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## Time, Equity, and Sexual Harassment

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# Time, Equity, and Sexual Harassment

Joseph A. Seiner\*

*Sexual harassment remains a pervasive problem in the workplace. Recent studies and empirical research reveal that this unlawful conduct continues to pervade all industries and sectors of the economy. The #MeToo movement has made great progress in raising awareness of this problem and in demonstrating the lengths that some employers will go to conceal a hostile work environment. The movement has further identified the lasting emotional toll workplace harassment can have on its victims.*

*The research in this area demonstrates that the short timeframe harassment victims have to bring a federal discrimination charge—180 or 300 days depending on the state—is wholly inadequate. The deception, misrepresentation, and sexual abuse encountered by many workplace harassment victims can make it impossible to file a timely charge. The pandemic has further highlighted the difficulties harassment victims can face in meeting this deadline through no fault of their own. This Article argues that the only practicable solution to this problem is a more robust application of the centuries-old doctrine of equitable tolling to pause the harassment time filing deadline where appropriate.*

*This Article identifies five equitable tolling guideposts that the courts should consider before dismissing a sexual harassment claim on the basis of an untimely charge—psychological harm, employer threats, fear, workplace deception, and public health. This Article discusses how each of these markers may impact the timeliness of a harassment claim and explains when the use of equitable tolling may be appropriate. Given the extensive research in this area, as well as our expanded understanding of the pervasiveness of sexual harassment in the workplace, employers should no longer be permitted to run out the clock on these claims through their own improper conduct.*

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#### INTRODUCTION

Over the last several years, our society has finally begun to truly grapple with the problem of sexual harassment and abuse—both in the workplace as well as in other settings. While our current knowledge of the extent of the problem still only scratches the surface, the recent research on sexual harassment has brought to light the pervasive and widespread nature of the issue.<sup>1</sup> This unlawful activity pervades all industries and workplaces, affecting all income levels and job categories, impacting both men and women alike.<sup>2</sup>

The #MeToo movement has made great strides in exposing the abuse and harassment that is taking place, and it has substantially raised awareness of this ongoing problem. This movement has helped clarify the extent to which employers and their agents will go to conceal, threaten, and misrepresent their unlawful activities.<sup>3</sup> It has further provided us with a much better understanding of the extreme psychological and emotional toll that this type of workplace abuse can have on the victims of harassment.<sup>4</sup>

When facing sexual harassment, victims of this unlawful activity have an extraordinarily short period of time to file a federal employment discrimination

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1. See *infra* Section III.A (addressing current social science research on workplace sexual harassment).

2. See generally *infra* Section III.A.

3. See *infra* Part III (discussing the history of the #MeToo movement and its role in identifying and preventing workplace harassment).

4. See generally *infra* Part III.

claim under Title VII of the Civil Rights Act of 1964 (Title VII).<sup>5</sup> Depending on the state, a timely charge of sexual harassment must be filed with the U.S. Equal Employment Opportunity Commission (EEOC) within 180 or 300 days of the unlawful activity.<sup>6</sup> By comparison, this time period is substantially shorter than the two-to-four year filing period for most state law personal injury claims.<sup>7</sup> Failure to comply with this administrative filing requirement has dire consequences for the claimant, as untimely discrimination charges must be dismissed, depriving harassment victims of the opportunity to ever be heard in court.<sup>8</sup>

As the extensive research in this area now makes clear, the 180/300-day time filing requirement for sexual harassment claims is highly problematic. The deception, misrepresentation, and outright abuse encountered by many workplace harassment victims make it difficult, if not impossible, to file a hostile work environment charge in a timely manner.<sup>9</sup> During this short time filing period, employees experiencing workplace abuse may be unaware of the full extent of the hostile work environment. Many workers subjected to this unlawful conduct also encounter lasting psychological scars, and filing a charge in this short period of time can unnecessarily force them to relive this emotional trauma without a sufficient opportunity to recover from the abuse.<sup>10</sup>

And the events of the COVID-19 pandemic have only amplified these difficulties; the resulting economic concerns and complexities have given employers an additional purported legitimate rationale to use when disciplining workers, when their true motivation is to discriminate or retaliate against an employee.<sup>11</sup> As many jobs move online and become more virtual in nature as a result of this public health crisis, workers also find themselves more isolated and less able to uncover systemic harassment perpetrated by an employer.<sup>12</sup>

This Article does not argue for congressional intervention to extend the time filing period for Title VII hostile work environment claims, though such a change would be both warranted and welcome. Given the current political divisiveness of these issues, as well as the fact that the Title VII time filing deadlines have remained unchanged for over half a century, there is little hope of legislative change in the

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5. See Title VII, 42 U.S.C. § 2000e.

6. *Id.* See generally Joseph A. Seiner, *The Discrimination Presumption*, 94 NOTRE DAME L. REV. 1115 (2019) (describing the litigation process for employment discrimination claims).

7. See *infra* Section II.A (comparing statute of limitations periods in personal injury cases to Title VII claims).

8. See Title VII, 42 U.S.C. § 2000e (setting forth time filing deadlines in employment discrimination cases).

9. See *infra* Part III (discussing recent research on sexual harassment and shortcomings of Title VII time filing deadlines).

10. See *infra* Section III.B (addressing emotional harm caused by workplace sexual harassment).

11. See *infra* Section III.B.5 (examining the role of the pandemic in plaintiff efforts to file timely employment discrimination charge).

12. See generally *infra* Section III.B.5.

near future.<sup>13</sup> Instead, this Article argues for immediate judicial intervention to better enhance access to justice for victims of workplace harassment.

The short-term answer to the existing problem of the overly rigid charge filing period for harassment claims can be found in a legal doctrine that predates the inception of this country and was first introduced by the courts of chancery—equitable tolling.<sup>14</sup> The doctrine of equitable tolling has a lengthy and rich history, and it stands for the basic proposition that a defendant should not be able to benefit from his own wrongdoing.<sup>15</sup> The Supreme Court has long recognized that the tolling of a particular statute of limitations may be necessary to avoid the “evils of archaic rigidity.”<sup>16</sup> In the employment discrimination context, this means that employers should not be able to run out the clock on the charge filing deadlines for sexual harassment claims through deception, threats, or emotional abuse—equity can and must intervene in these situations. The courts have a duty to step in to enforce the “humane and remedial” purposes of the legislation in those cases.<sup>17</sup>

This Article identifies five primary guideposts for the courts to consider in advance of dismissing a federal hostile work environment claim based on an untimely filed charge. While all sexual harassment claims deserve close consideration, these markers help identify the specific factual scenarios where equitable tolling of Title VII would be particularly appropriate. These guideposts are not exhaustive but capture the majority of instances where tolling of the statute would be appropriate in the hostile work environment context.

Initially, the courts must closely consider those situations where a sexual harassment plaintiff who filed an untimely charge *suffered psychological or emotional trauma* because of an employer’s hostile conduct. If a worker is psychologically unable to file a timely claim because of the abuse, the employer should not benefit from its wrongdoing. The courts should also examine those cases where a *threat of physical harm* has been made to the victim directly or indirectly or whether threats were made to a loved one or family member of the plaintiff. Understandably, these types of threats can dissuade a timely charge filing.

Additionally, the courts should consider the closely related issue of *fear of reprisal*. Many workers reasonably, and perhaps correctly, fear that their employer will retaliate against them with respect to their terms, conditions, or privileges of employment if they complain in a timely manner. Also, the courts should look to an employer’s *misrepresentations or concealment of facts* as an additional scenario where tolling may be appropriate. Through this common tactic, employers often deceive

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13. See *infra* Parts III–IV (addressing proposed equitable tolling guidelines and difficulties of Congressional intervention).

14. See *infra* Part II (tracing deep historical roots of equitable tolling).

15. See generally *infra* Part II.

16. *Holland v. Florida*, 560 U.S. 631, 650 (2010) (quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248 (1944)).

17. *Burnett v. N.Y. Cent. R.R.*, 380 U.S. 424, 427–28 (1965) (internal quotation omitted).

workers about the validity of their claim or about the extent of the harassment that is occurring in the workplace.

Finally, it is impossible to ignore the pandemic and its potential impact on the ability of a plaintiff to file a timely sexual harassment claim.<sup>18</sup> On the most practical level, the pandemic may delay a worker's access to information necessary to substantiate a hostile work environment charge. The health crisis may also allow employers to conceal the true extent of their unlawful conduct, as workers now have fewer overall interactions with one another. And the pandemic will make it easier for employers to attempt to justify retaliatory actions taken against workers who complain of harassment.

These five guideposts thus flag for the courts those common situations where the judiciary should tread lightly before dismissing a sexual harassment claim as untimely. In light of what we now know about the widespread nature of sexual harassment in our society, as well as the extent to which employers have gone to conceal this unlawful conduct, a more robust application of the equitable tolling doctrine is necessary to truly effectuate the well-established goals and deterrent effect of Title VII.<sup>19</sup> While all hostile work environment claims must be closely considered, this Article identifies clearly defined markers for the courts to use when analyzing these claims.

This Article proceeds in six parts. In Part I, this Article examines the extensive and intricate history of equitable tolling, which this country adopted from the English common law. Part II of this Article addresses the time filing requirements for Title VII claims, as applied by the U.S. Supreme Court, and summarizes the federal court case law on equitable tolling for sexual harassment claims. In Part III, this Article examines the recent research on sexual harassment, as well as the role of the #MeToo movement in our society. This Part then identifies the five guideposts that the federal courts should look to prior to dismissing a federal hostile work environment claim based on timeliness—psychological harm, employer threats, fear, deception, and public health. In Part IV, this Article helps situate the proposed guidelines in the context of federal case law by demonstrating how several claims would have resulted in different outcomes had these markers been properly considered. Part V addresses the implications of the proposed guidelines, exploring some of the costs and benefits of courts using the markers identified in sexual harassment cases. This Article then briefly discusses the conclusions to be drawn.

## I. HISTORY OF EQUITABLE TOLLING

The doctrine of equitable tolling is relatively straightforward. As Justice Story eloquently stated almost two hundred years ago, a statutory limitations period is “mainly intended to suppress fraud [and] ought not, then, to be so construed, as to

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18. See *infra* Section III.B.5 (examining the role of the pandemic in preventing timely sexual harassment claims).

19. Cf. *Burnett*, 380 U.S. at 427–28 (discussing tolling in workplace case).

become an instrument to encourage fraud.”<sup>20</sup> Simply put, tolling provides the equitable tool to guard against the type of fraud Justice Story warned against.<sup>21</sup> Under this legal theory, there are times when certain factual circumstances exist that make it unfair to strictly adhere to a rigid statute of limitations in a civil matter. As an early and well-known English case, *Booth v. Earl of Warrington*,<sup>22</sup> made clear, “[w]here there is fraud, and such fraud is concealed, no length of time can bar.”<sup>23</sup> Where this particular set of facts exist, it may be appropriate for a court to toll, or pause, the statute of limitations, thus permitting a claimant more flexibility in the time allowed to bring their case.

The doctrine thus “suspends the running of the limitations period against the party who filed late through no fault of her own”<sup>24</sup> and “allows a court to resuscitate untimely claims and proceed on the merits against a defendant despite a countervailing statute of limitations.”<sup>25</sup> In more basic terms, a court may give a party additional time to file a claim where fairness dictates that result. While the tolling doctrine itself is straightforward, the application of this legal theory is not as clear. Indeed, the use of equitable tolling is highly fact-driven, and it is difficult to develop clear rules for defining when it is appropriate to pause a time filing period. At best, we can articulate general parameters for when equitable tolling should be considered in a particular case.

Though the doctrine of equitable tolling may seem dry at first blush, the theory has a long and rich history that dates back to English times and the courts of chancery.<sup>26</sup> A historical review of this doctrine demonstrates that the theory of tolling was used under English law at least as far back as the 1700s.<sup>27</sup> Under the “old

20. *Sherwood v. Sutton*, 21 F. Cas. 1303, 1307 (Story, Circuit Justice, C.C.D.N.H. 1828) (No. 12,782); *see* *Expl. Co. v. United States*, 247 U.S. 435, 448 (1918) (quoting *id.*).

21. *See generally* *Sherwood*, 21 F. Cas. at 1307; *Expl. Co.*, 247 U.S. at 448; Malcolm L. Morris, *Troubled Taxpayers’ Tolling Troubles*, 47 SYRACUSE L. REV. 121, 123 (“In its simplest form, equitable tolling is a judicial constraint that allows a party to assert a claim after the statute of limitations has run with respect to it.”).

22. *Booth v. Earl of Warrington* (1714) 2 Eng. Rep. 111, 111. *See generally* David D. Doran, Comment, *Equitable Tolling of Statutory Benefit Time Limitations: A Congressional Intent Analysis*, 64 WASH. L. REV. 681, 682 n.10 (1989); Morris, *supra* note 21, at 124 n.14.

23. *Booth*, 2 Eng. Rep. at 111 (citations omitted).

24. Duane Rudolph, *Workers, Dignity, and Equitable Tolling*, 15 NW. J. HUM. RTS. 126, 131 (2017).

25. *Id.* at 127.

26. *Cf.* John R. Pagan, *Civil Rights and “Personal Injuries”: Virginia’s Statute of Limitations for Section 1983 Suits*, 26 WM. & MARY L. REV. 199, 210 (1985) (“At [English] common law, the passage of time did not affect a litigant’s right to sue. The victim of an actionable tort or breach of contract could invoke the jurisdiction of the king’s courts at any time, no matter how stale his claim.”). *See generally* *Borges v. Gonzales*, 402 F.3d 398 (3d Cir. 2005); Richard L. Marcus, *Fraudulent Concealment in Federal Court: Toward a More Disparate Standard?*, 71 GEO. L.J. 829, 856 (1983); Morris, *supra* note 21 (“The concept, which took hold in early English jurisprudence, gained acceptance in the American courts principally as an anti-fraud device.”).

27. *See* *McQuiggin v. Perkins*, 569 U.S. 383, 409 (2013) (Scalia, J., dissenting) (citing John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 52 (2001)); *See also* Rudolph, *supra* note 24, at 130 (“[T]he equitable canon [has applied] since at least colonial times, [and]

chancery rule,” the view was adopted that “where a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered[.]”<sup>28</sup> The early courts looked to equitable tolling where the application of laches, or the statute of limitations, resulted in a dismissal that was “inequitable.”<sup>29</sup> While this determination was inherently subjective, the courts of equity developed more defined areas where tolling was permitted.<sup>30</sup> For example, even where claims were brought outside of the statutory period, they would still be allowed if the result avoided permitting one of the litigants to “profit from their own bad conduct.”<sup>31</sup> Indeed, in one early case, “the House of Lords held that when a defendant concealed a fraudulent bond transaction from the plaintiff for nine years, the defendant could not equitably assert the statute of limitation as a defense.”<sup>32</sup>

Early application of equitable tolling in the U.S. courts often involved an effort to avoid fraud perpetrated on one of the parties.<sup>33</sup> Thus, in early American court decisions, if “affirmative acts by one party prevented the injured party from learning of the fraud, the statute of limitations would be tolled until the fraud was discovered,” and “if an injured party remained ignorant of a fraud through no fault of her own, equity could toll the statute of limitations.”<sup>34</sup> At the “essence” of equitable tolling was the basic premise that the “statute of limitations does not run against a plaintiff who is unaware of his cause of action.”<sup>35</sup> Though the early

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equitable tolling has allowed the court to rely on its discretion and proceed to evaluate a resurrected case on the merits.”) Cf. Pagan, *supra* note 26 (“In 1623, James I and Parliament changed the common-law rule by enacting a statute of limitations covering most personal actions.” (citing English Limitation Act of 1623, 21 Jac., c. 16, § 3)); Bruce A. McGovern, *The New Provision for Tolling the Limitations Periods for Seeking Tax Refunds: Its History, Operation and Policy, and Suggestions for Reform*, 65 MO. L. REV. 797, 804 (2000) (“The statute of James I, from which the first American statutes of limitations were derived, provided that if, at the time the cause of action accrued, the person entitled to assert the claim was ‘within the age of twenty-one years, *feme covert*, *non compos mentis*, impris[s]ioned or beyond the [s]ea[s],’ then the limitations periods of the statute would not commence until the impediment to bringing the claim had ceased.” (alteration in original) (citing 21 Jac., c. 16, § 3)).

28. *Borges*, 402 F.3d at 406 (quoting *Lopez v. Immigr. & Naturalization Serv.*, 184 F.3d 1097, 1100 (9th Cir. 1999)).

29. *Morris*, *supra* note 21. Statutes of limitations date back even further, and one fascinating work even explored their role in Ancient Greece. See DANIELLE S. ALLEN, *THE WORLD OF PROMETHEUS: THE POLITICS OF PUNISHING IN DEMOCRATIC ATHENS* 154 (2000) (“The statutes of limitations was set at five years for all types of cases except for homicide (which had no statute of limitations) . . .”).

30. See generally Mark A. Wilner, Comment, *Justice at the Margins: Equitable Tolling of Washington’s Deadline for Filing Collateral Attacks on Criminal Judgments*, 75 WASH. L. REV. 675, 684 (2000).

31. *Id.*

32. *Id.* (citing *Booth v. Earl of Warrington* (1714) 2 Eng. Rep. 111, 111).

33. See generally *Morris*, *supra* note 21.

34. *Id.* at 123–24.

35. *Serdarevic v. Advanced Med. Optics, Inc.*, 532 F.3d 1352, 1362 (Fed. Cir. 2008) (quoting *Cerbone v. Int’l Ladies’ Garment Workers’ Union*, 768 F.2d 45, 48 (2d Cir. 1985)).



American cases focused largely on fraud, the doctrine quickly expanded to include other areas as well.<sup>36</sup>

The U.S. Supreme Court has largely adopted the doctrine of equitable tolling from the English common law.<sup>37</sup> In so doing, the Court has “followed a tradition in which courts of equity have sought to relieve hardships, which, from time to time, arise from a hard and fast adherence to more absolute legal rules, which, if strictly applied, threaten the evils of archaic rigidity.”<sup>38</sup> While identifying the need for the courts to maintain a substantial amount of flexibility in reaching these equitable determinations when finding “particular injustices,”<sup>39</sup> the Court set out the two elements that plaintiffs must satisfy to be entitled to tolling of a statutorily prescribed timeframe: “(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way’ and prevented timely filing.”<sup>40</sup>

These elements make clear that the flexibility maintained by the courts to toll a particular statute must be applied in a factually specific way to remedy injustices that may arise.<sup>41</sup> Plaintiffs must do their best to pursue their rights, thereby appearing before the court with “clean hands.”<sup>42</sup> At the same time, there must be something “extraordinary” that occurred which prevented the claimant from making a timely filing.<sup>43</sup> In using this flexibility, then, the courts must balance their

36. See *Morris*, *supra* note 21, at 125 (“Once equitable tolling became available in actions at law, its status as a purely anti-fraud device eroded.”).

37. See generally Rudolph, *supra* note 24, at 130; *Holland v. Florida*, 560 U.S. 631, 650 (2010); *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 349 (1874) (“To hold that by concealing a fraud, or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure.”); *Morris*, *supra* note 21, at 124 (citing *id.*); *McGovern*, *supra* note 27, at 806 (citing *Bailey*, 88 U.S. (21 Wall.) 342).

38. Rudolph, *supra* note 24, at 130–31 (quoting *Holland*, 560 U.S. at 650).

39. *Holland*, 560 U.S. at 650. See generally Rudolph, *supra* note 24.

40. *Holland*, 560 U.S. at 649 (quoting *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005)).

41. The doctrines of equitable tolling and equitable estoppel are quite “distinct,” but are often blurred. *Morris*, *supra* note 21, at 125. “Equitable estoppel retained the equitable precept that prohibits a party from benefiting from its own improper actions . . . Equitable tolling, however, does not necessarily require any improper action by the party against whom the time bar is to be sought. Instead, it plays on equity’s notion of fairness from a broader perspective.” *Id.* (internal quotations omitted). As the Seventh Circuit aptly articulated, “[u]nlike the doctrine of equitable estoppel, the applicability of equitable tolling does not turn on any effort by the defendant to prevent the plaintiff from filing suit.” *Hentosh v. Herman F. Finch Univ. of Health Scis./Chi. Med. Sch.*, 167 F.3d 1170, 1174 (7th Cir. 1999) (citation omitted).

42. See, e.g., *Banks v. Rockwell Int’l N. Am. Aircraft Operations*, 855 F.2d 324, 327 (6th Cir. 1988) (“A cardinal maxim of equity jurisprudence is that he who comes into equity must come with clean hands.” (citing 30 C.J.S. *Equity* § 93 (1965)). See generally *Morris*, *supra* note 21, at 125 (“[O]ne could equitably toll the statute of limitations when the plaintiff, through neither any fault of her own nor wrongdoing by the prospective defendant, was unable to bring the action in a timely fashion, so long as a diligent effort to learn of the claim was made.”).

43. *Holland*, 560 U.S. at 649; cf. *Developments in the Law—Statutes of Limitations*, 63 HARV. L. REV. 1177, 1189 n.111 (1950) (“[T]here appears to be some degree of hostility on the part of the judiciary where the period for bringing suit is relatively short or where the plaintiff has exercised a reasonable degree of diligence.” (internal citation omitted)).

efforts to avoid strict adherence to statutorily imposed timeframes with the requirement that providing such equitable relief should only occur in extremely limited circumstances. At its core, this doctrine centers completely around fairness and what makes sense and is equitable in a given situation.<sup>44</sup> This fairness is well-grounded in constitutional principles, as restricting claimants' access to the courts based on timing constraints may "deprive citizens of one of the most fundamental rights upon which our legal system is based—the right to be heard."<sup>45</sup> Indeed, as far back as *Marbury v. Madison*, the Supreme Court has acknowledged that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."<sup>46</sup>

Given the Court's clear articulation of the limited nature of equitable tolling, it is not surprising that its application has been used only "sparingly" by the courts over time.<sup>47</sup> Nonetheless, the courts have generally accepted that, where "a litigant's failure to meet a legally-mandated deadline unavoidably arose from circumstances beyond that litigant's control," equitable tolling of a statute may be appropriate.<sup>48</sup>

## II. EQUITABLE TOLLING AND EMPLOYMENT DISCRIMINATION

The doctrine of equitable tolling may be particularly suitable to consider in employment discrimination cases. After all, federal anti-discrimination law is premised on the very idea of fairness and equality and requires that all employees must be treated in the same manner with respect to protected status. Under Title VII, employers must be fair to all workers, and therefore cannot differentiate on the

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44. See Morris, *supra* note 21, at 125 (noting that equitable tolling "plays on equity's notion of 'fairness' from a broader perspective"); see also Hadley Van Vactor, *Shifting Sands of Claim Accrual*: John R. Sand & Gravel, *Equitable Tolling, and the Suspension of Accrual in Tucker Act Cases*, 62 HOW. L.J. 441, 460–61 (2019) ("In general, equitable tolling applies to toll a statute of limitations when a litigant has pursued his rights diligently, but 'some extraordinary circumstance prevents him from bringing a timely action.'" (quoting *CTS Corp. v. Waldburger*, 573 U.S. 1, 9 (2014))).

45. Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68, 82 (2005). Indeed, "[t]he Supreme Court has long acknowledged the primacy of this value, established by the United States Constitution: 'The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns . . .'" *Id.* (alteration in original) (first quoting *Truax v. Corrigan*, 257 U.S. 312, 332 (1921); and then citing *Grannis v. Ordean*, 234 U.S. 385, 394 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard.")).

46. See Malveaux, *supra* note 45 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)).

47. See *Irwin v. Dep't of Veterans Affs.*, 498 U.S. 89, 96 (1990) ("Federal courts have typically extended equitable relief only sparingly. We have allowed equitable tolling in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary's misconduct into allowing the filing deadline to pass."); see, e.g., Marcus, *supra* note 26, at 906; cf. *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800 (2018) (declining to apply equitable tolling in class action context). See generally Morris, *supra* note 21, at 128–29; McGovern, *supra* note 27, at 813.

48. *Steiner v. Henderson*, 354 F.3d 432, 438 (6th Cir. 2003) (quoting *Graham-Humphreys v. Memphis Brooks Museum of Art*, 209 F.3d 552, 560–61 (6th Cir. 2000)).

basis of a protected class, which includes race, color, sex, national origin, and religion.<sup>49</sup>

*A. Time Filing Requirements for Title VII Claims*

The U.S. Supreme Court has long recognized the importance and value of statutorily based limitations periods, providing that “their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.”<sup>50</sup> The time limitations for satisfying the administrative requirements of Title VII are notoriously short, further suggesting that these time periods should be tolled in appropriate circumstances.

Under federal law, a worker who has been subjected to discriminatory treatment in employment must bring a charge with the EEOC within either 180 or 300 days of the unlawful act, depending upon the particular state where the discrimination takes place.<sup>51</sup> In those states that have an equivalent fair practices commission to the federal EEOC, the longer time period applies, likely for the purpose of allowing the state and federal agencies time to coordinate their efforts.<sup>52</sup> Thus, in all jurisdictions, claimants have less than a year to bring a claim of employment discrimination under federal law.<sup>53</sup>

This time period is strikingly short. Indeed, in most personal injury cases, for example, claimants are typically given between two and four years to bring a viable claim.<sup>54</sup> Where a victim of employment discrimination fails to bring a timely charge before the EEOC, the claim cannot be considered, and any subsequent case brought in federal court must be dismissed.<sup>55</sup> This is true even in the most egregious cases of employment discrimination. Thus, even where an employer may have overtly and openly discriminated against a worker on the basis of race, sex, or another protected category, a discrimination claim will not proceed if it has not been brought before the EEOC within either the 180- or 300-day applicable time limit.

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49. 42 U.S.C. § 2000e.

50. *Ord. of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 348–49 (1944).

51. 29 U.S.C. §§ 626, 633. *See generally* *Jones v. Dillard’s, Inc.*, 331 F.3d 1259, 1263 (11th Cir. 2003).

52. 29 U.S.C. § 626(d)(1)(B). *See generally* *How to File a Charge of Employment Discrimination*, EEOC, <https://www.eeoc.gov/how-file-charge-employment-discrimination> [https://perma.cc/RYX5-8VXM] (last visited Jan. 23, 2022).

53. 29 U.S.C. §§ 626, 633.

54. *See The Supreme Court, 2001 Term—Leading Cases*, 116 HARV. L. REV. 352, 356–57 (2002) (“[W]hereas Title VII claims must be filed with the EEOC within 180 (or 300) days, individuals bringing a tort claim can usually wait two or three years, civil RICO claimants have four years to file, and some victims of malpractice have even longer.” (footnotes omitted)).

55. *See, e.g., Abeita v. TransAmerica Mailings, Inc.*, 159 F.3d 246, 254 (6th Cir. 1998) (“Federal courts do not have subject matter jurisdiction to hear Title VII claims unless the claimant explicitly files the claim in an EEOC charge or the claim can reasonably be expected to grow out of the EEOC charge.”).

While these employment time filing deadlines are inherently short, Congress did have a viable rationale for imposing these strict time limits. From a policy standpoint, shorter time filing deadlines for employment claims allow for employers to become aware of the unlawful conduct and remedy it more quickly.<sup>56</sup> In addition, workers often change jobs, and it can be difficult to locate key witnesses in discrimination cases if too much time has passed.<sup>57</sup> Finally, memories quickly fade in the workplace, as employees often change positions and encounter a number of employment-related decisions on a daily basis—shorter time filing deadlines help keep these memories fresh with respect to the specific adverse action alleged in the case.<sup>58</sup> There is also a required administrative investigation into the allegations by the EEOC, and this process can be time-consuming in certain instances,<sup>59</sup> thus making an initial, quick filing beneficial to the overall time it may take to resolve a claim. And of course, any statutorily imposed time frame will bring more “certainty” to the resolution of the process.<sup>60</sup>

In *National Railroad Passenger Corp. v. Morgan*, the Supreme Court provided additional guidance on these time filing guidelines with the EEOC.<sup>61</sup> In *Morgan*, the claimant alleged a number of adverse actions taken by the employer on the basis of his race, including his wrongful suspension and subsequent termination, as well as the company’s overall perpetration of a racially hostile work environment towards him.<sup>62</sup> In its clearest decision on the EEOC charge filing process and timing requirements in these cases, the Court distinguished between “discrete acts,” like

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56. See, e.g., *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 630–31 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5, *as recognized in* *AT&T Corp. v. Hulteen*, 556 U.S. 701, 715 (2009) (“Th[is] short [EEOC filing] deadline reflects Congress’ strong preference for the prompt resolution of employment discrimination allegations through voluntary conciliation and cooperation.” (citing *Occidental Life Ins. Co. of Cal. v. EEOC*, 432 U.S. 355, 367–68 (1977))).

57. *EEOC v. Ind. Bell Tel. Co.*, 641 F. Supp. 115, 123 (S.D. Ind. 1986) (“[A]s with any other case, as time passes, witnesses move and/or change jobs, and their memories fade.”). See generally *English v. Pabst Brewing Co.*, 828 F.2d 1047, 1048–49 (4th Cir. 1987) (“The limitation period facilitates the prompt resolution of disputes upon fresh recollections. It also reflects the point at which Congress has determined the prospect of litigation should presumptively be laid to rest.”).

58. See Gerald L. Maatman Jr. & Lily M. Strumwasser, *The Tides Are Turning: EEOC Pattern or Practice Lawsuits Must Adhere to Title VII’s 300-Day Limitation Period*, 29 ABA J. LAB. & EMP. L. 71, 84 (2014) (“Enforcing the 300-day charge-filing period serves another important purpose: to ensure that lawsuits are filed while evidence is available, memories are recent, and witnesses are accessible.”).

59. See Sarah David Heydemann & Sharyn Tejani, *Legal Changes Needed to Strengthen the #MeToo Movement*, 22 RICH. PUB. INT. L. REV. 69, 74 (2019) (“After the charge is filed with the EEOC, the administrative process starts. It takes, on average, about ten months for the EEOC to investigate a charge, although some investigations can take significantly longer.” (footnote omitted)).

60. Cf. *English*, 828 F.2d at 1049 (“The certainty and repose these provisions confer will be lost if their application is up for grabs in every case.”).

61. 536 U.S. 101 (2002).

62. See *id.* at 114–16.

terminations, demotions, and failure to hire, with “continuing violations,” like hostile work environments.<sup>63</sup>

With respect to isolated adverse employment decisions, the Court was clear that where there is a discrete act like a failure to hire or promote, the claimant must file a discrimination charge with the government within the 180/300 day time filing window.<sup>64</sup> Even where a timely charge is not made, however, the employer’s actions may still come into evidence and are admissible to support a separate timely claim.<sup>65</sup> Thus, where a claimant has suffered multiple unlawful and discrete discriminatory acts, she may still introduce into evidence the untimely claims to help support the timely allegations that are made.<sup>66</sup> As the Supreme Court noted, Title VII does not “bar an employee from using the prior acts as background evidence” in the case.<sup>67</sup>

Allegations that involve ongoing, continuing violations are treated differently, however. These types of continuing violations typically involve discriminatory pay decisions, where a female worker receives less than a male worker for performing the same work under similar conditions, as well as allegations of a hostile work environment.<sup>68</sup> In *Morgan*, the Supreme Court specifically looked at the timing requirements for a hostile work environment on the basis of race. Contrasting the timing requirements for discrete acts, the Court held that for continuing violations,

[i]t does not matter . . . that some of the component acts of the hostile work environment fall outside the statutory time period. Provided that an act contributing to the claim occurs within the filing period, the *entire* time period of the hostile environment may be considered by a court for the purposes of determining liability.<sup>69</sup>

Thus, “for the charge to be timely, the employee need only file a charge within 180 or 300 days of *any act* that is part of the hostile work environment.”<sup>70</sup>

This is a somewhat subtle—but important—distinction. For hostile work environment cases, a charge is timely as long as any hostile act was committed within the 180/300-day charge filing window.<sup>71</sup> Even if numerous hostile acts were committed outside of this timeframe, all of the acts are timely, admissible, and actionable, permitted that there is at least one hostile act that occurred inside of this window.<sup>72</sup> This decision makes sense when the ongoing nature of hostile work environment claims is considered. These actions are often perpetrated over long

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63. *Id.*

64. *Id.* at 113.

65. *Id.* at 120–21.

66. *Id.*

67. *Id.* at 113.

68. Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5 (amending 42 U.S.C. § 2000e-5 and 42 U.S.C. § 2000e-5 note). *See generally* Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618, 619 (2007), *superseded by statute*, Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5, *as recognized in* AT&T Corp. v. Hulteen, 556 U.S. 701, 715 (2009).

69. Nat’l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 117 (2002) (emphasis added).

70. *Id.* at 118 (emphasis added).

71. *Id.* at 117.

72. *See id.*

periods of time, and harassment claims cannot often be condensed into a single 180/300-day time period.<sup>73</sup> For these types of ongoing discrimination claims, the Court was more flexible when articulating the time filing deadlines. As the Court surmised, a hostile working environment “cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own.”<sup>74</sup>

The *Morgan* decision is helpful from a policy standpoint as well, as it can be difficult for workers to identify precisely when a hostile working environment has occurred, and to fully understand the exact timing requirements of bringing the claim with the government. Indeed, if a worker files her hostile work environment claim too early, when not enough adverse events have occurred to support the claim, it can result in the dismissal of the case.<sup>75</sup> The Court’s flexible approach to the hostile work environment time filing deadlines is thus sound public policy, as well as a correct interpretation of the statute.

### B. *Morgan on Equitable Tolling*

In an important portion of the *Morgan* decision, the Supreme Court addressed the concerns that a worker might unfairly or unnecessarily cause a delay in a hostile work environment case, particularly given the flexible approach that the Court took to the timing requirements in these claims discussed above.<sup>76</sup> The Court highlighted that there may be certain defenses for employers in these situations and specifically looked to the doctrine of equitable tolling.<sup>77</sup> The Court noted that its decision “does not leave employers defenseless against employees who bring hostile work environment claims that extend over long periods of time” and stated that a business would still “have recourse when a plaintiff unreasonably delays filing a charge.”<sup>78</sup> Looking to its prior case law, the Court noted that the Title VII time filing deadline “is not a jurisdictional prerequisite to filing” a claim.<sup>79</sup> Instead, “it is a requirement subject to waiver, estoppel, and equitable tolling ‘when equity so requires.’”<sup>80</sup>

Most importantly, the Supreme Court stated that “[t]hese equitable doctrines allow us to honor Title VII’s remedial purpose without negating the particular purpose of the filing requirement, to give prompt notice to the employer.”<sup>81</sup> This statement makes clear that equity should be taken into account when applying Title

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73. See, e.g., *Ledbetter*, 550 U.S. 618 (2007).

74. See *Nat’l R.R. Passenger Corp.*, 536 U.S. at 115. As the Court noted, hostile work environment claims “are based on the cumulative effect of individual acts.” *Id.* (emphasis added).

75. See generally *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268 (2001).

76. See *Nat’l R.R. Passenger Corp.*, 536 U.S. at 117.

77. *Id.* at 117–21.

78. *Id.* at 121.

79. See *id.*

80. See *id.* (citing *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 398 (1982)).

81. See *id.* (quoting *Zipes*, 455 U.S. at 398).

VII's time filing deadlines.<sup>82</sup> In particular, the Court notes that the application of equitable tolling may be necessary to effectuate the purposes of Title VII.<sup>83</sup>

While these remarks in *Morgan* were made with respect to an employer's defenses to the time filing deadlines for hostile work environment claims, the broader and more important takeaway of the statement is that fairness is an important consideration when looking at the employment discrimination charge filing requirements. Fairness runs both ways, and equitable considerations and fairness must be taken into account by the courts for *both parties* to give full effect to Title VII's purposes.<sup>84</sup> As the Court further noted, "the federal courts have the discretionary power . . . to locate 'a just result' in light of the circumstances peculiar to the case."<sup>85</sup> When it comes to the application of Title VII's time filing deadlines, then, assuring a "just result" is the most important overall consideration. The Supreme Court in *Morgan* could not have been any clearer on this point.

The *Morgan* decision comports with one of the more well-known cases in this area, *Zipes v. TWA*,<sup>86</sup> where the Supreme Court addressed the general nature of the filing deadlines in federal employment discrimination cases. In *Zipes*, the Supreme Court considered a case which involved the timeliness of a Title VII gender lawsuit alleging that an airline's policy of prohibiting new mothers (but not new fathers) from working as flight attendants constituted sex discrimination.<sup>87</sup> The Court held, for the first time, that the timeliness of filing a discrimination charge with the government in such a case *is not jurisdictional*, and thus these statutory time periods are "subject to waiver, estoppel, and equitable tolling."<sup>88</sup> Like in *Morgan*, the Supreme Court in *Zipes* emphasized that by allowing the filing period for discrimination charges to be subject to a doctrine such as equitable tolling, the Court was balancing "the remedial purpose of [Title VII] as a whole" with the need to provide sufficient notice of the claim to the defendant.<sup>89</sup> Looking to the policy of the legislation, the Court referenced one of its earlier decisions, *Love v. Pullman Co.*,<sup>90</sup> where it had "[d]eclin[ed] to read literally another filing provision" of the statute and had "explained that a technical reading would be 'particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process.'"<sup>91</sup> The

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82. *See id.*

83. *See id.*

84. *Cf. Rotella v. Wood*, 528 U.S. 549, 560 (2000) ("[F]ederal statutes of limitations are generally subject to equitable principles of tolling . . .").

85. *See Nat'l R.R. Passenger Corp.*, 536 U.S. at 121 (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 424 (1975), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, *as recognized in Ricci v. DeStefano*, 557 U.S. 557, 578 (2009)).

86. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982).

87. *Id.* at 388.

88. *Id.* at 393 (emphasis added). The Court held that this result was supported by "[t]he structure of Title VII, the congressional policy underlying it, and the reasoning of our cases." *Id.*

89. *Id.* at 398.

90. *Love v. Pullman Co.*, 404 U.S. 522 (1972).

91. *Zipes*, 455 U.S. at 397 (quoting *Love*, 404 U.S. at 527).

Court ultimately held that this “principle must be applied here.”<sup>92</sup> The Supreme Court in *Zipes*, just like in *Morgan*, was thus quite clear that equity must be addressed when applying Title VII’s time filing requirements and that tolling should be considered in appropriate circumstances.<sup>93</sup>

### C. Equitable Tolling of Discrimination Claims in the Federal Courts

As discussed above, the *Morgan* decision was clear that equity and “a just result” must be considered when applying Title VII’s time filing requirements.<sup>94</sup> This is particularly important for Title VII claims because, as the Supreme Court noted in both *Zipes* and *Love*, employees themselves may frequently be the ones filing the charge, often without the assistance of counsel at this early stage of the process.<sup>95</sup> While application of equitable tolling to Title VII claims is somewhat limited,<sup>96</sup> there are nonetheless numerous examples of the federal courts applying this doctrine in the employment discrimination context. This Part explores some of the more notable and descriptive examples of the application of equitable tolling by the courts. While this discussion of the case law is not exhaustive, it does present the primary considerations the courts have looked to when applying this doctrine in the workplace context. Thus, there are certain identifiable considerations the courts have highlighted when applying equitable tolling to cases involving sexually harassing behavior by an employer or its agents.<sup>97</sup>

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92. *Id.*

93. *Id.*

94. *See Nat’l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 121 (2002). *See generally* Morris, *supra* note 21, at 130 (“It is clear that federal statutes can in certain circumstances be equitably tolled. Importantly, this can happen even without fraud or concealment on the defendant’s part. The courts are willing to apply the equitable construct where fairness so dictates.”).

95. *See Zipes*, 455 U.S. at 397 (quoting *Love v. Pullman Co.*, 404 U.S. 522 (1972)).

96. *Cf. Nat’l R.R. Passenger Corp.*, 536 U.S. at 113 (“Courts may evaluate whether it would be proper to apply such doctrines, although they are to be applied sparingly.”); *Irwin v. Dep’t of Veterans Affs.*, 498 U.S. 89, 90 (1990) (“Federal courts have typically extended equitable relief only sparingly in suits against private litigants . . . .”); *Robinson v. Schafer*, 305 F. App’x 629, 631 (11th Cir. 2008) (per curiam) (noting “the rare remedy of equitable tolling”). As one scholar summarized: “Federal courts often toll the statutory limitations period on a number of bases. Tolling often applies where either: (1) the worker filed suit in the wrong forum; or (2) the worker requested appointment of counsel (tolled during adjudication of eligibility); or (3) the worker asked to proceed as a pauper (tolled during adjudication of eligibility); or (4) the employer concealed relevant facts from the worker; or (5) the EEOC misled the worker. Some federal circuits also toll where (6) the relevant state agency made an error that prevented the worker from filing on time. Others toll where (6) attorney error caused the filing delay; and they may toll where (7) an unsophisticated plaintiff fails to understand filing requirements. Still others toll where (6) the worker filed prematurely in an attempt to preserve her rights; and where (7) the worker, proceeding pro se, was misled by defense counsel about filing requirements.” Rudolph, *supra* note 24, at 137–38 (citations omitted).

97. *Santiago v. SEPTA*, No. 13-5411, 2015 U.S. Dist. LEXIS 64370, at \*19 (E.D. Pa. May 15, 2015) (“(1) where the defendant has actively misled the plaintiff respecting the plaintiff’s cause of action; (2) where the plaintiff in some extraordinary way has been prevented from asserting his or her rights; or (3) where the plaintiff has timely asserted his or her rights mistakenly in the wrong forum.” (quoting *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1387 (3d Cir. 1994), *overruled in irrelevant part by Rotkiske v. Klemm*, 890 F.3d 422, 428 (3rd Cir. 2018) (en banc))).



*Emotional Distress.* One area where the courts have explored the doctrine of equitable tolling in the workplace has been where the employer's conduct is so severe that it has resulted in extreme distress to the employee and an inability to file a timely claim. Victims of sexual harassment may find themselves so badly treated, or even assaulted, that filing a claim within 300 days proves difficult, if not impossible.

In perhaps one of the best-known decisions in this area, *Stoll v. Runyon*,<sup>98</sup> the U.S. Court of Appeals for the Ninth Circuit applied equitable tolling principles to a sexual harassment case brought under Title VII. The plaintiff in that case worked in letter sorting at the Sacramento Post Office for six years.<sup>99</sup> During this time, she was subjected to grotesque sexual abuse by her coworkers and supervisors.<sup>100</sup> Indeed, despite her efforts to avoid him, one supervisor even "raped her repeatedly."<sup>101</sup> The abusive conditions forced the plaintiff to leave her employment with the postal facility.<sup>102</sup> As a result of this conduct, the plaintiff was "scarred for life," suffering severe depression, anxiety, and a pain disorder, and she attempted suicide multiple times.<sup>103</sup> Communication for the plaintiff became difficult, as she developed "anxiety and fear of anything to do with the Post Office,"<sup>104</sup> and it was determined that the plaintiff was "totally psychiatrically disabled."<sup>105</sup>

The plaintiff filed a claim for sexual harassment under Title VII, but she failed to follow the time filing requirements.<sup>106</sup> The court concluded that there was "overwhelming" evidence that equitable tolling should apply, as she had established "wrongful conduct" by the employer, as well as "extraordinary circumstances beyond [her] control" that made filing a timely claim impossible.<sup>107</sup> In applying the doctrine, the court held that "if ever equity demanded tolling a statute of limitations, it does so here,"<sup>108</sup> as the employer "[i]s not entitled to benefit from the fact that its own admittedly outrageous acts left [plaintiff] so broken and damaged that she cannot protect her own rights . . . [plaintiff's] mental incapacity . . . is an

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98. 165 F.3d 1238 (9th Cir. 1999).

99. *Id.* at 1239.

100. *Id.* ("Numerous male coworkers and supervisors asked Stoll to perform oral sex on them, commented on her body, shot rubber bands at her backside, asked her to wear lacy black underwear for them, bumped and rubbed up against her from behind, pressed their erect penises into her back while she was sorting mail and unable to get away, followed her into the women's bathroom, asked her to go on vacations, stalked her throughout the postal facility, and fondled her body.").

101. *Id.* at 1239-40.

102. *Id.* at 1240.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 1241. In this case, the defendant "asserted that Stoll's Title VII claim should be dismissed because Stoll did not file her pro se complaint until more than a year after the [EEOC's] decision letter was received by her counsel, which was well past the 90-day limitation period." *Id.*

107. *Id.* at 1242.

108. *Id.*

‘extraordinary circumstance’ beyond her control.”<sup>109</sup> Thus, in finding the application of equitable tolling appropriate for the plaintiff’s sexual harassment claims, the court emphasized the wrongful nature of the employer’s conduct, the extraordinary circumstances which existed in the case preventing plaintiff from filing a timely claim, as well as the severe emotional distress (and even mental incapacity) that the plaintiff suffered as a result of the actions of the defendant.<sup>110</sup>

In a much more recent case brought in a federal district court in Washington, D.C., the court explained how the equitable tolling doctrine may be applicable to tort-based claims where the employer’s alleged sexual harassment resulted in a worker’s strong emotional distress. In *Kennedy v. Berkel & Co. Contractors, Inc.*,<sup>111</sup> the court examined allegations that the plaintiff, a woman who had secured employment as a laborer with the defendant construction company after previously living in a homeless shelter, was harassed, assaulted, and raped by this employer over the course of her six weeks of employment.<sup>112</sup>

The specific allegations in the case were chilling and involved inappropriate conduct by the superintendent of the construction worksite that included improper non-consensual rubbing and exposure, forced oral sex on multiple occasions, as well as forced penetration.<sup>113</sup> The superintendent terminated the plaintiff and also misrepresented the nature of his interactions with her to other company workers, who openly mocked her when they subsequently encountered the plaintiff.<sup>114</sup> As a result of this conduct and the assaults, the plaintiff began having suicidal thoughts, became severely depressed, and was ultimately hospitalized with a diagnosis of post-traumatic stress disorder.<sup>115</sup> The plaintiff filed numerous claims against the employer approximately twenty-one months after the alleged rape occurred.<sup>116</sup> With respect to the timeliness of these claims, the court declined to dismiss the allegations given the possibility that the plaintiff was “mentally incapacitated for most of the year between the . . . rape and her retention of counsel.”<sup>117</sup> The plaintiff “had trouble performing basic life functions in the aftermath of [the abuse and,] for now at least, these allegations are sufficient to sustain her claims.”<sup>118</sup>

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109. *Id.* (“Equitable tolling is permitted even where a plaintiff has a lawyer if the interests of justice so require and there is no prejudice to the defendant.” (citing *Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd.*, 507 U.S. 380, 397 (1993))).

110. *See id.* at 1242–43. Beyond the plaintiff, the conditions for all women at this postal facility represented “a glaring situation no one should have to endure.” *Id.* at 1240 (internal quotations omitted).

111. *Kennedy v. Berkel & Co. Contractors, Inc.*, 319 F. Supp. 3d 236 (D.D.C. 2018).

112. *Id.* at 241.

113. *Id.* at 242–43.

114. *Id.* at 243.

115. *Id.*

116. *Id.* at 250. While the court here appears to consider the timeliness of tort claims, given the workplace nature of these allegations, the same equitable standards would apply to harassment allegations brought under Title VII.

117. *Id.* at 251.

118. *Id.* at 252.

These two cases certainly present obvious examples of where equitable tolling is appropriate in cases of sexual discrimination under federal law. Nonetheless, while the courts were willing to toll the applicable statutory time period in these decisions, the case law is still replete with other instances where the federal courts have found the evidence insufficient to toll the time periods in hostile work environment cases based on emotional distress.<sup>119</sup>

*Threatening Behavior.* Another area where some courts have been willing to take a flexible approach to the time filing requirements in harassment cases involves those instances where the employer has made direct or indirect threats to the worker. These types of threats can unreasonably prevent victimized workers from seeking appropriate relief with the EEOC or in the courts.

One example of these types of threats occurred in *EEOC v. Willamette Tree Wholesale, Inc.*,<sup>120</sup> a case arising in federal court in Oregon. In that case, one employee worked at Willamette Tree where she was allegedly raped repeatedly by a supervisor of the company.<sup>121</sup> These rapes were violent, and the supervisor “repeatedly threatened to kill and/or harm [the employee] and her family members . . . if she ever reported the rapes to anyone.”<sup>122</sup> This supervisor further threatened to fire some of her coworkers if she reported the assaults, and “if she quit her job he would find her and harm her.”<sup>123</sup> After the termination of her employment, the supervisor continued to call her and “reiterat[e] his threats to harm her and her family should she report the assaults.”<sup>124</sup>

The worker’s discrimination charge filed with the EEOC occurred 362 days following her final day of employment, making the charge untimely.<sup>125</sup> Given the overwhelmingly horrific facts involved, however, the plaintiffs argued that equitable tolling was appropriate.<sup>126</sup> The court accepted this argument, applying the tolling doctrine to the discrimination claim.<sup>127</sup> In reaching this result, the court relied upon the severe emotional and psychological harm caused by the employer,<sup>128</sup> as well as the supervisor’s “repeated threats to harm [her] and her family should she disclose

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119. See, e.g., *Peart v. Latham & Watkins LLP*, 985 F. Supp. 2d 72, 86 (D.D.C. 2013); *Goodman v. Port Auth. of N.Y. & New Jersey*, 850 F. Supp. 2d 363, 382 (S.D.N.Y. 2012); *Springs v. Bd. of Educ.*, No. 10 Civ. 01243(RJH), 2010 WL 4068712, at \*3 (S.D.N.Y. Oct. 14, 2010); *Powers v. United States*, Case No.: 16-13668, 2020 WL 4587415 at \*10 (E.D. Mich. Apr. 6, 2020); *Holt v. City of Dickinson of Tenn.*, No. 3:14-cv-1985, 2015 WL 6619969 at \*4 (M.D. Tenn. Oct. 30, 2015); *Cf. Rudolph, supra* note 24, at 138 (“It is unsurprising . . . that courts regard cases alleging that mental incapacity prevented a timely filing with some skepticism.”).

120. No. CV 09-690, 2011 WL 886402 (D. Or. Mar. 14, 2011).

121. *Id.* at \*2.

122. *Id.*

123. *Id.*

124. *Id.* at \*3.

125. *Id.* at \*6.

126. *Id.* at \*7.

127. *Id.* at \*8.

128. *Id.* (noting that the psychological impact to the victim included “severe depression, post-traumatic stress, suicidal ideation, social isolation and panic attacks, all exacerbated by any reminder of the sexual assaults, including being called upon to report or describe her experiences”).

the sexual assaults to anyone.”<sup>129</sup> In sum, the court looked to the extensive emotional harm caused by the employer, but also relied heavily on specific threats of physical harm made by the supervisor involved, in deciding to pause the statutory filing period under Title VII.

In *Koppman v. South Central Bell Telephone Co.*,<sup>130</sup> the court examined more generally the question of whether employer threats are sufficient to toll the administrative charge filing period for a Title VII employment discrimination claim brought under federal law.<sup>131</sup> In analyzing the question, the court looked to policy rationales to conclude that employer threats should be sufficient to pause the clock for filing a timely claim.<sup>132</sup> The court held that “[t]here is no logical reason to distinguish between a defendant who induces an employee to forgo filing an EEOC claim by misleading her from a defendant who achieves the same end by threatening her.”<sup>133</sup> The court noted that any other result “would encourage potential defendants to threaten potential claimants for six months until their claims prescribe.”<sup>134</sup> Just like in the *Willamette Tree* decision, then, the court was clear that it would be inequitable to reward an employer whose threats caused a plaintiff’s delay in filing a timely employment discrimination claim under Title VII. The court here was even more clear that as a matter of policy, employer threats should be considered as an independent basis for tolling the statutory time filing periods of Title VII so as not to create perverse incentives for employers to engage in this inappropriate conduct.<sup>135</sup>

While not all threats will be deemed sufficient to pause the time filing periods for federal employment discrimination claims, this type of improper employer behavior is an area where the courts have been willing to at least consider equitable tolling.<sup>136</sup> Whether a court would be willing to accept an employer’s threats as sufficient to toll a particular claim would very much depend on the jurisdiction and factual scenario at issue.

*Employer Deception.* As suggested by the *Koppman* decision, one additional area where the courts have looked when considering equitable tolling in the workplace context has been with respect to employer deception and misrepresentations.<sup>137</sup>

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129. *Id.* The court also found it important that the victim “was at all material times a monolingual, illiterate Spanish speaker unrepresented by legal counsel.” *Id.*

130. No. 90-4503, 1992 U.S. Dist. LEXIS 9115 (E.D. La. June 16, 1992).

131. *See id.* at \*36–37.

132. *Id.* at \*37–38.

133. *Id.* at \*37.

134. *Id.* at \*37–38.

135. *Id.*

136. *See, e.g.,* Chawla v. Emory Univ., No. Civ. A. 95CV0750JOF, 1997 WL 907571, at \*4 (N.D. Ga. Mar. 31, 1997); *see also* Moses v. Phelps Dodge Corp., 818 F. Supp. 1287, 1290 (D. Ariz. 1993).

137. *Koppman*, 1992 U.S. Dist. LEXIS 9115, at \*37 (“The typical equitable estoppel scenario is where the defendant misleads the plaintiff or conceals facts so as to cause the plaintiff not to assert her rights within the statutory period . . . where the employer causes the employee to file late, modification

These types of cases typically involve an employer's intentional misrepresentation(s)<sup>138</sup> to an employee which causes or encourages the worker to miss the relevant time filing deadline under the employment discrimination statute.<sup>139</sup> It has long been recognized that tolling may be appropriate "where the facts show that the defendant engaged in conduct, often itself fraudulent, that concealed from the plaintiff the existence of the cause of action."<sup>140</sup> If the courts allowed this form of deception, it would only encourage this type of unlawful employer behavior.<sup>141</sup> As Justice Black famously stated, "no man may take advantage of his own wrong . . . equity courts [have] frequently been employed to bar inequitable reliance on statutes of limitation."<sup>142</sup> Employer deception and misrepresentations are thus among the more common areas where the courts have accepted the doctrine of equitable tolling for Title VII employment discrimination claims.

For example, in *Reeb v. Economic Opportunity Atlanta, Inc.*,<sup>143</sup> the federal appellate court held that the statutory period<sup>144</sup> for a Title VII employment discrimination claim did not begin "until the facts that would support a charge of discrimination under Title VII were apparent to a person with a reasonably prudent regard for his rights similarly situated to the plaintiff."<sup>145</sup> The court's analysis focused on the impact of potential deception and misleading statements, noting that "employers that discriminate undoubtedly often attempt to cloak their policies with a semblance of rationality," and this improper conduct may thus "seek to convey to the victim of their policies an air of neutrality or even sympathy."<sup>146</sup> It is therefore possible that this conduct might "extend to the giving of misleading or false information to the victim."<sup>147</sup> The court was clear that where the allegations involve the "wrongful concealment of facts," an employer that is "responsible for such wrongful concealment is estopped from asserting the statute of limitations as a defense."<sup>148</sup>

In a similar case, *Santiago v. SEPTA*,<sup>149</sup> the plaintiff in the matter, a female lieutenant working for the state transit police, asserted that her supervisor "climbed

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of the filing requirement is necessary to effect the remedial purpose of the employment discrimination statutes.").

138. *See id.*

139. *See id.*

140. *Cerbone v. Int'l Ladies' Garment Workers' Union*, 768 F.2d 45, 48 (2d Cir. 1985).

141. *See Koppman*, 1992 U.S. Dist. LEXIS 9115.

142. *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 232–33 (1959).

143. 516 F.2d 924 (5th Cir. 1975).

144. In this particular case at the time, the relevant statutory period was ninety days. *Id.* at 926.

145. *Id.* at 931. In the case, the plaintiff argued that her employer "actively sought to mislead her," and that "the facts that would alert a reasonable person to the unlawful discrimination only became known to the plaintiff more than six months after the discriminatory act." *Id.* at 930.

146. *Id.* at 931.

147. *Id.*

148. *Id.* at 930.

149. No. 135411, 2015 U.S. Dist. LEXIS 64370 (E.D. Pa. May 15, 2015).

on top of her, groping and kissing her.”<sup>150</sup> She further alleged that subsequent workplace abuse by this supervisor included “unwanted touching and groping, and nonconsensual sexual intercourse.”<sup>151</sup> The plaintiff raised the matter with the Director of the agency’s EEO office, who the plaintiff alleged had “misled” her by not “explaining the consequences of not filing” a discrimination charge with the state and federal government.<sup>152</sup> The court concluded that the EEOC director’s information given to the plaintiff was “best characterized as a misrepresentation of omission—that is, [the Director] told Plaintiff that she could file, which was true, but did not tell her the critical detail that she must file if she wanted to preserve her statutory rights.”<sup>153</sup> Thus, according to the court, it was a reasonable inference that this information “actively misled Plaintiff, causing her to believe she had no need to preserve her claims outside of [the agency’s] own process.”<sup>154</sup> The court therefore agreed to equitably toll the time filing period as a result of the misleading statements provided to the plaintiff with respect to the proper charge filing requirements.<sup>155</sup>

Like *Reeb* and *Santiago*, numerous other courts have made clear that deceptive practices or material misrepresentations may be sufficient to toll the statutory time file period in discrimination cases.<sup>156</sup>

Where misrepresentation or deception have been found sufficient to toll the statute, courts often apply a discovery rule in determining how long the statutory time filing period should pause.<sup>157</sup> Under this rule, the statute of limitations would

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150. *Id.* at \*1. This case also involved threatening behavior, as “Plaintiff told [her supervisor] that she wanted to report this incident, but he told her that if she did so, she ‘would no longer have a job.’” *Id.*

151. *Id.* at \*3.

152. *Id.* at \*20. The court emphasized that the “critical question” was whether the EEO Director “‘actively misled’ Plaintiff by telling her that she could file a claim with the EEOC and PHRC if she wanted to and by failing to explain to her the consequences of not filing such a claim.” *Id.*

153. *Id.* at \*20.

154. *Id.* at \*21. The court expressly held that by examining “these facts in the light most favorable to Plaintiff, a reasonable jury could find that McKenzie’s statement—though less active than other misleading statements might have been—was indeed a misrepresentation that directly led Plaintiff to believe she had no need to file a claim with outside agencies.” *Id.* at \*20–21.

155. *Id.* The tolling question in this particular case looked at claims brought under Pennsylvania state law. *Id.* at \*2–4.

156. *See, e.g.,* *Jense v. Runyon*, 990 F. Supp. 1320, 1327 (D. Utah 1998) (“[Plaintiff] has created a material factual dispute over whether she is entitled to equitable tolling given that the written posters did not contain the information required by regulation and, in the case of [the] sexual harassment poster, may have been affirmatively misleading.”); *Biester v. Midwest Health Servs., Inc.*, 77 F.3d 1264, 1267 (10th Cir. 1996) (“[T]he Tenth Circuit has generally recognized equitable tolling of Title VII time limitations only if the circumstances of the case rise to the level of active deception which might invoke the powers of equity to toll the limitations period.”); *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1391–92 (3d Cir. 1994), *aff’d*, 96 F.3d 1434 (3d Cir. 1996) (“A fair reading of [plaintiff’s] complaint is that she claims that the firm told her there was no work when ‘apparently there was . . .,’ a fact which she learned for the first time much later . . . these allegations, taken as true . . . are sufficient to activate the doctrine of equitable tolling.”).

157. Justice Ginsburg opined on the distinction between equitable tolling and “the fraud-based discovery rule.” *Rotkiske v. Klemm*, 140 S. Ct. 355, 363 (2019) (Ginsburg, J., dissenting). She stated that “[e]quitable tolling” describes a doctrine that pauses, or ‘tolls,’ a statutory limitations period after

not start to run in an employment discrimination case “until the facts which would support the plaintiff’s cause of action are apparent, or should be apparent to a person with a reasonably prudent regard for his or her rights.”<sup>158</sup> Thus, tolling of the relevant statute would continue until the plaintiff discovered the facts necessary to support the cause of action or until a reasonable person would have recognized that they had a viable claim.<sup>159</sup> This discovery rule is an equitable modification of the time filing periods in discrimination cases.<sup>160</sup>

### III. THE FIVE GUIDEPOSTS OF EQUITABLE TOLLING

Despite the cases discussed above, the federal courts have declined to apply the doctrine of equitable tolling to sexual harassment claims in the overwhelming number of instances where it has been sought.<sup>161</sup> In light of what we now know from the #MeToo movement, and the extraordinary efforts made by employers to

it has commenced. . . . By contrast, the fraud-based discovery rule sets the time at which a claim accrues, i.e., the time when the statute of limitations commences to run.” *Id.* at 363–64 (citations omitted). Though Justice Ginsburg was correct that the two theories “are often blended or confused,” *id.* at 363, they are used synonymously in this paper which looks primarily at which indicia or guideposts the courts should be looking to when considering whether a Title VII claim should be considered timely. *See infra* Part IV (discussing factors for courts to consider when applying time deadlines in harassment cases).

158. *Oshiver*, 38 F.3d at 1389. The court noted that a number of other federal appellate courts had taken the same approach in applying the discovery rule to tolling in cases involving misrepresentation by a defendant, citing *Reeb v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924 (5th Cir. 1975), *Vaught v. Railroad Donnelley & Sons Co.*, 745 F.2d 407, 410–12 (7th Cir. 1984), *Wilkerson v. Siegfried Insurance Agency, Inc.*, 683 F.2d 344, 345–46 (10th Cir. 1982), and *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1531–32 (11th Cir. 1992).

159. *See, e.g., Oshiver*, 38 F.3d at 1389 (“[W]here the plaintiff has been actively misled regarding the reason for his or her discharge, the equitable tolling doctrine provides the plaintiff with the full statutory limitations period, starting from the date the facts supporting the plaintiff’s cause of action either become apparent to the plaintiff or should have become apparent to a person in the plaintiff’s position with a reasonably prudent regard for his or her rights.”); *Brown v. Lankenau Hosp.*, No. 95-7829, 1996 WL 257353, at \*5 (E.D. Pa. May 14, 1996) (“[B]y giving Plaintiff false information about the availability of positions . . . Defendant’s actions equitably tolled the limitations period. Equitable tolling of the limitations period is appropriate where the employer’s own acts lulled plaintiff into foregoing prompt action on his/her claim.”).

160. *Cf. Rotkiske v. Klemm*, 140 S. Ct. 355, 363 (2019) (“[T]his Court long ago ‘adopted as its own the old chancery rule that where a plaintiff has been injured by fraud and remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute [of limitations] does not begin to run until the fraud is discovered. . . . [T]he fraud-based discovery rule operates as a statutory presumption ‘read into every federal statute of limitation.’” (alteration in original) (internal quotation marks omitted) (quoting *Holmberg v. Armbrrecht*, 327 U.S. 392, 397 (1946) (citing *Bailey v. Glover*, 21 Wall. 342, 347, 22 L. Ed. 636 (1875))); *TRW, Inc. v. Andrews*, 534 U.S. 19 (2001) (declining to apply discovery rule to 15 U.S.C. § 1681(a)).

161. *See, e.g., Miller v. Downtown Bid Servs. Corp.*, 281 F. Supp. 3d 15, 22 (D.D.C. 2017); *Shareef v. McHugh*, No. 16-00509 ACK-KJM, 2017 WL 754326, at \*8 (D. Haw. Feb. 27, 2017); *Sapienza v. Castellon*, No. 14-974-LPS, 2016 WL 1212132, at \*4–5 (D. Del. Mar. 28, 2016); *Hentosh v. Herman M. Finch Univ. of Health Scis./Chi. Med. Sch.*, 167 F.3d 1170, 1175 (7th Cir. 1999); *Dyson v. D.C.*, 710 F.3d 415, 422 (D.C. Cir. 2013); *Newell v. Mnuchin*, No. 17-2695, 2020 WL 136648, at \*24 (D.D.C. Jan. 13, 2020); *Byrd v. D.C.*, 807 F. Supp. 2d 37, 61 (D.D.C. 2011); *Belton v. City of Charlotte*, 175 F. App’x 641, 654 (4th Cir. 2006); *Huff v. Bd. of Governors of N.C.*, 334 F. App’x 583, 584 (4th Cir. 2009).

conceal their own harassment, this result must change. As the courts in this country recognized early on, “the essence of the doctrine [of equitable tolling] ‘is that a statute of limitations does not run against a plaintiff who is unaware of his cause of action.’”<sup>162</sup> Even the earliest decisions in this area generally acknowledged that

when there has been no negligence or laches on the part of a plaintiff in coming to the knowledge of the fraud which is the foundation of the suit, and when the fraud has been concealed, or is of such character as to conceal itself, the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing.<sup>163</sup>

The #MeToo movement has revealed the true nature of the unlawful conduct of employers, and these same employers should not be permitted to benefit from their improper actions by concealing or running out the clock on hostile work environment claims.

This Part explores the origins of the #MeToo movement, as well as the recent research related to sexual harassment claims. This Part further identifies several core guideposts that the courts should look to when determining whether to apply equitable tolling to a harassment charge filed outside of the statutorily prescribed period.

#### *A. The #MeToo Movement*

Much has been written on the #MeToo movement, and scholars continue to produce important and critical academic literature with respect to sexual harassment in the workplace.<sup>164</sup> This Article cannot review all that valuable work, but it is important to briefly examine the overarching purposes of the #MeToo movement—and where we are today—for purposes of the analysis here.

While sexual harassment has long been a persistent problem in this country,<sup>165</sup> the #MeToo movement is much more recent.<sup>166</sup> This movement grew on social

162. *Serdarevic v. Advanced Med. Optics, Inc.*, 532 F.3d 1352, 1363 (Fed. Cir. 2008) (alteration in original) (internal quotation marks omitted) (citation omitted) (quoting *Cerbone v. Int’l Ladies’ Garment Workers Union*, 768 F.2d 45, 48 (2d Cir. 1985)).

163. *Bailey v. Glover*, 88 U.S. 342, 349–50 (1874); *Morris*, *supra* note 21, at 124 (citing *Bailey*, 88 U.S. 342); *McGovern*, *supra* note 27, at 806 (citing *Bailey*, 88 U.S. 342).

164. See generally Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L.J.F. 22 (2018); Deborah Tuerkheimer, *Beyond #MeToo*, 94 N.Y.U. L. REV. 1146 (2019); Deborah L. Rhode, *#MeToo: Why Now? What Next?*, 69 DUKE L.J. 377 (2019); Elizabeth C. Tippett, *The Legal Implications of the MeToo Movement*, 103 MINN. L. REV. 229 (2018); Jean R. Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where To, #MeToo?*, 54 HARV. C.R.-C.L. L. REV. 155 (2019).

165. See, e.g., Reva B. Siegel, *Introduction: A Short History of Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 1, 3 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004) (“The practice of sexual harassment is centuries old—at least, if we define sexual harassment as unwanted sexual relations imposed by superiors on subordinates at work.”).

166. See *Elliott v. Donegan*, 469 F. Supp. 3d 40, 51 (E.D.N.Y. 2020) (“#MeToo catapulted into the public’s consciousness in October 2017.”); *Hardwick v. Ind. Bell Tel. Co., Inc.*, No. 15-cv-01161-JMS-DML, 2018 WL 4620252, at \*15 (S.D. Ind. Sept. 26, 2018) (“In early October 2017 #MeToo became an internet phenomenon, a ‘viral awareness campaign that inspired millions of



media as a way of spreading awareness about sexual harassment, as well as sexual assault and abuse.<sup>167</sup> One of the primary purposes of this important campaign involved the workplace component of sexual harassment, which included both employees' experiences with hostile work environments as well as with sexual assaults.<sup>168</sup> While the #MeToo movement has seen headlines related to a number of high-profile celebrities, including Alyssa Milano, Reese Witherspoon and Jennifer Lawrence,<sup>169</sup> hundreds of thousands of women have added their voices to this movement in recent months, and stories of widespread sexual assault have reached all corners of the economy.<sup>170</sup> Indeed, the #MeToo movement quickly expanded beyond the United States to all parts of the world.<sup>171</sup> While the entertainment, technology, and banking sectors are some of the more prevalent areas where sexual discrimination and harassment are found in the workplace, all industries have faced valid criticism for failing to appropriately respond to hostile work environment claims.<sup>172</sup> Though the #MeToo movement started out primarily

posts on Facebook and Twitter' after dozens of women spoke out against the sexual misconduct of Harvey Weinstein." (quoting Abby Ohlheiser, *Meet the Woman Who Coined 'Me Too' 10 Years Ago - to Help Women of Color*, CHI. TRIB. (Oct. 19, 2017, 11:55 AM), <https://www.chicagotribune.com/lifestyles/ct-me-too-campaign-origins-20171019-story.html> [<http://web.archive.org/web/20210628085754/https://www.chicagotribune.com/lifestyles/ct-me-too-campaign-origins-20171019-story.html>])). In 2006, Tarana Burke founded the 'me too.' movement to help survivors of sexual violence heal. *See History & Inception*, ME TOO., <https://metoomvmt.org/get-to-know-us/history-inception/> [<https://perma.cc/Q4JK-NECE>] (last visited Feb. 12, 2022) (describing Tarana Burke's work centering survivors and "disrupt[ing] the systems that allow sexual violence to proliferate in our world."). The #MeToo hashtag became popular much later following a tweet from Alyssa Milano. *See generally* Tarana Burke, *I Founded 'Me Too' in 2006. The Morning It Went Viral Was a Nightmare*, TIME (Sept. 14, 2021, 2:51 PM), <https://time.com/6097392/tarana-burke-me-too-unbound-excerpt/> [<https://web.archive.org/web/20220126013840/https://time.com/6097392/tarana-burke-me-too-unbound-excerpt/>].

167. *See, e.g.*, Elliott, 469 F. Supp. 3d at 51–52 ("On October 15, 2017, actor Alyssa Milano wrote on Twitter, 'if you've been sexually harassed or assaulted write "me too" as a reply to this tweet.' Within days, thousands heeded her call. And thus, the voices of few became many, and the #MeToo movement became a chorus bolstering the credibility of victims of sexual assault and harassment.").

168. *See* Bonnie Marcus, *What Women Can Do to Successfully Navigate the Workplace Post #MeToo*, FORBES (June 13, 2019, 1:45 PM), <https://www.forbes.com/sites/bonniemarcus/2019/06/13/what-women-can-do-to-successfully-navigate-the-workplace-post-metoo/#12aeb1a64e95> [<https://perma.cc/3WUV-6AGA>] ("Since the resurgence of #MeToo in 2017, there has been a lot of media attention to the issue of sexual harassment and abuse in the workplace.").

169. *See, e.g.*, Joyce Chen, *Alyssa Milano Wants Her "Me Too" Campaign to Elevate Harvey Weinstein Discussion*, ROLLING STONE (Oct. 17, 2017, 5:05 PM), <https://www.rollingstone.com/movies/movie-news/alyssa-milano-wants-her-me-too-campaign-to-elevate-harvey-weinstein-discussion-123610/> [<https://perma.cc/7K4M-JLMQ>] (discussing celebrity involvement in the #MeToo movement).

170. *See* Benedetta Faedi Duramy, *#MeToo and the Pursuit of Women's International Human Rights*, 54 U.S.F. L. REV. 215, 217 (2020) ("Within twenty-four hours, the hashtag had been posted nearly a million times.").

171. *See* Catherine Powell, *How #MeToo Has Spread Like Wildfire Around the World*, NEWSWEEK (Dec. 15, 2017, 8:00 AM), <https://www.newsweek.com/how-metoo-has-spread-wildfire-around-world-749171> [<https://perma.cc/KP3E-2XS2>] ("Besides hitting Hollywood, media, politics, national security, and other sectors, the movement has rapidly spread across the world—a mirror of the numerous women's marches across the globe this past January. By early November, #MeToo had been tweeted 2.3 million times from eight[y]-five different countries.").

172. *See generally id.*

as a way for women to raise these concerns, many men—including several celebrities—have also added their voices.<sup>173</sup>

Fundamentally, the #MeToo movement began as a way for women to share their experiences with sexual abuse, thereby allowing others to feel more comfortable speaking out as well, and to spread awareness of how deep of a problem sexual harassment and assault have been—and continue to be—in our society.<sup>174</sup> Indeed, it was estimated that “in its first six months the #MeToo movement led to the reporting of 26,371 additional sex crimes.”<sup>175</sup> All industries have proven to be woefully problematic in this area, and prior to #MeToo, there was an unfortunate lack of understanding of the hostile experiences women were encountering every day at work in this country and around the world.<sup>176</sup>

At its core, then, #MeToo has performed several important functions, perhaps the most critical of which has been educational in nature.<sup>177</sup> By raising awareness across the board on this issue, both men and women now have a much better understanding and grasp of the problem, though much work remains to be done in this area. Importantly, employees now are aware that they are not alone when they face harassment, and workers across all sectors of the economy have weighed in to share their experiences with this type of abuse. Through education and awareness, #MeToo has done much to change the way our society and culture view sexual harassment in the workplace.<sup>178</sup> Recent research has even demonstrated

173. See, e.g., Mahita Gajanan, ‘This Happened to Me Too.’ Terry Crews Details His Alleged Sexual Assault During Emotional Senate Testimony, TIME (June 26, 2018, 4:18 PM), <https://time.com/5322629/terry-crews-sexual-assault-senate-committee/> [<https://web.archive.org/web/20210514155653/https://time.com/5322629/terry-crews-sexual-assault-senate-committee/>] (“Crews said . . . ‘And I chose to tell my story and share my experience to stand in solidarity with millions of other survivors around the world. That I know how hard it is to come forward. I know the shame associated with the assault.’”).

174. See Duramy, *supra* note 170, at 217 (describing early stages of the #MeToo movement).

175. Ro’ee Levy & Martin Mattsson, The Effects of Social Movements: Evidence from #MeToo 23 (August 6, 2021) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3496903](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3496903) [<https://perma.cc/Y4P7-AJU4>]. See Mark Morales, #MeToo Cited as One Reason Rape Reports Increased 22% in New York in 2018, CNN (Jan. 3, 2019, 7:07 PM) (“Reports of rape in New York were up 22% in 2018, in part because the #MeToo movement inspired victims to come forward and tell their stories.”), <https://www.cnn.com/2019/01/03/us/nypd-crime-stats-briefing/index.html> [<https://perma.cc/HKU6-BEB5>].

176. See Sarah Beaulieu, 4 Conversations Leaders in the #MeToo Era Should Be Ready For, HARV. BUS. REV. (Aug. 12, 2020), <https://hbr.org/2020/08/4-conversations-leaders-in-the-metoo-era-should-be-ready-for> [<https://perma.cc/8CCK-ARX7>] (“The #MeToo movement broke the silence on sexual harassment in the workplace, inspiring leaders in every industry to reckon with their organization’s culture—and their own behavior—to build a work environment that’s safe and supportive for everyone.”).

177. See Alia E. Dastagir, *It’s Been Two Years Since the #MeToo Movement Exploded. Now What?*, USA TODAY (Sept. 30, 2019, 6:00 AM) <https://www.usatoday.com/story/news/nation/2019/09/30/me-too-movement-women-sexual-assault-harvey-weinstein-brett-kavanaugh/1966463001/> [<https://perma.cc/XWW4-XGSE>] (“Houser, of the National Sexual Violence Resource Center, said the biggest impact of #MeToo is decreased stigma and increased awareness.”).

178. See Anna North, 7 Positive Changes that Have Come from the #MeToo Movement, VOX (Oct. 4, 2019, 7:00 AM), <https://www.vox.com/identities/2019/10/4/20852639/me-too-movement->

that “awareness-raising campaigns can have a large effect on the reporting of sexual crimes,”<sup>179</sup> and many acts of harassment can also be criminal in nature.

There have been different responses by industry to this persistent problem, including enhanced training, increased policy measures, and new complaint processes that have been introduced and implemented in the workplace.<sup>180</sup> However, what now remains clear is the broad extent to which harassment continues to be a problem. Indeed, countless recent studies have shown just how broad-based sexual harassment continues to be in the workplace.<sup>181</sup> The #MeToo movement has also shown us the extent to which companies and industries will go to cover up harassment, both legally and otherwise. Prior to this movement, women in all workplaces were largely unaware of the extent of the problem and many often felt isolated and alone when they were subjected to a hostile work environment.<sup>182</sup> This is no coincidence. Through nondisclosure agreements, arbitration clauses, and out-of-court, non-public settlements, companies have been extremely effective in keeping claims of harassment quiet over the years.<sup>183</sup> Indeed, there has been enormous pressure on corporate America to change these policies, and some high-profile companies have even done so in recent months.<sup>184</sup> But, not all measures have been legal in nature. Numerous workers have shared, and some cases have revealed, that many supervisors and employers have resorted to physical and

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sexual-harassment-law-2019 [https://perma.cc/XA3F-P39V] (“One of the biggest effects of the #MeToo movement has been to show Americans and people around the world how widespread sexual harassment, assault, and other misconduct really are. As more and more survivors spoke out, they learned they were not alone. And people who had never had cause to think about sexual harassment before suddenly saw how much it had affected their coworkers, children, parents, and friends.”).

179. Levy & Mattsson, *supra* note 175, at 5.

180. See North, *supra* note 178 (describing different impacts of the #MeToo movement). Indeed, on the federal level, there have been efforts to pass legislation in this area, though these attempts have largely failed. See BE HEARD in the Workplace Act, H.R. 2148, 116th Cong. (2019); see also BE HEARD in the Workplace Act, S. 1082, 116th Cong. (2019).

181. See, e.g., HOLLY KEARL, NICOLE E. JOHNS, & ANITA RAJ, MEASURING #METOO: A NATIONAL STUDY ON SEXUAL HARASSMENT & ASSAULT 10 (2019), <http://www.stopstreetharassment.org/wp-content/uploads/2012/08/2019-MeToo-National-Sexual-Harassment-and-Assault-Report.pdf> [https://perma.cc/2C2U-6D4U] (noting thirty-eight percent of women reporting sexual harassment at place of employment).

182. See Stefanie K. Johnson, Ksenia Keplinger, Jessica F. Kirk, & Liza Barnes, *Has Sexual Harassment at Work Decreased Since #MeToo?*, HARV. BUS. REV. (July 18, 2019), <https://hbr.org/2019/07/has-sexual-harassment-at-work-decreased-since-metoo> [https://perma.cc/5LHJ-74E2] (“Social psychological theories suggest that stigmatizing experiences, like sexual harassment, can be very damaging to self-esteem, especially because the stigmatized individuals fear that they are alone and share in the blame for their mistreatment.”).

183. Tippet, *supra* note 164, at 263 (“Non-disclosure provisions can prohibit the employee from revealing the amount of the settlement, discussions leading up to the settlement, the fact of the settlement agreement, or even the facts giving rise to the dispute.”); See Sternlight, *supra* note 162, at 181 (“Critics have long worried that requiring employees to arbitrate rather than litigate claims will undermine the force of law not only by suppressing claims, but also by requiring claims to be heard privately and limiting easy access to precedent.”).

184. See Sternlight, *supra* note 164, at 204 (“Microsoft ended its use of forced arbitration clauses with respect to sexual harassment claims in December 2017. Similarly, Uber and Lyft have now ended forced arbitration of sexual harassment and assault claims.”).

psychological threats to keep workers quiet; in some instances, workers have even been physically abused.<sup>185</sup>

Over a hundred years ago, the U.S. Supreme Court reminded us of the “almost universal” principle that a statutorily established time period “shall not begin to run until the discovery of the fraud.”<sup>186</sup> Because of #MeToo, we now know the extent to which fraud, sexual abuse, and hostile work environments have been improperly concealed by employers for years around the country. It is true that the courts, including the Supreme Court, have been quite clear since the inception of equitable tolling that this doctrine does not provide the opportunity for a litigant to “inexcusably sl[eep] on his rights.”<sup>187</sup> However, the #MeToo movement provides us with definitive evidence that we remain miles away from this concern with respect to hostile work environment claims, where employers have often actively concealed their wrongful conduct.

Applying this doctrine in the workplace context decades ago to the Federal Employers’ Liability Act,<sup>188</sup> the Supreme Court held that under the facts of the case, the time limitation of the statute should be tolled when fully “considering the Act’s ‘humane and remedial’ purposes.”<sup>189</sup> In that case, like in situations we often face today, the importance of rigidly applying a statute of limitations was “frequently outweighed . . . where the interests of justice require vindication of the plaintiff’s rights.”<sup>190</sup> Justice now requires a closer look at how the courts examine the timing restrictions in hostile work environment claims.

### B. Guideposts for Tolling Title VII

This Article does not propose any type of congressional intervention over the statutory time deadlines for employment discrimination claims, though others have long pointed to the flaws inherent in Title VII’s extraordinarily short charge filing

185. See Beverly Engel, *Why Don’t Victims of Sexual Harassment Come Forward Sooner*, PSYCH. TODAY: THE COMPASSION CHRONICLES BLOG (Nov. 16, 2017), <https://www.psychologytoday.com/us/blog/the-compassion-chronicles/201711/why-dont-victims-sexual-harassment-come-forward-sooner> [<https://perma.cc/BTY6-EEZK>] (“[W]e have evidence from recent events to validate that fear. Sexual harassers frequently threaten the lives, jobs, and careers of their victims. And many victims are frightened by the perpetrator’s position of power and what he could do with it. Those who have reported sexual harassment or assault, especially by powerful men, have reported that they lost their jobs, and that their careers or reputations have been destroyed.”).

186. *Expl. Co. v. United States*, 247 U.S. 435, 449 (1918). See generally *Holmberg v. Armbrrecht*, 327 U.S. 392, 397 (1946) (“[T]his Court long ago adopted as its own the old chancery rule that where a plaintiff has been injured by fraud and ‘remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.’” (quoting *Bailey v. Glover*, 88 U.S. 342, 348 (1874)) (citing *Exploration*, 247 U.S. 435; *Sherwood v. Sutton*, 21 F. Cas. 1303, 1307 (C.C.D.N.H. 1828) (No. 12,782))).

187. *Holmberg*, 327 U.S. at 396 (1946) (citing *Russell v. Todd*, 309 U.S. 280, 289 (1940)).

188. 45 U.S.C. §§ 51–60 *et seq.* (2012).

189. *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 427–28 (1965).

190. *Id.* at 428.

period.<sup>191</sup> This Article also does not argue for a change in the way courts have defined equitable tolling. Indeed, the federal courts have largely developed their own tests on the applicability of equitable tolling.<sup>192</sup> Rather, this Article seeks to identify several core areas where the courts should hesitate prior to dismissing a harassment claim on timeliness grounds. While all harassment cases deserve close consideration, there are certain guideposts the courts should look to before rejecting a hostile work environment claim filed outside of the statutorily prescribed period.

What is clear from the case law is that it is critically important to engage in a careful factual analysis before rejecting a federal sexual harassment claim based on a failure to satisfy Title VII's time deadlines. As one federal court addressing a sexual harassment claim properly surmised, the “cases indicate a detailed factual inquiry is necessary to determine whether equitable tolling should be applied [and] additional discovery [in the matter before the court] is required.”<sup>193</sup> This is true in all hostile work environment cases.

As discussed, the #MeToo movement has made profound progress in bringing awareness to the problems of sexual harassment and abuse that occur every day in workplaces across the country.<sup>194</sup> We know far more today than we did just a few short years ago about the true nature of these issues and the pervasive extent to which sexual harassment has invaded our employment culture. Importantly, this movement has also brought into the open the extent to which corporate America and many individuals cloaked with supervisory authority have both participated in the harassment and gone to great lengths to cover it up.<sup>195</sup> This movement has done much to disrupt these concealment efforts by businesses,<sup>196</sup> though there is far more

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191. See generally Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859 (2008); Heydemann & Tejani, *supra* note 59, at 75–76; Ronald Turner, *Pliable Precedents, Plausible Policies, and Lilly Ledbetter's Loss*, 30 BERKELEY J. EMP. & LAB. L. 336 (2009).

192. See, e.g., *Steiner v. Henderson*, 354 F.3d 432, 435 (6th Cir. 2003) (“In considering whether equitable tolling should apply, we generally look at five factors: (1) whether the plaintiff had actual notice of the time constraints; (2) whether she had constructive notice of the time constraint; (3) the degree of diligence exerted in pursuing her rights; (4) the degree of prejudice to the defendant; and (5) the reasonableness of plaintiff's ignorance of the time constraint.”); *Zerilli-Edelglass v. N.Y.C. Transit Auth.*, 333 F.3d 74, 80–81 (2d Cir. 2003) (setting forth similar test in Second Circuit); *Jobe v. Immigr. & Nationalization Serv.*, 238 F.3d 96, 100 (1st Cir. 2001) (setting forth similar test in First Circuit).

193. *Delmar v. Raytheon Aircraft Corp.*, No. 96–1002–JTM, 1996 U.S. Dist. LEXIS 12913, at \*19 (D. Kan. Aug. 9, 1996). See *id.* at \*13–19 (outlining employment discrimination cases on equitable tolling in this area).

194. See *supra* Section II.A. (discussing the history and role of the #MeToo movement in our society).

195. See, e.g., Tiffany Hsu & Mohammed Hadi, *Wynn Leaders Helped Hide Sexual Misconduct Allegations Against Company's Founder, Report Says*, N.Y. TIMES (Apr. 2, 2009), <https://www.nytimes.com/2019/04/02/business/wynn-resorts-sexual-misconduct-steve-wynn.html> [<https://perma.cc/C4WK-ULUY>]; Tippet, *supra* note 164, at 234 (“The MeToo movement also revealed the ways in which the law can be misused to enable and conceal harassment.”).

196. See generally Jena McGregor, *New Database Aims to Expose Companies that Make Employees Arbitrate Sexual Harassment Claims*, WASH. POST (Feb. 27, 2020), <https://>

to do. The research in this area now clearly demonstrates the lengths employers have gone to prevent workers and the public from gaining a true understanding of the abusive cultures that exist in the workplace.<sup>197</sup> While these efforts may often be undertaken to prevent public-relations crises, they have also had a chilling effect on the ability of victims to successfully bring harassment claims in the courts.

Indeed, the intentional, and highly successful, efforts made by businesses to stall or prevent these claims have had adverse effects on sexual harassment victims across the country. A company need only run out the short clock—180 or 300 days depending upon the state—to forever prevent a plaintiff from obtaining the proper statutory remedies for the abuse.<sup>198</sup> As one recent study by the EEOC revealed, “[r]oughly three out of four individuals who experienced harassment never even talked to a supervisor, manager, or union representative about the harassing conduct.”<sup>199</sup>

The #MeToo movement has made clear that the short statutory time filing periods can be unfair. We now have an awareness that previously did not exist about the extent of this problem, and the federal courts have a corresponding duty to more aggressively intervene and “locate ‘a just result’ in light of the circumstances peculiar to the case.”<sup>200</sup> The courts have a further duty to step in to enforce the “humane and remedial” purposes of the legislation.<sup>201</sup> As recent data have demonstrated, sexual crimes as a whole have tended to go underreported, and even where sufficiently alleged, there is often a delay in reporting.<sup>202</sup> There are numerous valid reasons why these crimes are not alleged—or that it takes a longer period of time for a victim to bring the allegations—and many of the same concerns of sexual assault victims apply in the hostile work environment context.<sup>203</sup>

[www.washingtonpost.com/business/2020/02/27/new-database-reveals-which-companies-prevent-employees-filing-sexual-harassment-lawsuits/](http://www.washingtonpost.com/business/2020/02/27/new-database-reveals-which-companies-prevent-employees-filing-sexual-harassment-lawsuits/) [https://perma.cc/5E9M-ESS5].

197. See, e.g., Heidi Lynne Kurter, *4 Things You Didn't Know About Non-Disclosure Agreements*, FORBES (Jan. 21, 2020, 8:55 PM), <https://www.forbes.com/sites/heidilynnekurter/2020/01/21/4-things-you-didnt-know-about-non-disclosure-agreements/#428346897c12> [https://perma.cc/8B3Z-CDTL] (“Companies from all industries are being exposed for their corrupt NDA practices to cover up hostile work environments. High-profile cases such as Fox News, NBC Universal, Binary Capital and the Weinstein Company, to name a few, have demonstrated the abuse of NDAs to conceal bullying, harassment, discrimination and toxic workplace cultures.”).

198. 29 U.S.C. §§ 626, 633.

199. CHAI R. FELDBLUM & VICTORIA A. LIPNIC, U.S. EQUAL EMP. OPPORTUNITY COMM’N, REPORT OF THE CO-CHAIRS OF THE EEOC SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE (2016), [https://www.eeoc.gov/sites/default/files/migrated\\_files/eeoc/task\\_force/harassment/report.pdf](https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf) [https://perma.cc/7DW3-W8V2].

200. Nat’l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 121 (2002) (quoting Albemarle Paper Co. v. Moody, 422 U.S. 405, 424–25 (1975)).

201. Burnett v. N.Y. Cent. R.R., 380 U.S. 424, 427 (1965).

202. See W. David Allen, *The Reporting and Underreporting of Rape*, 73 S. ECON. J. 623 (2007), [www.jstor.org/stable/20111915](http://www.jstor.org/stable/20111915) [https://perma.cc/NKA5-JDD4] (addressing underreporting of sexual abuse); Levy & Mattsson, *supra* note 175, at 29 (discussing recent data on sexual crimes); Morales, *supra* note 175 (discussing the potential impact of the #MeToo movement on reporting).

203. Cf. Levy & Mattsson, *supra* note 175, at 5–6 (“Underreporting of sexual misconduct is a serious global problem. . . [A]mong eight countries . . . only 15% of sexual assaults were reported to

The way that the courts can enforce the remedial provisions of Title VII, and in which they can achieve a just result and honor the humane purposes of the federal employment discrimination provisions, is through equitable tolling. No legislative action is needed if the courts are more willing to take a holistic approach to equitable tolling in sexual harassment cases considering the additional information that we now have about this problem. Judicial intervention could thus make substantial strides in resolving the problem and preventing these claims of harassment from getting mired in the weeds of unfair procedure.

Along the same lines, it is important to remember the Supreme Court's emphasis on avoiding "the evils of archaic rigidity" and its admonition against "mechanical rules" that leave no room for "flexibility."<sup>204</sup> The need to approach these claims on an individualized basis is critical, and courts should hit the pause button before immediately dismissing a sexual harassment case for failure to satisfy administrative filing requirements. As the Supreme Court has advised, fairness demands that we examine these types of equity issues "on a case-by-case basis,"<sup>205</sup> and that is precisely what should be done when looking at sexual abuse in the workplace.

As a general rule, it likely makes sense—given what we now know about the prevalence of sexual harassment—for the federal courts to be cautious in *all cases* involving a failure of the plaintiff to satisfy the time filing deadlines under Title VII. This is not to say that every victim who fails to timely bring a claim should be permitted to proceed with her case; rather, the courts should be particularly vigilant in those instances to make sure that dismissal renders an equitable and fair result.

Beyond this general caveat, however, there are several markers that the courts should look to in sexual harassment cases that might suggest that a flexible approach to the filing deadlines is needed. Below, this Article identifies five guideposts that the courts should look to in sexual harassment cases as areas where particular caution is warranted prior to dismissal. It is worth emphasizing that these pigeonholes are in no way exhaustive, and again, the courts should be careful before dismissing *any* sexual harassment claim based on timeliness grounds. Nonetheless, these five guideposts will help serve as a warning for the judiciary and help flag areas where prior case law and immediate equitable considerations demand that the case receive a closer look. Each pigeonhole is addressed below.

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the police in 2010–2017, compared to 35% of non-sexual assaults. . . . Given the potentially large positive externality from reporting, but the high personal cost of doing so, it is likely that sex crimes are reported at a rate that is below what is optimal from a social welfare perspective.”)

204. *Holland v. Florida*, 560 U.S. 631, 650 (2010) (first quoting *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 248 (1944); and then quoting *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946)).

205. *Id.*

### 1. Psychological Harm

As the #MeToo movement has made particularly clear, and as we have known for decades, sexual harassment, assault, and abuse can all lead to lasting emotional distress and psychological harm.<sup>206</sup> We are only now beginning to learn just how impactful this type of abuse can be in the employment setting.<sup>207</sup> Where a victim of sexual harassment in the workplace suffers this type of trauma, she may have substantial difficulty filing a timely claim, given the emotional toll of the employer's abusive conduct to which she has been subjected.<sup>208</sup>

As discussed above, there is already federal case law that identifies the difficulty victims of workplace sexual harassment can have when it comes to filing a timely claim. Workers who are badly treated, and sometimes assaulted, may find it psychologically impossible to go to the EEOC within 180/300 days. As one federal court properly observed, “[f]iling an EEOC charge is an adversarial proceeding that forces a complainant to relive the memories of the alleged discriminatory treatment.”<sup>209</sup> Where an employer has caused psychological trauma,

206. Rebecca Campbell, Emily Dworkin & Giannina Cabral, *An Ecological Model of the Impact of Sexual Assault on Women's Mental Health*, 10 TRAUMA, VIOLENCE, & ABUSE 225, 225–26 (2009), <http://www.jstor.org/stable/26636192> [<https://web.archive.org/web/20220117173133/https://www.jstor.org/stable/26636192>] (“The impact of sexual assault on women’s mental health has been extensively studied and has been the subject of multiple prior reviews. The reviews from the early 1900s are remarkably consistent with more recent syntheses of the literature: rape is one of the most severe of all traumas, causing multiple, long-term negative outcomes. Between 17% and 65% of women with a lifetime history of sexual assault develop posttraumatic stress disorder . . . . Many (13%–51%) meet diagnostic criteria for depression. Most sexual assault victims develop fear and/or anxiety . . . . It is not uncommon for victims to experience suicidal ideation.” (internal citations omitted)); Jamie Ducharme, *Any Type of Sexual Harassment Can Cause Psychological Harm, Study Says*, TIME (Nov. 9, 2017, 2:42 PM), <https://time.com/5017072/sexual-harassment-psychological-damage/> [<https://web.archive.org/web/20210512201913/https://time.com/5017072/sexual-harassment-psychological-damage/>] (“The research, which was published Thursday in the International Journal of Public Health and comes at a time when sexual misconduct is under increasing public scrutiny, finds that non-physical sexual harassment—such as derogatory comments, unwanted sexual attention and unsolicited explicit images—can take a psychological toll, potentially exacerbating symptoms of anxiety, depression, negative body image and low self-esteem.”).

207. See Dorothy Roberts, *The Collective Injury of Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW, *supra* note 165, at 365 (“The harm of sexual harassment is collective because it affects the status of all women in the workplace where it occurs, in the labor market, and in society as a whole. Although sexual harassment inflicts a personal injury on the victim, ‘it is a social wrong and a social injury that occurs on a personal level.’” (quoting CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 173 (1979))).

208. See FELDBLUM & LIPNIC, *supra* note 199, at 10 (Victims “experience[] similar negative psychological, work and health consequences.”); Nancy Chi Cantalupo & William C. Kidder, *A Systematic Look at a Serial Problem: Sexual Harassment of Students by University Faculty*, 2018 UTAH L. REV. 671, 696 (“Meta-analytic studies . . . show that sexual harassment has substantial negative consequences for the mental health and wellbeing of victims, including symptoms of depression, anxiety, withdrawal and post-traumatic stress disorder . . .”).

209. *Tsai v. Rockefeller Univ.*, 137 F. Supp. 2d 276, 282–83 (S.D.N.Y. 2001).



it can thus be understandably difficult for an employee to relive this trauma by bringing a claim against the business.<sup>210</sup>

In one of the seminal cases in this area discussed at length above, *Stoll v. Runyon*,<sup>211</sup> the federal appellate court found equitable tolling applicable in a Title VII sexual harassment case where the employer's abusive conduct caused the worker to suffer severe psychological harm, and it was even determined that the plaintiff was "totally psychiatrically disabled."<sup>212</sup> Similarly, in the more recent case of *Kennedy v. Berkel & Co. Contractors*,<sup>213</sup> the court declined to dismiss the claim against the employer given the possibility that the company's severe harassment and abuse resulted in the plaintiff's mental incapacitation.<sup>214</sup> *Stoll* and *Kennedy* both provide important reminders of the severe harm employers can cause workers through harassment and abuse.

While the discriminatory acts may ultimately cease, or the worker may separate from employment, the psychological damage can last for years, or even a lifetime. Where this type of psychological harm is inflicted by an employer, that business should suffer the full consequences of its actions. As one of the primary principles of equity demands, an employer that stops a plaintiff "from asserting a [timely] claim" through its own "wrongful conduct" should not be permitted to benefit from the improper behavior, and equitable tolling may be appropriate.<sup>215</sup>

Where *Stoll*, *Kennedy*, and other federal cases fall short, however, is in recognizing the potential breadth of psychological harm caused by *all* sexual harassment. Now that we are aware of the full extent to which this abuse is present in the workplace, as well as the efforts employers will go to in suppressing this information, we should no longer require a case to involve facts as severe as rape, mental incapacity, or psychiatric disability to toll a filing period.<sup>216</sup> Rather, the proper inquiry should be whether or not the hostile work environment perpetrated by the employer caused sufficient psychological harm or emotional distress that would prevent an ordinary person from filing a claim in a timely manner. This is obviously a factually distinct question that will vary depending upon the specific case, and this determination will result in an individualized inquiry for harassment claims. Nonetheless, victims of sexual harassment clearly deserve, through ordinary

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210. *See id.* at 282 ("The severity of a mental disability is a fact question that cannot be decided as a matter of law based solely on the pleadings.").

211. 165 F.3d 1238 (9th Cir. 1999).

212. *Id.* at 1240, 1243.

213. 319 F. Supp. 3d 236 (D.D.C. 2018).

214. *Id.* at 241.

215. *Stoll*, 165 F.3d at 1242; *see also* *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 232–33 (1959) ("[N]o man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations." (footnote omitted)); *English v. Pabst Brewing Co.*, 828 F.2d 1047, 1049 (4th Cir. 1987) (noting that the equitable tolling doctrine is "based primarily on the view that a defendant should not be permitted to escape liability by engaging in misconduct that prevents the plaintiff from filing his or her claim on time").

216. *See generally Stoll*, 165 F.3d 1238; *Kennedy*, 319 F. Supp. 3d 236.

principles of equity, the opportunity to demonstrate why the employer's abusive conduct resulted in a delayed charge filing.

As the Supreme Court identified years ago in *Harris v. Forklift Systems*,<sup>217</sup> the prohibitions of the statute “come[] into play before the harassing conduct leads to a nervous breakdown.”<sup>218</sup> Given that the Court has identified this standard for harassment cases, it seems equally unfair to require plaintiffs to have a nervous breakdown if the employer's conduct results in an inability to file a timely claim. Only by considering all of the circumstances related to each case can a court properly determine whether equitable tolling should apply. Quite simply, the bar is currently too high, and the courts should take a more relaxed approach when considering whether tolling is appropriate where the employer's conduct has caused psychological harm or emotional distress.

## 2. Threats

Where an employer, or an individual with supervisory authority, has made specific or indirect threats to a worker (or to their family or loved ones), it should immediately be cause for concern as to whether the victim will have difficulty filing a timely harassment claim. Where an employee is concerned that their employer's behavior threatens her safety or that of others close to her, it will logically follow that this worker may avoid filing an EEOC charge if she believes doing so could result in physical harm.

As discussed, the federal courts have already addressed the applicability of equitable tolling in such extreme situations. Indeed, the courts have even applied tolling where an employer's threats of physical harm were registered against both the employee and her family,<sup>219</sup> and the courts made clear that as a general matter, threatening behavior is sufficient to pause the time deadlines of the statute.<sup>220</sup> Again, this is simply a straightforward matter of equity, and an employer should not be permitted to attempt to run out the clock on the statute of limitations through threats of physical harm.<sup>221</sup>

The #MeToo movement and additional research have revealed the extent to which employers have subjected workers to physical harm. Indeed, many women have reported threats to their own safety and that of others, and there are startling numbers of reports of workers who have been subjected to physical harm.<sup>222</sup> In one

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217. 510 U.S. 17 (1993).

218. *Id.* at 22.

219. Equal Emp. Opportunity Comm'n v. Willamette Tree Wholesale, Inc., No. CV-09-690-PK, 2011 WL 886402 at \*8 (D. Or. Mar. 14, 2011).

220. Koppman v. S. Cent. Bell Tel. Co., No. 90-4503, 1992 U.S. Dist. LEXIS 9115, at \*37 (E.D. La. June 16, 1992).

221. *Id.*

222. See *Workplace Violence*, U.S. DEP'T OF LABOR, <https://www.osha.gov/workplace-violence> [<https://perma.cc/DK3J-BR2A>] (last visited Jan. 24, 2022) (“According to the Bureau of Labor Statistics Census of Fatal Occupational Injuries (CFOI), of the 5,147 fatal workplace injuries that

study, a number of male workers surveyed *even conceded* that they had engaged in such improper conduct, including “pressuring people into sexual acts by offering rewards or threatening retaliation.”<sup>223</sup>

Equity thus demands that the courts look closely at those cases where a worker has failed to meet the Title VII sexual harassment time filing deadlines because her safety has been threatened by the employer. Where a reasonable person would have similar concerns about her safety or that of those close to her, tolling of the statute will likely be appropriate until the threat passes. Any other result would allow the employer to greatly benefit from its own wrongful acts and could even provide a perverse incentive for companies to engage in this type of improper conduct in an effort to cause the worker to miss the deadline.<sup>224</sup>

It is also important to note that the courts should look to the reasonableness of a victim’s belief in the employer’s perceived or actual threat. The credibility of the threat itself should not be the standard. Even if an employer lacks the ability to carry out the actions, it should make no difference for purposes of tolling the statute—rather, the key inquiry is whether the victim had a good-faith belief that her safety was at risk.

### 3. Fear

The third guidepost that the courts should address when considering whether to equitably toll a Title VII harassment claim is fear. This proposed pigeonhole is more subtle than threatening behavior, but it is just as important. Whereas threats examine the overt conduct or statements of employers,<sup>225</sup> fear looks more to the reasonableness of a harassment victim’s perception of potential retaliation by the employer if a complaint is made. Fear can also be reasonably derived from prior physical assaults by an employer.<sup>226</sup>

In the context of sexual abuse, victims may have concerns about reporting as a result of “the loss of privacy and the risk of recrimination and reprisal.”<sup>227</sup> These same concerns carry over to the workplace, and harassment victims often fear both

occurred in the United States in 2017, 458 were cases of intentional injury by another person. However it manifests itself, workplace violence is a major concern for employers and employees nationwide.”)

223. 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/WK9D-Z9TK>]. Indeed, ten percent of men also admitted to “touching, making comments about someone’s body, and asking colleagues on dates after they’ve said no.” *Id.* See generally Joseph A. Seiner, *Plausible Harassment*, 54 U.C. DAVIS L. REV. 1295, 1326 (2021) (discussing study in greater detail).

224. See *Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 232 (1959) (“[N]o man may take advantage of his own wrong.”). See generally *Koppman*, 1992 U.S. Dist. LEXIS 9115.

225. See *supra* Section III.B.2 (explaining basis of threats as a basis to equitably toll Title VII time filing deadlines).

226. See generally Allen, *supra* note 202, at 638–39 (“[C]ompelling evidence indicates that [nonreporting rape victims] concerned themselves with . . . a different kind of personal concern, related to the fear of reprisal from the offender.”).

227. *Id.* at 640.

potential stigmatization and fear of retaliation from the employer. Fear can also come from the way an employer has mishandled prior complaints. One well-known, recent study found that “only 32% of women agreed that 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.”<sup>228</sup>

The courts have generally not considered fear as an independent basis for equitably tolling a workplace claim under Title VII, but fear should be considered as strongly as any of the other factors currently recognized by the courts. An employee will have a legitimate basis to equitably toll a claim where (1) that worker reasonably fears that her employer will retaliate if a complaint is filed, or (2) a harassment victim sees the futility of complaints filed by others in the past, or (3) there is a reasonable belief that coworkers will be punished if a complaint is filed. This list is not exclusive, however, and fear can take many forms. An employer whose illegal conduct induces sufficient fear to deter a timely complaint should not be able to benefit from that conduct, and the statute should be appropriately tolled in those circumstances.

Fear may also be intertwined with any of the other guideposts addressed here. Indeed, fear is likely to go hand in hand with any psychological harm or emotional distress caused by an employer. As specifically addressed in the *Willamette Tree* decision discussed above, in addition to threatening behavior, the plaintiff feared retaliation against her family members.<sup>229</sup> As its own independent factor, then, or considered in conjunction with any of the other guideposts, the reasonably placed fear of an employer’s punitive conduct should serve as a sufficient basis to toll the sexual harassment time filing period for a claim brought under Title VII.<sup>230</sup>

#### 4. Concealment and Misrepresentation

Employer deception is perhaps the best-known and most-recognized basis for the application of equitable tolling in the workplace. As a general matter, the courts have long recognized that “[e]quitable tolling applies where the defendant has wrongfully deceived or misled the plaintiff in order to conceal the existence of a cause of action.”<sup>231</sup>

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228. EDISON RSCH. & MARKETPLACE, SEXUAL HARASSMENT IN THE WORKPLACE: #METOO, WOMEN, MEN, AND THE GIG ECONOMY 7 (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/DYB3-C9R8>]. See generally Seiner, *supra* note 219, at 1327–28 (discussing the Edison Research and Marketplace study in more detail).

229. Equal Emp. Opportunity Comm’n v. Willamette Tree Wholesale, Inc., No. CV-09-690-PK, 2011 WL 886402, at 8\* (D. Or. Mar. 14, 2011).

230. See FELDBLUM & LIPNIC, *supra* note 197, at 16 (“Employees who experience harassment fail to report the behavior or to file a complaint because they anticipate and fear a number of reactions—disbelief of their claim; inaction on their claim; receipt of blame for causing the offending actions; social retaliation (including humiliation and ostracism); and professional retaliation, such as damage to their career and reputation.”).

231. English v. Pabst Brewing Co., 828 F.2d 1047, 1049 (4th Cir. 1987).

The #MeToo era has shown us the extent to which employers have gone to conceal their own overtly harassing behavior.<sup>232</sup> This concealment has been both within the law—in the form of nondisclosure agreements and arbitration clauses—and in violation of the law, in simply covering up the unlawful behaviors. The result of both employer actions is the same; a victim of harassment may be unaware of the nature and extent to which an employer has cultivated a sexually abusive working environment. In hiding this conduct, the employer keeps its actions from public view and creates a sense of isolation for the victim, who remains unaware that others at the company have been similarly victimized.

The courts have opined that equity must prevail where an employer has engaged in “wrongful concealment of facts,” and an employer should not be permitted to hide information in an effort to run out the statute of limitations.<sup>233</sup> As the #MeToo era has demonstrated, employers have been highly successful at suppressing information about sexual abuse for years. And the widely regarded perception of many victims is that their complaint, and the complaints of others, will go unheard and unremedied. As one recent study found, “[a]mong women who’ve personally experienced unwanted sexual advances in the workplace, nearly all, 95 percent, say male harassers usually go unpunished.”<sup>234</sup>

Indeed, over two decades ago, the Supreme Court recognized the need to bring acts of sexual harassment in the workplace to light. In *Faragher v. City of Boca Raton*,<sup>235</sup> and *Burlington Industries, Inc. v. Ellerth*,<sup>236</sup> the Court developed a public policy of encouraging employers to establish—and abide by—anti-harassment policies in the workplace. In *Faragher* and *Ellerth*, the Court created an affirmative defense for employers that permitted them to *completely avoid* liability for a hostile work environment where the employer developed such a policy and effectively implemented it.<sup>237</sup> As the Court in *Faragher* held, this affirmative defense could be asserted in cases not involving a tangible employment action where “the employer exercised reasonable care to prevent and correct” the harassment and where the purported victim “unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”<sup>238</sup>

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232. See, e.g., Tippet, *supra* note 164, at 234 (“The MeToo movement also revealed the ways in which the law can be misused to enable and conceal harassment.”).

233. Reeb v. Econ. Opportunity Atlanta, Inc., 516 F.2d 924, 930 (5th Cir. 1975).

234. GARY LANGER, UNWANTED SEXUAL ADVANCES: NOT JUST A HOLLYWOOD STORY 1 (2017), <https://www.langerresearch.com/wp-content/uploads/1192a1SexualHarassment.pdf> [<https://perma.cc/2CDB-94JB>] (poll produced for ABC News and *The Washington Post* by Langer Research Associates). See generally Seiner, *supra* note 223, at 1325–26 (discussing the Langer Research poll in greater detail).

235. 524 U.S. 775 (1998).

236. 524 U.S. 742 (1998).

237. See *Faragher*, 524 U.S. at 807–08; *Ellerth*, 524 U.S. at 764–65.

238. *Faragher*, 524 U.S. at 807.

The employer's creation of a valid anti-harassment policy to root out and prevent hostile conduct is often a critical component of this affirmative defense.<sup>239</sup>

Thus, over twenty years ago, the Supreme Court identified the need to encourage a proper reporting process for sexual harassment, even providing a clear legal benefit for employers that establish an effective complaint mechanism in the workplace.<sup>240</sup> The #MeToo movement that we see today reveals that the work of the courts has been incomplete in this area and that a tremendous amount of unlawful sexual conduct in the workplace has gone unreported and undetected. By taking a more expansive approach to equitable tolling in these instances, the courts can further effectuate the goals established by the Supreme Court in the *Faragher* and *Ellerth* decisions. Where an employer has concealed its conduct or misrepresented important facts, the courts should give victims of harassment additional leeway in bringing their claims. And where an employer has failed even to establish an effective anti-harassment policy, the courts should further consider this as an indication of the employer's lack of transparency regarding potential discrimination in the workplace.

Some courts have been receptive to applying equitable tolling where an employer has concealed its unlawful conduct or has made substantive misrepresentations to the harassment victim. As the federal appellate court in *Reeb* noted, an employer should not be permitted to benefit from its "wrongful concealment of facts."<sup>241</sup> And as the federal court in *Santiago v. SEPTA*<sup>242</sup> concluded, an employer's "misrepresentation of omission" can be sufficient to toll the clock in Title VII claims.<sup>243</sup> The courts should not only continue to be receptive to applying principles of equity to an employer's deceptive acts, but they should also act more affirmatively. The times we are in now demand vigilance, and the courts should actively look to the facts when determining whether a harassment victim has filed an untimely claim because the employer has hidden or misrepresented important information. Indeed, where a reasonable person would have filed a timely claim if all the relevant facts were known and remained unhidden, the court should strongly consider tolling the charge filing period if necessary.<sup>244</sup>

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239. *Id.* As the Court noted, "While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense." *Id.* at 807–08.

240. *See Faragher*, 524 U.S. at 807–08; *Ellerth*, 524 U.S. at 764–65.

241. *Reeb v. Econ. Opportunity Atlanta, Inc.*, 516 F.2d 924, 930 (5th Cir. 1975).

242. No. 13-5411, 2015 U.S. Dist. LEXIS 64370 (E.D. Pa. May 15, 2015).

243. *Id.* at \*20–22.

244. *See Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1389 (3d Cir. 1994) ("The statute of limitations will not begin to run . . . until the facts which would support the plaintiff's cause

Thus, this fourth guidepost serves as a reminder that an employer's deceptive practices—whether through hiding or misrepresenting important facts concerning the extent of sexual harassment or abuse, or facts concerning the victim's ability to pursue her claims—are an area that the courts should actively consider before dismissing a Title VII case based on an untimely filed charge. Before rejecting a victim's harassment claim on this basis, the courts should closely examine whether the employer's actions to hide or prevent the claim were the real cause of the plaintiff's late filing in the case.

### 5. *Public Health*

The COVID-19 pandemic has had a widespread impact on a variety of different legal and workplace-related issues.<sup>245</sup> The pandemic resulted in direct change to how workers approach collective-bargaining rights, working at home, and procedurally litigating employment-related claims.<sup>246</sup> Indeed, this outbreak has caused us to redefine what employment actually means, as many traditional brick-and-mortar jobs have now been shifted online or to platform-based employment.<sup>247</sup> It is not surprising, then, that the pandemic has also disrupted the ability of some workers to file timely employment-related claims.<sup>248</sup>

While the pandemic unquestionably presents the legislature and the courts with novel and extraordinary circumstances, there are other emergencies that we can look to with respect to the question of suspending time filing requirements. Most notably, in the wake of the unprecedented and horrific events of September 11, 2001, fairness demanded a flexible approach to court deadlines. As one federal court held at the time, “the equitable tolling doctrine is based on the general principles of equity and fairness, [and] the unprecedented circumstances of the World Trade Center disaster and subsequent Court closure warrant relief from a

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of action are apparent, or should be apparent to a person with a reasonably prudent regard for his or her rights.”).

245. *See generally* JOSEPH A. SEINER, *THE VIRTUAL WORKPLACE* (2021).

246. *See generally id.*

247. *See generally id.*

248. *See generally* *Kumar v. First Abu Dhabi Bank USA N.V.*, No. ELH-20-1497, 2020 WL 6703002 (D. Md. Nov. 13, 2020) (holding in employment discrimination case that “due to the COVID-19 pandemic and the restrictions at the Courthouse, the pandemic constituted an extraordinary circumstance, beyond plaintiff’s control, which impeded his ability to file the Complaint on time”); *Baxter v. Burns & McDonnell Eng’g Co.*, No. JKB-19-3241, 2020 WL 4286828, at \*3 (D. Md. July 27, 2020) (tolling the limitations period under the Fair Labor Standards Act for putative opt-in collective action members “[t]o offset any prejudice resulting from the pandemic,” and looking specifically to achieving fairness in the case); *McCoy v. Transdev Servs.*, No. DKC 19-2137, 2020 WL 2319117, at \*5 (D. Md. May 11, 2020) (finding that the pandemic satisfied the “extraordinary circumstances” necessary to toll the statute of limitations, when “[t]aking into account the current public health crisis, during which many deadlines in civil cases have been extended”). *But see* *Linz v. Core Values Roadside Serv.*, No. 2:20-cv-00107-SMJ, 2020 WL 3051341, at \*5 (E.D. Wash. June 8, 2020) (“Plaintiffs [in FLSA class action] have not provided sufficient explanation of why equitable tolling is appropriate [as they] cite no particular delays owing to the pandemic in this case [and] fail to tie the requested amount of tolling to the length of the alleged delays in effectuating service on Defendants.”).

strict application of the 90-day statute of limitations in this case.”<sup>249</sup> During this crisis, the government also stepped in, and the governor of New York issued an executive order tolling certain time filing requirements.<sup>250</sup>

Like all cases, however, the decision whether to apply equitable tolling is one that is fact-specific, and the courts will require facts demonstrating that the extraordinary circumstances exist that would warrant pausing the statute. Not all public disasters or health issues will rise to this level, and several courts have declined to extend deadlines during notable crises. For example, after hurricanes Katrina and Rita, one court declined to apply equitable tolling to the time filing period for a notice of appeal because the plaintiff had failed to show that the disasters “directly resulted in barriers beyond his control that continued to exist throughout the judicial-appeal period and prevented him from filing” a notice of appeal in a timely fashion.<sup>251</sup> Similarly, another federal court declined to toll a statutory period following an earthquake as the plaintiff did not demonstrate “that he diligently attempted to file a timely complaint” or that the incident “interfered with [the plaintiff’s] ability to deal with his case.”<sup>252</sup>

As specifically applied to sexual harassment cases, the pandemic will undoubtedly create circumstances where a flexible approach to the charge filing deadlines is necessary. The outbreak of this virus may—in certain circumstances—delay an individual’s ability to access information related to her claim. It may also make it easier for employers to engage in deceptive practices about the widespread nature of harassment and for harassers to conceal their unlawful conduct. The outbreak will also make it harder for workers to detect retaliation that they may suffer, as employers may attempt to couch their adverse actions in terms of an economic downturn rather than as a result of a worker’s complaints about harassment. And, as much work is now being performed remotely or virtually, it is becoming increasingly difficult for employees to detect when their coworkers may be experiencing a hostile work environment, thus potentially resulting in fewer overall complaints of harassment.

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249. *Buckley v. Doha Bank Ltd.*, No. 01 CIV. 8865 (AKH), 2002 WL 1751372, at \*2 (S.D.N.Y. July 29, 2002).

250. *See* N.Y. COMP. CODES R. & REGS. tit. 9A, § 5.113.7 (2009); *see also* *Scheja v. Sosa*, 771 N.Y.S.2d 554, 555 (2004). The executive order “suspend[ed] temporarily, until further notice, CPLR 201 insofar as it barred actions the limitations period of which concluded during the period from the date that the disaster emergency was declared . . . . The order provided an exception for those litigants or their attorneys who have been directly affected by the terrorist attack and temporarily suspended . . . CPLR 201 insofar as it barred an action, by or on behalf of such person, if the limitations period with respect to a particular action concluded during the period the Executive Order was in effect . . . .” *Id.*

251. *Gelpi v. Shinseki*, No. 07-827, 2013 WL 3895215 (Vet. App. July 30, 2013). *But see* *Checo v. Shinseki*, 748 F.3d 1373, 1380 (Fed. Cir. 2014) (altering the standard such that plaintiff “must only demonstrate due diligence during the extraordinary circumstance period [and not] due diligence throughout the entire appeal period”).

252. *Butler v. S.F. Unified Sch. Dist.*, No 90-16480, 1992 WL 180214, at \*2 (9th Cir. July 29, 1992).



These are just a few possible examples of how the pandemic might slow or stall a worker's sexual harassment complaint. There are likely countless other scenarios, however, where equity will need to be strongly considered in sexual harassment cases that have been impacted as a result of COVID-19. The pandemic has changed the very way we define work in this country, and the federal courts must recognize the need for a flexible approach to considering alleged sexual harassment that has occurred during (or shortly before) the outbreak. Thus, sexual harassment claims that are not filed in a timely manner during the pandemic should receive close consideration by the courts for potential equitable tolling, and this subset of cases should serve as the final guidepost for pausing the time filing deadlines for these claims. Public health is a major consideration in many cases, and the pandemic may understandably delay charge filing for many hostile work environment claims, depending, certainly, on the specific facts involved.

#### IV. FEDERAL CASES WHERE PIGEONHOLES WOULD HAVE MADE A DIFFERENCE

The above framework identifies several key guideposts for the courts to consider when determining whether equitable tolling applies to federal sexual harassment claims. The pigeonholes identified may seem a bit amorphous at first glance, and it may not be readily apparent how these markers could be applied to actual litigation. The guideposts identified here are intended to be more than merely academic, however, and can be used by the courts and parties in ongoing and prospective Title VII litigation. By way of example, then, this Part identifies several cases where the markers suggested above could have resulted in a different result in the federal sexual harassment case law.

For example, in *Catone v. Brink, C.B.*,<sup>253</sup> the federal district court declined to apply equitable tolling under circumstances where it should have been more fully considered. In *Catone*, the plaintiff, who worked at a McDonald's franchise, alleged that she had been inappropriately subjected to numerous hostile acts, including that her "breasts and buttocks" were touched "against her will."<sup>254</sup> Her complaints to management went unaddressed, and she was subsequently retaliated against for these claims.<sup>255</sup> The plaintiff alleged that her employer's conduct caused a "loss of self-esteem" as well as "severe mental and emotional distress."<sup>256</sup> Plaintiff filed a charge of discrimination 236 days after her eighteenth birthday, which was 315 days after the final harassing act of the employer.<sup>257</sup> Though her charge was thus filed fifteen days late, the plaintiff asserted that the time period should be tolled given that she was a minor when the harassment occurred.<sup>258</sup> The court rejected this

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253. 488 F. Supp. 2d 214 (N.D.N.Y. 2007).

254. *Id.* at 216.

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.* at 217.

argument as unsupported by the case law, holding that “[p]laintiff has failed to allege how infancy creates circumstances so ‘extraordinary that the doctrine should apply.’”<sup>259</sup> This court’s decision completely misses the mark.

The federal district court in this case refused to toll the Title VII statutory period for *even fifteen days* where the alleged conduct by the employer included unwanted physical, sexual touching of a minor during the course of her employment, which understandably resulted in severe distress.<sup>260</sup> Under the first guidepost addressed above, it seems reasonable to expect that psychological harm will result when a minor is assaulted in this way and that it is more than appropriate to pause the time filing period to account for this mental harm. Indeed, the plaintiff filed the claim within 250 days of turning eighteen years of age and only missed the filing deadline by a little over two weeks. By dismissing the claim, the court here employs the exact “evils of archaic rigidity”<sup>261</sup> that equitable tolling was designed to prevent. It is difficult to see how the physical assault of a minor is not by definition the type of “extraordinary circumstance” that would permit an employee an additional two weeks to file her claim. It is equally difficult to understand how allowing this claim would prejudice the employer in any way.

As the guideposts proposed above suggest, we must look at these cases holistically. Where physical assault results in emotional harm, equity would demand that we allow some flexibility to a minor in filing her sexual harassment claim under Title VII. The recent studies and better understanding that we now have of the impact of this type of sexual assault on a victim reflect that a longer time filing period would be warranted in this case.<sup>262</sup> It seems entirely reasonable to apply more flexibility, and less rigidity, when the assault of a minor has been alleged. The better, more equitable course here would be to allow the employer to defend against the merit of the allegations, rather than to strictly adhere to the statutory timelines the court imposed.

Similarly, in *Hentosh v. Herman M. Finch University of Health Services/The Chicago Medical School*,<sup>263</sup> a federal appellate court demonstrated, in classic fashion, how the judiciary often misunderstands and misapplies sexual harassment law. In *Hentosh*, an assistant professor at the University alleged that her department chair had “engaged in a pattern and practice of sexual favoritism in the workplace” and that he had “made unwanted and unwelcome sexual demands of at least four women” in the workplace.<sup>264</sup> The plaintiff further alleged that another female

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259. *Id.* at 218.

260. *Id.* at 215–18.

261. Rudolph, *supra* note 24, at 131 (citing *Holland v. Florida*, 560 U.S. 631, 650 (2010)).

262. *See supra* Section II.A. (addressing the #MeToo movement and better understanding we now have of the impact of sexual assault on victims in recent years).

263. 167 F.3d 1170 (7th Cir. 1999).

264. *Id.* at 1172. Hentosh did not allege that she was one of the women to whom these demands were made, and the district court held that the plaintiff had failed to sufficiently allege the elements of a hostile work environment claim. *Id.* at 1173. The appellate court limited its reasoning to the timeliness of the claim, avoiding the question of whether the allegations themselves rose to the level of a Title VII

professor who had engaged in a sexual relationship with this department chair received favorable treatment in her employment compared to her colleagues.<sup>265</sup> The Seventh Circuit affirmed the lower court's dismissal of the plaintiff's Title VII hostile work environment claim because her charge was untimely.<sup>266</sup> The plaintiff explained that she had not filed her claim until fifteen months after the department chair resigned because she only became fully aware of the hostile work environment and sexual favoritism after the chair's departure.<sup>267</sup> At the heart of this request for equitable tolling, then, was that the plaintiff "was not able to obtain enough information regarding the existence of a claim because . . . [the department chair] was secretive about his sexually harassing conduct."<sup>268</sup> Indeed, the plaintiff alleges that the conduct of the department chair remained hidden until "after his resignation [when] this information gradually c[a]me to light."<sup>269</sup>

In rejecting the application of equitable tolling in this case, the Seventh Circuit placed too heavy of a burden on the plaintiff.<sup>270</sup> The court declined to apply the doctrine because the plaintiff "makes absolutely no showing that a reasonable person exercising due diligence would not have been aware of the possibility of a claim based on the sexual harassment she claims to have experienced as a result of the supposed hostile work environment."<sup>271</sup> The plaintiff thus purportedly failed to act diligently "in order to obtain the information essential to filing her suit."<sup>272</sup>

This standard simply places too heavy of a requirement on the victim in sexual harassment cases. As we now know in light of recent research, employers have gone to great lengths to improperly conceal unlawful sexual activity in the workplace.<sup>273</sup> By rejecting this claim on the basis that the harasser kept his conduct secret and hidden from the plain view of other employees, the court adopts a policy of encouraging this type of concealment. As the guideposts recommended above identify, concealment and deception are among the more common methods that employers use to run out the clock in harassment cases. Now that we have a better understanding of the lengths employers will go to in hiding this type of conduct, we must take a much more flexible approach to the filing deadlines in these cases.

In *Hentosh*, the plaintiff's claim was late by months, not years, and it is difficult to see how the employer would be prejudiced in defending against such a claim.<sup>274</sup> The employer in the case should certainly not have been rewarded for its success in

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violation. *Id.* at 1175. Some of the facts of the case also raise the interesting question of the extent to which "paramour preference" can form the basis of a Title VII claim, but the appellate court did not address this issue as part of its holding. *Id.*

265. *Id.* at 1172.

266. *Id.* at 1175.

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.* (emphasis added).

272. *Id.*

273. *See supra* Section III.B.4. (discussing employer concealment of sexual harassment).

274. *Hentosh*, 167 F.3d at 1175.

keeping the hostile work environment quiet. And it is misplaced analysis for the court to blame the victim for failing to exercise proper diligence in uncovering the information that had been improperly concealed by the harasser, as the court in *Hentosh* reasoned.<sup>275</sup> This situation is extraordinarily common, and in light of what we now know about sexual harassment, this is the exact circumstance where equitable tolling would be appropriate. We should reject any policy that encourages the concealment of the wrongs performed by a corporate entity or its agents, and we should not place any blame on those subject to a hostile environment for failing to uncover the employer's deception earlier.

In another troublesome case that seems to improperly shift too heavy of a burden to the victim, *Ruffino v. State Street & Trust Co.*,<sup>276</sup> the federal court considered a Title VII claim brought by a bank employee alleging that a senior vice president at the business frequently harassed her by making remarks that “were often laced with inappropriate and offensive sexual innuendo.”<sup>277</sup> When the worker complained to the manager of employee relations, this manager told her that she had also observed the senior vice president make improper comments but that she was inclined against “get[ting] in the middle of it.”<sup>278</sup> The plaintiff subsequently talked with an employment department manager, who instructed her to just “tolerate” the conduct as “nothing . . . could be done.”<sup>279</sup> The hostile conduct from the senior vice president continued, and after an additional complaint, the bank assured her of an investigation, which never took place.<sup>280</sup> Instead, the bank “accelerated their attempts to demean her work and scuttle her attempts at continued success” in her employment.<sup>281</sup> Only after receiving a highly critical performance review following her complaints, and filing a response, did the bank perform a “perfunctory” investigation finding no sexual harassment on the part of the vice president.<sup>282</sup> The stress of these events caused the plaintiff to take disability leave and subsequently to resign from her employment.<sup>283</sup>

The federal district court dismissed the plaintiff's Title VII sexual harassment claim as untimely, as it was brought after the charge filing period had run.<sup>284</sup> The plaintiff asked that the court toll this period in consideration of the bank's “promises of investigation and remediation” which “prevented her both from knowing that her grievances were not being dealt with in a serious manner and from

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275. *Id.* at 1174–75.

276. 908 F. Supp. 1019 (D. Mass. 1995).

277. *Id.* at 1029.

278. *Id.* at 1030.

279. *Id.*

280. *Id.* at 1030–33. The plaintiff did transfer to a different position at the bank, where she had far more limited contact with this vice president. *Id.* at 1032.

281. *Id.* at 1033.

282. *Id.* at 1034.

283. *Id.* at 1035.

284. *Id.* at 1039–40.

asserting her rights.”<sup>285</sup> The court declined to apply this equitable doctrine, concluding that the plaintiff’s complaints internally at the bank demonstrated her awareness of the potential cause of action.<sup>286</sup> The court did not accept the argument that the bank’s promised investigation misled the plaintiff; rather, the “repeated, unheeded . . . stonewalling by supervisors” should have made the plaintiff aware that the bank would not perform an adequate investigation into her allegations.<sup>287</sup> While the court understood that the worker might “hope against hope for internal redress,” it was simply unreasonable for this employee “to rely on [the company’s] alleged representations” and she should not have counted “on a recalcitrant workplace grievance process.”<sup>288</sup>

This decision seems to fly in the face of the well-defined purposes of equitable tolling, including preventing an employer from benefiting from its own misdeeds. Here, the employee seemed to do everything right—she complained multiple times of sexual harassment and her allegations were simply rebuffed.<sup>289</sup> She attempted to resolve the matter internally within the company and relied on a promised investigation by the employer, which at first did not take place and then was performed in a wholly perfunctory way.<sup>290</sup> The employer lied to the sexual harassment victim and concealed the true nature of the almost nonexistent “investigation” it was performing.<sup>291</sup> The concealment and misrepresentations made by the bank, as well as the psychological harm inflicted by this employer, make it more than reasonable and foreseeable that the plaintiff would file her charge in a delayed manner.

By shifting the blame to the employee (for not realizing soon enough that the bank was blatantly lying to her about performing any substantive investigation), the court misunderstands the basic nature and purpose of the employment-discrimination statutes and the time limitations they contain.<sup>292</sup> By engaging in lies and deception, the employer should bear responsibility for the consequences, and it should have to answer for the improper actions of its vice president. Indeed, there does not seem to be any prejudice to the employer caused by the delayed filing; the victim here raised the issue numerous times and the company had more than sufficient notice of the allegations that were being brought against it.<sup>293</sup> Looking to the guideposts set forth in this Article, future courts should be far more hesitant in dismissing this (unfortunately all too common) type of claim. Psychological harm, employer lies, and deception are all strong signals that equitable tolling may be appropriate.

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285. *Id.* at 1041.

286. *Id.*

287. *Id.*

288. *Id.* at 1042.

289. *Id.* at 1030–33.

290. *Id.* at 1032–34.

291. *Id.*

292. *See supra* Part II (discussing the purpose of charge filing time requirements in Title VII).

293. *Ruffino*, 908 F. Supp. at 1030–34.

## V. IMPLICATIONS OF PIGEONHOLES

The pigeonholes identified by this Article represent strong indicia of circumstances where the courts should look to the potential need for tolling Title VII's time filing periods in cases of harassment. These factors are not exhaustive and must be looked at holistically with all of the facts of the specific case. Indeed, there are a number of implications for adopting the pigeonholes proposed here (including benefits and potential drawbacks) that are worth addressing.

One of the greatest benefits of using the proposed approach is that it would help streamline sexual harassment litigation. By providing clear guideposts for tolling in harassment cases, the suggested approach would help the courts and litigants to apply a complex legal doctrine to an already confusing area of employment law. The suggested pigeonholes thus help synthesize those circumstances where the courts should be wary of dismissing a hostile work environment claim on timing grounds, flagging for the courts those cases where additional caution is warranted. All hostile work environment claims deserve close consideration, but the approach proposed here helps simplify the doctrine of tolling in harassment cases, highlighting for the courts those instances where it may be particularly appropriate. By bringing readily identifiable guideposts to these complex topics, the proposed approach helps clarify and streamline a confusing area of the law.

The proposed pigeonholes would also bring a strong educational component to sexual harassment litigation. The doctrine of equitable tolling has evolved gradually over the decades, while the #MeToo movement has dramatically changed our understanding of workplace sexual harassment in recent years.<sup>294</sup> The guideposts set forth here thus help educate the courts and litigants on the reality of hostile work environment cases and the difficulties harassment victims often face when trying to bring a timely claim under Title VII's restrictive administrative filing requirements. Employer deception, psychological harm, workplace threats, induced fear, and public health are all important considerations in harassment cases.<sup>295</sup> Given our increased—and more recent—awareness of these issues, the courts may not currently have a full understanding of the realities and challenges harassment victims face in the workplace. The pigeonholes set forth here thus help increase awareness and understanding of all these topics, providing an important educational function for the courts.

The proposed guideposts also provide this streamlined and informative approach in a very pragmatic way. The pigeonholes suggested here are only markers for the courts to consider and are not binding on the judiciary. This provides the courts with substantial flexibility when considering whether to apply tolling to a

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294. *See supra* Part II and Section III.A (addressing the history of equitable tolling for harassment claims and discussing the #MeToo movement).

295. *See supra* Part III (addressing areas of harassment that deserve close consideration on timing questions).

particular harassment claim, which is important given how widely the facts can vary from case to case. A likely alternative suggestion—a congressionally mandated change to Title VII’s time filing requirements—is less workable and far more restrictive.<sup>296</sup> While such a statutory change is likely warranted, the current filing deadlines have remained static for over half a century<sup>297</sup> and are unlikely to change anytime soon. A more immediate and practical response to our increased awareness of the pervasiveness of workplace sexual harassment is to provide a framework for the courts to consider when addressing whether a claim has been timely filed. The guideposts proposed here thus preserve the flexibility of the courts to toll individual cases, while providing a general model to follow for these claims.

Perhaps one of the strongest objections that might be raised against these guidelines is the same concern addressed by some of the early courts—that plaintiffs may unreasonably sleep on their rights, thereby unfairly disadvantaging defendants.<sup>298</sup> Like any equitable doctrine, the concept of equitable tolling must be applied by considering all the facts together, and defendants should—and will—have every opportunity to present evidence that the harassment victim did not diligently pursue her claim.<sup>299</sup>

Indeed, there should be little concern that the courts will fail to take a plaintiff’s lack of diligence into proper account; the Supreme Court itself “ha[s] generally been much less forgiving in receiving late filings where the claimant failed to exercise due diligence in preserving his legal rights.”<sup>300</sup> The Court has thus been expressly unwilling to extend equitable tolling to a situation where the facts present “at best a garden variety claim of excusable neglect.”<sup>301</sup> The indicia proposed here are not intended to override concerns over the potential lack of a victim’s diligence in pursuing her legal remedies in a federal employment discrimination case. Rather, they are simply signals for the courts and litigants to more closely examine all of the facts in these cases and to take into account what we now know about widespread sexual harassment in this country.

Another potential criticism is that the pigeonholes identified here provide too relaxed of an approach to the time filing deadlines and that this would open the floodgates of litigation. This criticism misses the mark. The approach advocated here only flags those cases where fairness may require additional time for filing, and

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296. See generally Section II.A (describing congressional policy behind short time filing deadlines).

297. See generally 29 U.S.C. §§ 626, 633.

298. Holmberg v. Armbrrecht, 327 U.S. 392, 394–96 (1946); Purrington v. Univ. of Utah, 996 F.2d 1025, 1031 (10th Cir. 1993) (denying equitable tolling of statutory filing period in sexual harassment case where alleged victim failed to diligently pursue claim). See generally Hugler v. Kazu Constr., LLC, 262 F. Supp. 3d 1032 (D. Haw. 2017); Viti v. Guardian Life Ins. Co. of Am., 817 F. Supp. 2d 214 (S.D.N.Y. 2011); Pollock v. Chertoff, 361 F. Supp. 2d 126, 133 (W.D.N.Y. 2005); Simon v. Food & Drug Admin., No. 04CV252(DLI)(CLP), 2005 WL 2105789 (E.D.N.Y. Aug. 31, 2005).

299. See generally Pelnarsh v. R.R. Donnelley & Sons Co., 348 F. App’x 178 (7th Cir. 2009).

300. Irwin v. Dep’t of Veterans Affs., 498 U.S. 89, 96 (1990) (citing Baldwin Cnty. Welcome Ctr. v. Brown, 466 U.S. 147, 151 (1984)).

301. *Id.*

where equity is not outweighed by any potential harm to defendants. Thus, the pigeonholes identified should not create any extensive new litigation; they merely aim to level the playing field for victims of harassment. A legitimate basis to extend the deadlines must exist to allow the claim, and something more than mere inconvenience to the victim is required in all cases.<sup>302</sup>

Finally, some might also argue that these pigeonholes are too narrow and that there may be instances not contemplated here where tolling would be appropriate. While a fair concern, the guideposts suggested are not intended to be exhaustive; rather, they serve as an attempt to capture the vast majority of instances where tolling would be appropriate in a hostile work environment case. Courts should not limit themselves only to these pigeonholes, however, as there will undoubtedly be harassment cases that do not fit neatly within these parameters. When applying equitable measures generally, and for harassment cases specifically, the courts must maintain flexibility; no single framework will be able to capture the breadth of all potential cases.<sup>303</sup>

At the end of the day, the benefits of the proposed model far outweigh any perceived drawbacks. The framework advocated for here will help synthesize the law in this area, providing clarity to a complex field. At the same time, the proposed approach builds in substantial flexibility for the courts to address each case in an individualized way, taking into account the vast and varied instances where tolling may be appropriate for a harassment claim.

#### CONCLUSION

The Supreme Court has repeatedly emphasized that the Title VII time filing requirements should not be given an overly “technical reading,” as it is often the victims of discrimination themselves, “unassisted by trained lawyers,” who file the initial charge.<sup>304</sup> As our understanding of the prevalence of workplace sexual harassment continues to evolve, the importance of avoiding a “technical reading” of the timing requirements has grown increasingly important. Psychological harm, employer threats, fear, workplace deception, and public health frequently prevent harassment victims from filing a timely claim, often through no fault of their own.

While congressional intervention to extend these deadlines where necessary would be ideal, such a solution is unrealistic. A more workable approach to this issue would be for the courts to embrace a robust application of the centuries-old doctrine of equitable tolling in hostile work environment cases. Given what the research has demonstrated in recent years about the harm and frequency of

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302. See, e.g., *Hibbard v. Don Love, Inc.*, 584 F. Supp. 2, 3 (S.D. Tex. 1984) (stating that moving is insufficient to extend statute of limitations); *Davis v. Sears, Roebuck & Co.*, 708 F.2d 862, 864–65 (1st Cir. 1983) (noting that distance to court is not a basis for equitable tolling).

303. See generally *supra* Parts I–III (describing the case-specific nature of the equitable tolling doctrine).

304. *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 397 (1982) (quoting *Love v. Pullman Co.*, 404 U.S. 522, 527 (1972)).



sex-based harassment, employers should no longer be allowed to run out the clock on these claims through their own misconduct. This Article advocates for the more aggressive use of equitable tolling in Title VII cases and identifies those instances where application of this doctrine would be appropriate. There can be no doubt that we must examine hostile work environment claims through the lens of the current research in this area, and a closer consideration of all sexual harassment cases is now warranted.