the ways in which the lessons taught by the 'MeToo' movement are relevant to the claims of the individual women who have been encouraged to speak out against their harassers.").

[253] *See supra* Part II (discussing data supporting the fact of workplace harassment).

[254] *See* Michael Selmi, *The Evolution of Employment Discrimination Law: Changed Doctrine for Changed Social Conditions*, 2014 WIS. L. REV. 937, 940-41 ("Although it is certainly true that discrimination has sharply receded since the 1970s, it is also true that the discrimination that remains has changed in character, becoming more subtle, more entrenched, and more systemic in nature, which in turn means more difficult to identify or prove."). *See generally* John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983 (1991) ("The nature of employment discrimination litigation in the federal courts . . . has changed considerably since Title VII went into effect . . . .").

[255] *See, e.g.*, Melissa Murray, *Consequential Sex: #MeToo,* Masterpiece Cakeshop*, and Private Sexual Regulation*, 113 NW. U. L. REV. 825, 833 (2019) ("No longer willing to accept a culture where these behaviors are tacitly condoned and victims' injuries go

harassment claims is far different today than it was only a few years ago.[256]

A similarly important benefit of the proposed framework is that it helps streamline the litigation. By applying a straightforward framework to the complex field of sexual harassment law, the parties are more easily able to assert and defend individual claims. Thus, rather than being required to navigate the difficult parameters and elements of a sexual harassment allegation,[257] as well as the complexity of the plausibility standard, the proposed model helps the courts — and the litigants — to more fully and easily evaluate the allegations early in the proceedings.

The model thus provides more certainty to this area of the law. This certainty is badly needed following the *Twombly* and *Iqbal* cases, which introduced much confusion to the entire pleading process. Employment discrimination plaintiffs in particular face tremendous difficulty in pleading their claims.[258] This model provides more uniformity to a

unremedied, the #MeToo movement enlists private entities as agents of reform to both challenge — and ultimately replace — extant norms of sexual conduct. Using social media and the press, the #MeToo movement has identified recidivist harassers and workplaces where sexual harassment and sexual assault are rife, advocated for increased workplace harassment training, and, ultimately, called for the expulsion from the workplace of several high-profile men who, for years, engaged in objectionable conduct with impunity." (footnotes omitted)).

256 *See, e.g.*, Hébert, *supra* note 14, at 335 ("The 'MeToo' movement has already had dramatic effects on the way that sexual harassment is viewed as a cultural matter, raising societal awareness of the prevalence of sexual harassment and of the harms that it causes. In a matter of months, allegations of sexual harassment have resulted in the resignations, suspensions, or discharges of public officials, including judges, senators, and representatives, as well as newscasters, actors, and other celebrities."); *see also* Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L.J.F. 22, 24 (2018) ("With the rise of the #MeToo movement, we are witnessing an extraordinary cultural moment of resistance against sexual harassment — one that could galvanize real change.").

257 *See* Hébert, *supra* note 14, at 325 (discussing the difficulty plaintiffs often face "satisfy[ing] the various elements of a claim of sexual harassment"); *see also* Daniel Hemel & Dorothy S. Lund, *Sexual Harassment and Corporate Law*, 118 COLUM. L. REV. 1583, 1605 (2018) (discussing "substantial hurdles for victims of harassment").

258 *See supra* Part I (discussing difficulty employment discrimination plaintiffs have experienced navigating plausibility standard); *see also* Brooke D. Coleman, *The Vanishing Plaintiff*, 42 SETON HALL L. REV. 501, 522 (2012) ("[S]cholars have repeatedly argued that when it comes to proving racial or sexual discrimination, restrictive procedural doctrines are difficult to overcome."); Devah Pager & Bruce Western, *Identifying Discrimination at Work: The Use of Field Experiments*, 68 J. SOC. ISSUES 221, 222 (2012) ("The bulk of evidence . . . suggests that declines in claims of hiring discrimination result from changing standards of legal evidence and the difficulties facing plaintiffs in acquiring the necessary information to pursue a successful claim."

currently confused process. This type of certainty can further help clear dockets. Where there is more certainty in the law, there tends to be a higher rate of settlement.[259] Thus, where parties have a better idea of how the litigation will proceed, the case itself is more likely to be resolved earlier in the proceedings.[260]

By highlighting the limited role of plausibility for employment discrimination cases brought in the harassment context, the proposed model further saves judicial resources. As the courts and litigants undoubtedly spend countless hours attempting to define what plausibility actually means — particularly for workplace cases — there can be no question that the proposed model helps remove much of the doubt in this area. Armed with the knowledge that *Twombly* and *Iqbal* are largely irrelevant for sexual harassment claims — at least in the current workplace climate — courts can allow these cases to proceed without getting bogged down in technical arguments about the pleadings.[261] Of course, as already noted, there may be certain exceptions to this general rule, and the defendant will have the opportunity to more fully develop any argument that the plaintiff's claims should not be permitted into discovery.

Some might argue that the model proposed here establishes too low of a pleading bar, and thus "opens the floodgates" of litigation to sexual harassment claims. While a fair criticism, the framework really only

(citing Laura Beth Nielsen & Robert L. Nelson, *Scaling the Pyramid: A Sociolegal Model of Employment Discrimination Litigation*, *in* HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH 3 (Laura Beth Nielsen & Robert L. Nelson eds., 2005))). *See generally* Michael O'Neil, Twombly *and* Iqbal*: Effects on Hostile Work Environment Claims*, 32 B.C. J.L. & SOC. JUST. 151 (2012) (discussing the plausibility standard and harassment cases).

259 *See* Richard B. Stewart, *The Discontents of Legalism: Interest Group Relations in Administrative Regulation*, 1985 WIS. L. REV. 655, 662 ("The more certain the law — the less the variance in expected outcomes — the more likely the parties will predict the same outcome from litigation, and the less likely that litigation will occur because of differences in predicted outcomes."). *See generally* Anthony D'Amato, *Legal Uncertainty*, 71 CALIF. L. REV. 1, 15-18 (1983) (discussing relationship between legal certainty and settlement).

260 *See* D'Amato, *supra* note 259, at 17 ("[T]he principal reasons for [litigants] to settle their dispute without litigation — to avoid the risk and expense of litigation — are most powerful when the law governing the dispute is less certain."); Stewart, *supra* note 259, at 662.

261 *Cf.* Marleen A. O'Connor, *Toward a More Efficient Deterrence of Insider Trading: The Repeal of Section 16(b)*, 58 FORDHAM L. REV. 309, 360 (1989) ("On the whole, a specific rule increases deterrence and saves judicial resources. These benefits must be weighed against the costs resulting from a specific rule being both underinclusive and overinclusive. By enhancing deterrence and saving judicial resources, a specific rule influences the next tradeoff made in designing a deterrence strategy, the certainty-severity tradeoff." (footnotes omitted)).

acknowledges a straightforward truth about the overt and ongoing nature of harassment in the workplace. It is also important to note that the model in no way predicts the outcome of the litigation. Indeed, once discovery has concluded in a case, the sexual harassment allegations may still be thrown out on a motion for summary judgment.[262] Or, a plaintiff may be unable to ultimately convince a jury as to the veracity of the allegations.[263] Plaintiffs should at least, however, have the opportunity to gather the important facts related to their claims that are frequently only in the employer's control.

Moreover, as already discussed, this Article concludes that the plausibility standard is largely *irrelevant* for sexual harassment claims, as the vast majority of such allegations are at least plausible on their face. This argument largely situates the case law for these claims back

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[262] *See, e.g.*, Murphy v. City of Aventura, 383 F. App'x 915, 918 (11th Cir. 2010) ("Although [supervisor's] use of terms like 'slut,' 'whore,' 'bitch,' 'hooker,' and his remark about a young student's bust size were no doubt degrading and sex based, [supervisor's] nine remarks, made over the course of over three years, were neither severe nor pervasive. [Plaintiff] also failed to produce evidence that [supervisor's] conduct unreasonably interfered with her work performance. . . . The district court correctly granted summary judgment . . . ."); *see also* Kenneth R. Davis, *Strong Medicine: Fighting the Sexual Harassment Pandemic*, 79 OHIO ST. L.J. 1057, 1076 (2018) ("It is not surprising, therefore, that numerous courts have dismissed cases where plaintiffs have alleged facts that, although troubling, fail to meet the threshold for liability." (citing cases)); Nancy Gertner, *Sexual Harassment and the Bench*, 71 STAN. L. REV. ONLINE 88, 97 (2018) (addressing *Murphy* decision). *See generally* Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71, 75 (1999) (examining "the trend of courts to grant summary judgment based on the lack of severity or pervasiveness of the harassment (many times improperly under the standards set out for such motions)"); Vivian Berger, Michael O. Finkelstein & Kenneth Cheung, *Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits*, 23 HOFSTRA LAB. & EMP. L.J. 45, 48 (2005) ("A major part of reality testing in employment actions involves assessing the chance the defendant will succeed in getting summary judgment, in whole or in part, against the plaintiff.").

[263] *See* Gertner, *supra* note 262, at 96 ("[P]laintiffs in discrimination cases tend to lose on summary judgment, more so than any other party in any other type of case. If they manage to get to trial and, significantly, if they convince a jury of their claims, their damage verdicts run a substantial risk of being reduced by trial judges and their counsel's fees slashed — again more than the verdicts or fees of plaintiffs and plaintiffs' counsel in any other category of case. On appeal, the story is even more striking: [W]hile summary judgment dismissals are overwhelmingly affirmed by appellate courts, even successful plaintiffs' verdicts are reversed more than jury verdicts in other types of cases." (alterations in original) (quoting Nancy Gertner, *The Judicial Repeal of the Johnson/Kennedy Administration's "Signature" Achievement*, *in* A NATION OF WIDENING OPPORTUNITIES: THE CIVIL RIGHTS ACT AT 50, at 165 (Ellen D. Katz & Samuel R. Bagenstos eds., 2015))). *See generally* Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Cases Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 429 (2004) (addressing difficulties of litigating employment discrimination claims).

to where it was pre-*Twombly*, but does not lower the pleading bar. Indeed, before *Twombly* sexual harassment (and discrimination cases generally) routinely survived dismissal even where only basic facts were asserted.[264] The model set forth here does not propose a radical departure from the law. Rather, it advocates for a standard that existed for decades pre-*Twombly*. In perhaps the most well-known employment discrimination pleading decision during this time, Judge Easterbrook opined that a complaint which only states that "I was turned down for a job because of my race," would provide sufficient factual detail to survive dismissal.[265] Similarly in the sexual harassment context, providing basic facts as to the severity or pervasiveness of the alleged conduct, along with its imputability to the employer, should be sufficient to proceed in the case.

A similar criticism of the proposed framework might be that it is too rigid, and adopts a one-size-fits-all approach that is unworkable in the face of the unpredictable facts found in everyday workplace litigation. Again, while a fair concern, the model proposed here is not meant to be exhaustive, and should serve as only a single approach to evaluating harassment claims. There are numerous ways to litigate cases involving sexual misconduct,[266] and it is entirely possible that the approach proposed here will not work in a specific factual scenario. Rather, this model attempts to capture the vast majority of cases that will be brought in this area. It also attempts to provide the courts and litigants with the most up-to-date information in the field, and to serve as a reminder of the prevalence of discrimination and harassment still found in the workplace.[267]

The analytical framework proposed here also comports with the suggestions of other scholars. For example, Professor Charles Sullivan has already raised the possibility of using social science information in employment discrimination cases.[268] And, Professor Michael Zimmer

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[264] *See generally* Seiner, *supra* note 24 (discussing the plausibility standard and employment discrimination cases).

[265] Bennett v. Schmidt, 153 F.3d 516, 518 (7th Cir. 1998).

[266] *See generally* Jill E. Huntley & Mark Costanzo, *Sexual Harassment Stories: Testing a Story-Mediated Model of Juror Decision-Making in Civil Litigation*, 27 LAW & HUM. BEHAV. 29 (2003); Linda J. Krieger & Cindi Fox, *Evidentiary Issues in Sexual Harassment Litigation*, 1 BERKELEY WOMEN'S L.J. 115 (1985).

[267] This framework was specifically established for claims of sexual harassment. The model should not be applied to other Title VII discrimination claims brought outside of this particular context.

[268] Sullivan, *supra* note 41, at 1666-67, 1671-72. In his Article, Professor Sullivan provides a superb discussion of the potential use of social science research in these cases following the Supreme Court's *Twombly* and *Iqbal* decisions. *Id.*

previously discussed the potential educational role social science research can provide in the workplace context.[269] Building on that research, this Article explains precisely how to properly place this type of social science (and related data and statistics) before the federal courts. And, the model explains how this can specifically be accomplished in the sexual harassment context.[270]

In the end, the enormous benefits of the proposed model should effectively outweigh any existing concerns.[271] The ongoing prevalence of sexual harassment in the workplace demands that we take a fresh look at how these claims are analyzed, and provide full access to the courts to those who are the unfortunate victims of sexual harassment.

CONCLUSION

In light of all of the evidence that we now have on the topic, there can be little doubt that workplace sexual harassment is a fact in our society. As a fact, it can properly be pled in a federal complaint of sexual harassment in the employment context. The federal rules generally allow the social science research, governmental data, and litigation statistics supporting this fact to be attached to the federal complaint. And judges should consider this information when deciding whether the complaint is plausible.

Judge Posner recently stated that "it has taken our courts and our society a considerable while to realize that sexual harassment, which has been pervasive in many workplaces (including many Capitol Hill offices and, notoriously, Fox News, among many other institutions), is a form of sex discrimination."[272] Given the fact of harassment, any individual allegation of improper workplace conduct of a sexual nature should be deemed plausible. While the defendant may rebut this plausibility, the vast majority of Title VII harassment cases must be allowed to proceed to discovery. *Twombly* and *Iqbal*, then, are largely

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[269] *See* Michael J. Zimmer, *Title VII's Last Hurrah: Can Discrimination Be Plausibly Pled?*, U. CHI. LEGAL F. 19, 89-90 (2014).

[270] *See generally* Tristin K. Green, *"It's Not You, It's Me": Assessing an Emerging Relationship Between Law and Social Science*, 46 CONN. L. REV. 287, 289 (2013) (discussing the relationship between employment discrimination law and social science); Melissa Hart & Paul M. Secunda, *A Matter of Context: Social Framework Evidence in Employment Discrimination Class Actions*, 78 FORDHAM L. REV. 37, 39 (2009) (same); Pager & Western, *supra* note 258, at 222.

[271] *Cf.* Seiner, *supra* note 24 (discussing implications of similar model proposed for Title VII cases).

[272] Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339, 355 (7th Cir. 2017) (Posner, J., concurring).

irrelevant for sexual harassment claims as the plausibility standard announced in these Supreme Court cases will ordinarily be satisfied by the plaintiffs, with only limited exceptions. The fact of sexual harassment in the workplace can no longer be ignored, and the federal courts should take these individual Title VII claims much more seriously.