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I. INTRODUCTION

Rising racial tensions in the South following desegregation catalyzed the introduction of the 1964 Civil Rights Act (CRA).[1] However, protections based on gender were not included until the House floor debate on the bill.[2] Congressman Howard Smith, a staunch segregationist, introduced "sex" as a protected class in Title VII of the act as a "poison pill"[3] meant to kill the bill.[4] Title VII of the CRA—prior to Smith's amendment—prohibited employment discrimination based on race, color, religion, or national origin.[5] Supporters of the bill feared the inclusion of sex would cause Northern Democrats allied with labor unions to abandon their support of the Act, since labor unions opposed expanding employment protections to women.[6]

Despite these concerns, the House approved the CRA with Smith's amendment included. But the inclusion of "sex" was not taken seriously by the Equal Employment Opportunity Commission (EEOC), the enforcers of Title VII protections.[7] The first executive director of the EEOC, Herman Edelsberg, called the "sex amendment" a "fluke . . . conceived out of wedlock."[8] And, when a reporter asked the first chairman of the EEOC, Franklin Roosevelt, Jr., "What about sex?" he joked, "Don't get me started. I'm all for it."[9]

Washington, D.C., and the public feared that enforcing gender-based protections in Title VII would irreparably damage the workplace status quo.

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1. M.J. O'Brien, *Medgar Evers & Civil Rights Act of 1964 Linked*, CLARION LEDGER (July 1, 2014), https://perma.cc/4LYS-QEF7.

2. Allen Fisher, *Women's Rights and the Civil Rights Act of 1964*, NAT'L ARCHIVES (June 7, 2022), https://perma.cc/E5MN-MVJP.

3. Clay Risen, *The Accidental Feminist*, SLATE (Feb. 7, 2014), https://perma.cc/WC9T-T59P.

4. Gerald Rosenberg, *The 1964 Civil Rights Act: The Crucial Role of Social Movements in the Enactment and Implementation of Anti-Discrimination Law*, 49 ST. LOUIS U. L.J. 1147, 1151 (2004).

5. Paul Downing, *The Civil Rights Act of 1964: Legislative History; Pro and Con Arguments*, CONG. RESEARCH SERV. (Aug. 1965), https://perma.cc/8P5Z-97R8.

6. Caroline Fredrickson, *How the Most Important U.S. Civil Rights Law Came to Include Women*, 43 N.Y.U. REV. L. & SOC. CHANGE 122, 124 (2019).

7. Louis Menand, *How Women Got In on the Civil Rights Act*, NEW YORKER (July 14, 2022), https://perma.cc/8HGY-JDBW.

8. Rosenburg, *supra* note 4, at 1152. R

9. GILLIAN THOMAS, BECAUSE OF SEX: ONE LAW, TEN CASES, AND FIFTY YEARS THAT CHANGED AMERICAN WOMEN'S LIVES AT WORK 4 (2017).

Noyes Powers, who served as acting executive director before Edelsberg, stated that the "commission is very much aware of the importance of not becoming the sex commission."[10] Edelsberg would later tell the press that "no man should be required to have a male secretary."[11]Among members of Congress, the inclusion of sex in Title VII was often referred to as the "bunny problem," based on a hypothetical situation where *Playboy* would have to hire male and female models.[12] An editorial from the *New York Times* lamented that "a maid can now become a man" and "the Rockettes may become bi-sexual."[13] Martha Griffiths, speaking on the House floor, summarized the damaging effects of these attitudes:

> This emphasis on odd or hypothetical cases has fostered public ridicule which undermines the effectiveness of the law, and disregards the real problems of sex discrimination in employment. By emphasizing the difficulties of applying the law in these odd cases, the impression is created that compliance with the law is unnecessary and that its enforcement can and will be delayed indefinitely or wholly overlooked.[14]

These dismissive attitudes identified by Griffiths led to a general policy of apathy toward gender-based discrimination in the workplace. For example, in the EEOC's first year, approximately one-third of the 8,854 complaints filed were due to sex-based discrimination.[15] To address this growing crisis, the EEOC hired a single temporary worker, the wife of an EEOC employee, to process all gender-related claims.[16]

Though society's views on workplace gender discrimination have matured, similar fears continue to impact gender-based hostile work environment claims. Past concerns that Title VII would upturn accepted gender roles in the workplace have morphed into a more general concern about interfering with typical socialization between men and women in the workplace. Courts today worry Title VII will turn into a civility code if they hold employers liable for ordinary socializing in the workplace.[17] To prevent

10. CYNTHIA HARRISON, ON ACCOUNT OF SEX: THE POLITICS OF WOMEN'S ISSUES, 1945–1968, at 187 (1989).

11. *Id.* at 190.

12. THOMAS, *supra* note 9, at 4. **R**

13. Editorial, *De-Sexing the Job Market*, N.Y. TIMES, Aug. 21, 1965, at 20.

14. *Women Are Being Deprived of Equal Rights by the Equal Opportunity Commission*, 112 CONG. REC. 13,689 (1966) (speech by Rep. Griffiths).

15. Menand, *supra* note 7; *see Sex-Based Discrimination*, U.S. EQUAL EMP'T OPP'Y COMM'N, **R** https://perma.cc/GX2E-VNX8 (last visited Jan. 21, 2023) ("Sex discrimination involves treating someone (an applicant or employee) unfavorably because of that person's sex, including the person's sexual orientation, gender identity, or pregnancy.").

16. Menand, *supra* note 7. **R**

17. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998); EEOC v. Sunbelt Rentals, Inc., 521 F.3d 306, 315–16 (4th Cir. 2008); Peters v. Dist. of Columbia, 873 F. Supp. 2d 158, 188 (D.D.C. 2012); Campbell v. Garden City Plumbing, 97 P.3d 546, 551–52 (Mont. 2004).

Title VII from becoming a civility code, the Supreme Court has held that "not all workplace conduct that may be described as 'harassment' affects a 'term, condition, or privilege' of employment within the meaning of Title VII."[18] Rather the Court held that sexual harassment only becomes actionable when the harassment is "sufficiently severe or pervasive 'to alter the conditions of employment.'"[19] The severe or pervasive standard has set a high bar for employees seeking to establish a viable hostile work environment claim and has prevented sexual harassment jurisprudence from evolving alongside societal expectations. This comment will explore current issues with the "severe or pervasive" standard used by courts when determining if an employer fostered a hostile work environment in violation of Title VII. Part A of Section II discusses the historical development of hostile work environment claims and the associated severe or pervasive standard, and Parts B and C examine modern judicial applications of the severe or pervasive standard in hostile work environment claims based on sex and race, respectively. Section II further highlights two shortcomings of the severe or pervasive standard: (1) judges' tendency to reference outdated cases despite changing social expectations, and (2) the liberal use of summary judgment to dismiss hostile work environment claims. Section III examines how Montana has most recently applied the severe or pervasive standard in a hostile work environment claim, and Section IV recommends two potential changes for Montana courts when reviewing hostile work environment claims to ensure the severe or pervasive standard stays aligned with current workplace expectations. Section V concludes this comment.

II. Common Law Development of the Severe or Pervasive Standard

A. Historical Development

Though the CRA was passed in 1964, the Supreme Court did not officially recognize sexual harassment as a violation of Title VII until 1986 in *Meritor Savings Bank, F.S.B. v. Vinson*. There, the Court held that pervasive sexual harassment without a tangible economic loss could violate Title VII.[20] In *Meritor Savings Bank*, Mechelle Vinson was coerced into a sexual arrangement with Taylor, a senior employee, shortly after being hired in 1974.[21] The arrangement did not end until 1977 when Vinson began "going with a steady boyfriend."[22] Vinson was eventually dismissed from the Bank

18. Meritor Sav. Bank, F.S.B. v. Vinson, 477 U.S. 57, 67 (1986).
19. *Id.*
20. *Id.* at 64.
21. *Id.* at 60.
22. *Id.*

for excessive use of sick leave in late 1978.[23] In the period between 1974 and 1977, Taylor often fondled Vinson in front of other employees, forcibly exposed himself to Vinson, and raped her on several occasions.[24]

Though this seems like an obvious case of sex-based discrimination, the federal district court rejected Vinson's claim because there was no tangible economic discrimination.[25] The Supreme Court affirmed the reversal of this decision and, for the first time, stated that Title VII sex discrimination was not limited to "economic" or "tangible" discrimination but could include the creation of a "hostile work environment."[26]

The Court held that not all workplace conduct that could be considered "harassment" violated Title VII.[27] Rather, the harassment would have to be "sufficiently *severe or pervasive* to alter the conditions of the victim's employment and create an abusive working environment."[28] Thus, the "severe or pervasive" standard was born. To determine whether an abusive, or hostile, work environment is created, the Supreme Court considers the frequency of discriminatory conduct, its severity, the degree to which the harassment interfered with an employee's work, or whether the harassment was merely an offensive utterance.[29]

The severe or pervasive standard has both subjective and objective components.[30] Employees must prove (1) they subjectively felt their work environment was hostile or abusive, and (2) an objectively reasonable person in the employee's position would have found the work environment hostile or abusive.[31] The Supreme Court has "always regarded [the objective] requirement as crucial, and as sufficient to ensure courts and juries do not mistake ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation—for discriminatory conditions of employment."[32] In other words, the objective component of the test ensures workplace behavior does not become actionable whenever an insignificant act offends the sensibilities of a hypersensitive employee.[33]

23. *Id.* at 59–60.

24. *Meritor Sav. Bank*, 477 U.S. at 60.

25. Vinson v. Taylor, No. 78-1973, 1980 U.S. Dist. LEXIS 10676, at *20, 23 (D.D.C. Feb. 26, 1980), *rev'd*, 753 F.2d 141 (D.C. Cir. 1985).

26. *Meritor Savs. Bank*, 477 U.S. at 66–67, 73.

27. *Id.* at 67.

28. *Id.* (emphasis added) (cleaned up).

29. Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993).

30. *Id.* at 21–22.

31. *Id.*

32. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 81 (1998) (internal quotation marks omitted); *see also Harris*, 510 U.S. at 21–22.

33. Zabkowicz v. W. Bend Co., 589 F. Supp. 780, 784 (E.D. Wis. 1984); *see also* Robinson v. Jacksonville Shipyards, Inc., 118 F.R.D. 525, 530 (M.D. Fla. 1988).

The acknowledgment of sexual harassment as a form of employment discrimination was an important victory for equality in the workplace, but the high bar set by the Court through the severe or pervasive standard has prevented Title VII from keeping up with current standards of acceptable workplace behavior.

B. Modern Applications of the Severe or Pervasive Standard in Gender-Based Claims

The perception of what makes workplace harassment severe or pervasive has failed to develop consistently with changing societal expectations. In 1973, Minnesota amended the Minnesota Act Against Discrimination to prohibit discrimination against women in employment, education, housing, public services, and public accommodations.[34] These protections were later incorporated into the Minnesota Human Rights Act (MnHRA).[35] Though the MnHRA is not identical to Title VII, judges have generally followed Title VII precedent when interpreting and enforcing the MnHRA,[36] including adopting the severe or pervasive standard when evaluating hostile work environment claims.[37]

Until 2020, Minnesota also relied on Title VII precedent for evaluating whether the conduct was sufficiently severe or pervasive. But in *Kenneh v. Homeward Bound, Inc.*,[38] the Minnesota Supreme Court reformulated the severe or pervasive standard to try and reach results more closely aligned with a modern understanding of acceptable workplace behavior.[39] To highlight the issues with the current severe or pervasive standard, the court in *Kenneh* pointed to several cases where plaintiffs had their complaints dismissed despite the extreme nature of the conduct they endured.[40] A summary of the cases mentioned is provided below:

> *Case one.* The supervisor "entered a room where the appellant was cleaning a tanning bed, grabbed her and kissed her." Later, the supervisor "grabbed the back of [the appellant's] neck in an attempt to touch his lips to hers." Lastly, during a business trip, the supervisor "put his hand on the appellant's leg and suggested they run away together." The court found there was no severe or pervasive harassment.[41]

34. *Minnesota Women's Legislative Timeline: Significant Legislation Passed by the Minnesota Legislature Since Suffrage (1919–2020)*, MINN. LEGIS. REF. LIBRARY, HTTPS://PERMA.CC/U4YQ-GUC6 (LAST VISITED JAN. 21, 2023).

35. *Id.*

36. Frieler v. Carlson Mktg. Grp., 751 N.W.2d 558, 564–67 (Minn. 2008).

37. Goins v. W. Group, 635 N.W.2d 717, 725 (Minn. 2001).

38. 944 N.W.2d 222 (Minn. 2020).

39. *Id.* at 231–33.

40. *Id.* (citations omitted).

41. Geist-Miller v. Mitchell, 783 N.W.2d 197, 200 (Minn. Ct. App. 2010).

> *Case two.* The supervisor twice put his arms around the appellant and tried to kiss her on the cheek. The supervisor later brought the appellant into a closed-door meeting where he asked her to remove a hair from her chin or be fired. When she refused and tried to leave the office, the supervisor removed her hand from the door, held her "in a locked position," and attempted to kiss her. The court found there was no severe or pervasive harassment.[42]
>
> *Case three.* The supervisor sexually propositioned the appellant, repeatedly tried to hold her hand, requested she draw an image of a phallic object, and displayed a poster portraying the appellant as the president and CEO of the "Man Hater's Club of America." Lastly, he asked her to type a copy of the "He-Man Women Hater's Club" manifesto, which included language such as, "Women [are] the cause of 99.9 percent of stress in men." The court found there was no severe or pervasive harassment.[43]

Two other cases decided by the Eighth Circuit under the MnHRA demonstrate the flaws identified by the Minnesota Supreme Court. In *LeGrand v. Area Resources for Community and Human Services*,[44] a board member, Father Nutt, asked an employee, LeGrand, to watch pornographic movies with him and masturbate together.[45] Months later, Father Nutt "suggested LeGrand would advance in the company, if he watched 'these flicks' and 'jerk[ed Father Nutt's] dick off.' "[46] Father Nutt then kissed LeGrand in the mouth and grabbed his genitals.[47] The final incident occurred the next month when Father Nutt grabbed LeGrand's thigh during an office meeting.[48] Considering these actions, the court affirmed summary judgment for the employer, holding that the "three isolated incidents . . . which occurred over a nine-month period, were not so severe or pervasive as to poison LeGrand's work environment."[49]

Fifteen years later, the Eighth Circuit used its holding in *LeGrand* to justify affirming summary judgment for the employer in *Paskert v. Kemna-ASA Auto Plaza, Inc.*[50] In *Paskert*, the plaintiff's manager was overheard saying "he should have never hired a woman," openly bragged about his sexual conquests at work, rubbed the plaintiff's shoulders, tried to hug her, and told her he could "have" her if they both were not married.[51] The court found the manager's behavior was inappropriate, but in comparison to the behavior exhibited in cases like *LeGrand*, was inadequate to establish se-

42. McMiller v. Metro, 738 F.3d 185, 186–89 (8th Cir. 2013).
43. Duncan v. Gen. Motors Corp., 300 F.3d 928, 931–35 (8th Cir. 2002).
44. 394 F.3d 1098 (8th Cir. 2005).
45. *Id.* at 1100.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* at 1102–03.
50. 950 F.3d 535 (8th Cir. 2020).
51. *Id.* at 536–38.

vere or pervasive harassment.[52] The court found "in light of these precedents, Burns's alleged behavior, while certainly reprehensible and improper, was not so severe or pervasive as to alter the terms and conditions of Paskert's employment."[53]

Considering these decisions, the court in *Kenneh* declined to abandon the severe or pervasive framework,[54] and instead clarified how the severe or pervasive standard should apply under the MnHRA.[55] The court held that "for the severe-or-pervasive standard to remain useful in Minnesota, the standard must evolve to reflect changes in societal attitudes towards what is acceptable behavior in the workplace. As we recognized 30 years ago, the 'essence' of the Human Rights Act is 'societal change.'"[56]

To better reflect these changes in societal attitudes, the court made two suggestions for courts moving forward. First, the court held that "each case . . . must be considered on its facts, not on a purportedly analogous federal decision."[57] Secondly, the court cautioned judges from taking on the role of the jury, as summary judgment is a "blunt instrument" and should be used with the greatest caution in hostile work environment claims.[58] Only when a judge believes that no reasonable jury could find the conduct severe or pervasive is summary judgment appropriate.[59]

The Minnesota court identified a reliance on older analogous case law and a liberal use of summary judgment as barriers to the severe or pervasive framework remaining a useful tool. The issues identified by the Minnesota court are not limited to Title VII gender discrimination cases. As the next subsection shows, these issues also extend to racial discrimination cases under Title VII.

C. Modern Applications of the Severe or Pervasive Standard in Race-Based Claims

Courts considering hostile work environment claims based on racial discrimination have similarly relied on older analogous case law and have rushed to issue summary judgments in favor of the employer. These cases demonstrate that the severe or pervasive standard is not a localized issue but an issue intrinsic to the standard itself, which prevents employment discrimination jurisprudence from evolving alongside societal expectations.

52. *Id.* at 538.
53. *Id.*
54. Kenneh v. Homeward Bound, Inc., 944 N.W.2d 222, 226 (Minn. 2020).
55. *Id.* at 231–32.
56. *Id.* at 231 (quoting Wirig v. Kinney Shoe Corp., 461 N.W.2d 374, 278 (Minn. 1990)).
57. *Id.* at 231–32.
58. *Id.* at 232.
59. *Id.*

In *Meritor Savings Bank*, the Supreme Court cited "with approval, analogies between racial and sexual harassment in the workplace,"[60] made by lower courts.[61] A little less than two decades later, in *National Railroad Passenger Corporation v. Morgan*,[62] the Court adopted the severe or pervasive standard established in *Meritor Savings Bank* for hostile work environment claims based on racial discrimination.[63] As mentioned in Section I, the 1964 Civil Rights Act was introduced as a response to rising racial tensions in the South.[64] Yet, as the following cases show, the severe or pervasive standard has halted progress even for the groups Title VII was originally designed to protect.

In *Nichols v. Michigan City Plant Planning Department*,[65] a Black employee was called a "black n——r" and referred to as "boy" over a two-week period.[66] The Seventh Circuit affirmed summary judgment for the employer on the hostile environment work claim.[67] The court expressed that, though the use of the n-word was egregious, the isolated nature of the incidents did not create a hostile work environment.[68] The court concluded that "while referring to colleagues with such disrespectful language is deplorable and has no place in the workforce, one utterance of the n-word has not generally been held to be severe enough to rise to the level of establishing liability."[69]

In *Gates v. Board of Education of the City of Chicago*,[70] the Northern District of Illinois followed the lead of *Nichols* in applying the severe or pervasive standard. Gates's supervisor, Rivera, made jokes to Gates that involved calling him a "shit-sniffing n——r," telling Gates he would "write his black ass up," and referring to Black Americans as "you people" in Gates's presence.[71] The court found that while referring to colleagues with such language was deplorable, various past cases including *Nichols* had generally held that one or two utterances of the n-word was not severe or

60. Heather L. Kleinschmidt, *Reconsidering Severe or Pervasive: Aligning the Standard in Sexual Harassment and Racial Harassment Causes of Action*, 80 IND. L.J. 1119, 1122 (2005).

61. Meritor Sav. Bank, F.S.B. v. Vinson, 477 U.S. 57, 66–67 (1986) (citing Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982)).

62. 536 U.S. 101 (2002).

63. *Id.* at 116.

64. O'Brien, *supra* note 1. **R**

65. 755 F.3d 594 (7th Cir. 2014).

66. *Id.* at 598, 601 (dashes in original).

67. *Id.* at 598–99.

68. *Id.* at 603.

69. *Id.* at 601 (citing Smith v. Ne. Ill. Univ., 388 F.3d 559, 566 (7th Cir. 2004)).

70. No. 15-CV-1394, 2017 WL 4310648 (N.D. Ill. Sept. 28, 2017), *aff'd in part, rev'd in part*, 916 F.3d 631 (7th Cir. 2019).

71. *Id.* at *5–6 (dashes added).

pervasive enough to rise to the level of establishing liability.[72] The court granted summary judgment to the defendant regarding the hostile work environment claim.[73]

The Seventh Circuit eventually reversed summary judgment, but only because Rivera was Gates's supervisor. If co-workers harassed Gates while his supervisor had turned a blind eye, the court would have likely affirmed summary judgment. The court of appeals held that "the district court's analysis is flawed . . . because it overlooked the fact that in most of the cases it cited rejecting hostile work environment claims, a *co-worker* as opposed to a *supervisor* uttered the racially offensive language. This distinction is critical in general, and in this case."[74]

In *Winston v. Dart*,[75] one of the plaintiffs was called "nappy-headed" by the executive director of the organization where she was employed.[76] Again the Northern District of Illinois referred to *Nichols* to guide its decision. The court was willing to analogize the insult "nappy-headed" to the "n-word" regarding emotional impact.[77] But since the same court held in *Nichols* and *Gates* that one or two utterances of the n-word did not establish liability, the singular use of "nappy-headed" indeed did not—especially since the insult was only overheard by the employee and not directed at her.[78] The court again granted summary judgment for the defendant.[79]

These cases show that the failure of the severe or pervasive standard is not a localized issue but an intrinsic issue with the standard itself. Though the cases above were decided in the Seventh Circuit and related to racial discrimination, they reveal the same flaws highlighted by the *Kenneh* court. First, the standard causes judges to be self-referential to previous findings despite changing societal expectations. Second, it allows judges to take the ultimate decision out of the hands of a jury, who will be more aware of what is considered acceptable workplace behavior.

72. *Id.* at *14; *see also Smith*, 388 F.3d at 566 (stating "the mere utterance of an epithet which engenders offensive feelings in an employee" does not necessarily violate Title VII even though the plaintiff was referred to—outside of his presence—as a "black motherfucker"); *see also* Roberts v. Fairfax Cty. Pub. Sch., 858 F. Supp. 2d 605, 609 (E.D. Va. 2012) (two isolated uses of a racial epithet are insufficient to meet the "severe and pervasive" prong of a hostile work environment claim).

73. *Gates*, 2017 WL 4310648 at *19.

74. Gates v. Bd. of Educ. of Chi., 916 F.3d 631, 638 (7th Cir. 2019).

75. No. 18-C-5726, 2021 WL 3633918 (N.D. Ill. Aug. 17, 2021).

76. *Id.* at *3–4.

77. *Id.* at *14.

78. *Id.*

79. *Id.*

III. The Severe or Pervasive Standard in Montana

Like Minnesota, Montana has its own anti-discrimination statute, titled the Montana Human Rights Act (MHRA).[80] The Montana Supreme Court has stated the MHRA is "closely modeled after Title VII, and reference to pertinent federal case law is both useful and appropriate."[81] In line with this reasoning, Montana has adopted the federal severe or pervasive standard when considering hostile work environment claims.[82]

Montana State University-Northern v. Bachmeier[83] is one of the more recent sex discrimination cases decided by the Montana Supreme Court. In the case, Randy Bachmeier, an employee of Montana State University-Northern (MSU-N), was continually harassed by his female supervisor, Rosalyn Templeton. Templeton's actions included placing her hands on Bachmeier's knees, stroking Bachmeier's back, rubbing his shoulders, and various other instances of inappropriate touching.[84] To avoid Templeton's inappropriate touching, Bachmeier moved to a smaller office in a different building, installed a wind chime on his door, avoided meetings with Templeton, and adopted "closed body language" when around Templeton.[85] Despite these proactive measures by Bachmeier, the inappropriate touching by Templeton continued.[86]

In its decision, the majority held that Bachmeier experienced a hostile work environment.[87] The majority came to this conclusion while seemingly ignoring the severe or pervasive standard. The Court mentioned the standard just once, and only in a parenthetical citing a previous Montana case.[88] The Court focused instead on whether the discrimination was hostile and abusive.[89] Specifically, "based on a totality of the circumstances, the claimant must prove that he or she found the misconduct subjectively hostile and abusive and that a reasonable person also would find the misconduct objectively hostile and abusive."[90]

Why would the majority avoid using the severe or pervasive language when the Court has consistently held that the MHRA generally follows Ti-

80. Mont. Code Ann. § 49-1-102 (2021).

81. Snell v. Mont.-Dakota Utils. Co., 643 P.2d 841, 844 (Mont. 1982); *see also* Martinez v. Yellowstone Cty. Welfare Dep't, 626 P.2d 242, 245 (Mont. 1981).

82. Beaver v. Mont. Dep't of Nat. Res. & Cons., 78 P.3d 857, 864 (Mont. 2003).

83. 480 P.3d 233 (Mont. 2021).

84. *Id.* at 238–39.

85. *Id.* at 239.

86. *Id.*

87. *Id.* at 248.

88. *Id.* (citing Beaver v. Mont. Dep't of Nat. Res. & Cons., 78 P.3d 857, 864 (Mont. 2003)).

89. *Bachmeier*, 480 P.3d at 243, 247.

90. *Id.* at 243 (citations omitted).

tle VII precedent?[91] Justice McKinnon's dissent provides some insight. Her dissent mostly focuses on the severe or pervasive standard and falls more in line with the hostile work environment jurisprudence discussed in Section II.[92] While the majority does not explicitly depart from the severe or pervasive standard, the majority's avoidance of the severe or pervasive language may be an acknowledgment that the severe or pervasive standard is too high of a bar for employees who are victims of serious workplace sexual harassment.

In one of her strongest arguments, Justice McKinnon pointed out that the majority ignored the hearing officer's conclusion "that while other MSU-N employees found the touching inappropriate and intimate, a *reasonable* person would not find that an offensive and hostile work environment was created."[93] In support, Justice McKinnon argued the inappropriate touching was neither pervasive nor severe, as Bachmeier only reported a few instances of touching over a three-year period, and the touching could be categorized as "neither severe nor physically threatening."[94] Justice McKinnon highlighted that no other employee found Templeton's touching to be unreasonably intimate or inappropriate.[95] Additionally, the hearing officer found Bachmeier's response to the touching was heightened because of childhood sexual trauma and a reasonable person would not perceive the conduct as creating a hostile work environment.[96] Justice McKinnon agreed that "it was only Bachmeier, because of his childhood sexual trauma, who internalized Templeton's touching differently . . . and found it to be severe and unbearable."[97] Therefore, Justice McKinnon concluded that Bachmeier's claim failed the objective prong of the severe or pervasive test.[98]

Justice McKinnon recognized Templeton's touching was inappropriate,[99] but was concerned that holding it actionable under Title VII runs the risk of turning the statute into a civility code.[100] When compared to *Beaver v. Montana Department of Natural Resources and Conservation*, where the Montana Supreme Court denied the employee's claim, it is easy to see why

91. *See* Puskas v. Pine Hills Youth Corr. Facility, 307 P.3d 298, 303 (Mont. 2013); Stringer-Altmaier v. Haffner, 138 P.3d 419, 422 (Mont. 2006); Campbell v. Garden City Plumbing, 97 P.3d 546, 549 (Mont. 2004); *Beaver*, 78 P.3d at 863–64.

92. *Bachmeier*, 480 P.3d at 256–59 (McKinnon, J., concurring and dissenting).

93. *Id.* at 253 (emphasis in original).

94. *Id.* at 259.

95. *Id.* at 261.

96. *Id.*

97. *Id.* at 259.

98. *Bachmeier*, 480 P.3d at 262.

99. *Id.* at 259.

100. *Id.* at 257.

Justice McKinnon found Templeton's touching insufficient to create a hostile work environment.

In *Beaver*, the plaintiff, Kimberli Beaver, was on a work trip where her co-worker, Michael Ness, arranged for the two to share one room with two single beds.[101] During the night, Ness forced himself on Beaver and attempted to rape her.[102] Ness was suspended shortly after and eventually resigned.[103] The incident left Beaver shaken and she was subsequently diagnosed with post-traumatic stress disorder by a psychologist.[104] Though Beaver's employer took action against Ness, the gender-based discrimination continued. Beaver had her seasonal work cut from eight to six months. When Beaver asked for a reason she was told "she did not need to worry because she had been recently married and had a new husband to support her."[105] Despite the attempted rape and loss of work, the Montana Supreme Court, in considering the totality of the circumstances, affirmed the district court's view that the harassment was not sufficiently severe or pervasive to create a hostile work environment.[106]

Compared to the facts in *Beaver* and the treatment highlighted in the cases discussed in Section II of this comment, the treatment Randy Bachmeier received, while certainly inappropriate, was relatively mild. Fortuitously, the majority applied an easier standard. Further, although Justice McKinnon's dissent is likely more in line with current sexual harassment case law, the majority's decision better reflects what a reasonable person today would consider sexual harassment in the workplace.

IV. Recommendations for the Future Application of the Severe or Pervasive Standard in Montana

As discussed in Section III, Montana courts view the MHRA as "closely modeled after Title VII, and reference to pertinent federal case law is both useful and appropriate."[107] In line with this reasoning, Montana has adopted the federal severe or pervasive standard when evaluating hostile work environment claims under the MHRA.[108] Though the Court in *Bachmeier* seemed to be signaling its departure from the severe or pervasive standard, the Court appeared to return to the standard in its most recent

101. Beaver v. Mont. Dep't of Nat. Res. & Cons., 78 P.3d 857, 861 (Mont. 2003).
102. *Id.* at 861–62.
103. *Id.* at 862.
104. *Id.*
105. *Id.*
106. *Id.* at 870.
107. Snell v. Mont.-Dakota Utils. Co., 643 P.2d 841, 844 (Mont. 1982); *see also* Martinez v. Yellowstone Cty. Welfare Dep't, 626 P.2d 242, 245 (Mont. 1981).
108. *Beaver*, 78 P.3d at 864.

sexual harassment case, *NorVal Electric Coop. Inc. v. Lawson*.[109] There, the Court stated:

> [A] work environment is hostile if the employee is subjected to unwelcome verbal or physical conduct of a sexual nature that is "sufficiently severe or pervasive to alter the condition of her employment and create an abusive working environment." The severity and pervasiveness of the harassment is sufficient if it is both "objectively and subjectively offensive"; meaning that "a reasonable person would find [the workplace] hostile and abusive, and [the victim] in fact perceived [it] as hostile and abusive."[110]

Here, the Court explicitly refers to the severe or pervasive standard. Though the Court does not elaborate on its reasoning for returning to the severe or pervasive standard after implicitly abandoning it in *Bachmeier*, the extreme facts presented in *NorVal* could be a possible justification.

The harassment of Lawson, an employee of NorVal Electric Co-Op, began during a work-related car ride in May 2017. Lawson's supervisor, Herbert, asked her why she had started wearing fake eyelashes, and then told Lawson that "when women go and try to improve their looks, it's because they're looking to have an affair." A month later Herbert asked Lawson if she had ever "fooled around" with a banker connected to an upcoming work conference. Later, Lawson mentioned obtaining a massage in Bozeman after taking her son to football camp and Herbert inquired whether her husband gave her good massages. Herbert informed Lawson that he gave good massages and would "like to get you relaxed." In July 2017, Herbert told Lawson she was filling her pants out nicely. In August 2017, Herbert entered Lawson's office and started questioning her about her sex life. In a September 2017 meeting, board members joked about a sexual relationship between Herbert and Lawson. In October 2017, Herbert and Lawson had a scheduled work meeting during a work conference in Great Falls; when they arrived at the conference, Herbert requested they have the meeting in his hotel room and handed Lawson a spare room key.[111]

By then, Lawson felt she had limited options, and in October 2017, she told Herbert she needed to report the hotel room incident or find another job. As Lawson's direct supervisor, Herbert refused to tell Lawson how to report the incident to the board. Four days after her conversation with Herbert, Lawson received a letter from NorVal's attorney informing her that she was being formally reprimanded for, among other things, creating a toxic work environment. Herbert personally delivered the letter to her and told her the next day that "he did not want to sleep with her." Herbert then began minimizing Lawson's role at the company, removing her from her

109. 523 P.3d 5 (Mont. 2022).

110. *Id.* at 15 (quoting *Beaver*, 78 P.3d at 864).

111. *Id.* at 10–11.

role in taking the minutes of meetings and belittling her during conversations.[112]

The continuous harassment from a supervisor had a serious impact on Lawson's mental health and well-being. To ward off Herbert's harassment, Lawson began showering less and stopped wearing nice clothes. She told her husband she was suffering a serious loss of self-worth and eventually sought medical assistance. Lawson consulted with a psychologist, who recommended Lawson be hospitalized for severe depression; she was subsequently diagnosed with suicidal ideation. By November 2017, Lawson began calling out of work, citing the "extreme stress and anxiety caused by [Herbert's] continued harassment and retaliation and threats." On November 10, Lawson received a letter informing her she was banned from NorVal property and her work credentials had been revoked.[113]

The Montana Supreme Court had little trouble affirming the hearing officer's finding that the harassment was objectively severe or pervasive. In a 5–0 opinion that included Justice McKinnon, the Court held:

> [I]n consideration of the totality of the circumstances, including insinuations the employee wanted to commence a sexual affair by wearing false eyelashes, offers to give a massage, sniffing of hair, attempting to hug or make physical contact, making inquiry about the employee's sex life and comments about "turn offs," comments about filling out pants, and set-ups to visit a hotel room while away on a work trip, we have little difficulty in affirming the Hearing Officer's conclusion that a reasonable person subjected to such actions would find NorVal's workplace to be hostile and abusive.[114]

In other words, Lawson experienced severe, continuous sexual harassment that could not be confused with "mere intersexual flirtation."[115]

Between *Bachmeier* and *NorVal* the Court appears to be shifting the standard used to evaluate hostile work environment claims depending on the facts of the case. The Court avoids using the severe or pervasive language when the harassment is not as extreme as the facts in *NorVal* but is still potentially actionable, as in *Bachmeier*.

Instead of changing the standard based on the facts of the case, Montana can retain the severe or pervasive framework while changing its application for future cases. As previously discussed, Minnesota made two suggestions for courts evaluating hostile work environment claims under the severe or pervasive framework, which Montana should also adopt: (1) avoiding reliance on previous analogous federal and state decisions, and (2)

112. *Id.* at 11–12.
113. *Id.* at 12–13.
114. *Id.* at 16.
115. *NorVal*, 523 P.3d at 16.

avoiding the use of summary judgment.[116] These suggestions will be discussed in turn in Parts A and B, below.

A. Avoid Reliance on Previous Analogous Federal Decisions

Since "today, reasonable people would likely not tolerate the type of workplace behavior that courts previously brushed aside,"[117] reliance on older federal and Montana Supreme Court decisions such as *Beaver* prevents the severe or pervasive standard from evolving alongside societal expectations. Even ten years ago, behavior that might have been accepted in workplaces could be considered actionable harassment under Title VII today. As discussed in Section II, the Seventh Circuit in *Nichols*—a 2014 case—relied on a previous analogous holding from 2004, which stated that "one utterance of the n-word has not generally been held to be severe enough to rise to the level of establishing liability."[118] Though this may have been in line with societal expectations in 2004 and even 2014, it is hard to imagine the use of the n-word, even once, would not meet the requisite objective hostile workplace standard today.

Justice McKinnon's dissent in *Bachmeier* also referenced similar language from an earlier federal case. While discussing the severe or pervasive standard, Justice McKinnon cites *Meritor Savings Bank*, which in 1986 held that "mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee would not affect the conditions of employment to [a] sufficiently significant degree to violate Title VII."[119] Though the utterance of racial epithets is not an issue in *Bachmeier*, Justice McKinnon used this ruling to help establish what level of harassment should be considered severe or pervasive.[120] Additionally, in her dissent, Justice McKinnon's cited with approval the hearing officer's contrasting of the harassment experienced by Bachmeier to the harassment endured by the plaintiff in *Beaver*, as support for her conclusion that Bachmeier never experienced an objectively hostile work environment.[121]

While the holdings from *Meritor Savings Bank* and *Beaver* may have been relevant when written, a reasonable person today would find the treat-

116. Kenneh v. Homeward Bound, Inc., 944 N.W.2d 222, 231–32 (Minn. 2020).

117. *Id.* at 231.

118. Nichols v. Mich. City Plant Planning Dep't, 755 F.3d 594, 601 (7th Cir. 2014) (citing Smith v. Ne. Ill. Univ., 388 F.3d 559, 566 (7th Cir. 2004)).

119. Mont. State Univ.-N. v. Bachmeier, 480 P.3d 233, 256 (Mont. 2021) (McKinnon, J., concurring and dissenting) (citing Meritor Sav. Bank, F.S.B. v. Vinson, 477 U.S. 57, 67 (1986)).

120. *Id.*

121. *Id.* at 261–62 ("[T]he Hearing Officer, in the context of *Beaver* . . . clarified that 'an anonymous request to direct the provost to stop her inappropriate touching, with no formal complaint of inappropriate touching submitted through the established channels for complaints of sexual harassment, simply was not sufficient notice to require sooner action by MSU-N.'").

ment experienced by either employee in these cases is severe enough to create an objectively hostile work environment. Relying on older federal decisions can unreasonably heighten the standard for when workplace harassment becomes actionable. While the Montana Supreme Court has held that "reference to federal case law is appropriate in employment discrimination cases filed under the [MHRA],"[122] this does not mean Montana is required to adopt every fact-based finding of federal courts. Montana can still retain the severe or pervasive framework while making fact-based findings independent of previous analogous federal decisions.

B. Ensure a Jury Based Fact-Finding Process Occurs

The second suggestion from Minnesota is less helpful since Montana courts do not grant summary judgment in hostile work environment claims. The Human Rights Commission (HRC) initially handles employment discrimination claims under the MHRA. Once a case is filed with the HRC, "the department shall informally investigate the matters . . . to determine whether there is reasonable cause to believe the allegations are supported by a preponderance of the evidence.[123] If the assigned hearing officer finds "reasonable cause" that illegal discrimination took place, the HRC will attempt to resolve the "complaint by conciliation."[124] If a resolution is impossible, a final agency decision will be made after a contested hearing.[125]

After the HRC makes its final agency decision, any district court on judicial review cannot substitute its judgment for the agency's.[126] Instead, the court must review the record to determine whether the hearing officer's findings of fact are clearly erroneous.[127] In *Blaine County v. Stricker*,[128] the Montana Supreme Court held that "an agency may reject a hearing officer's findings of fact 'only if,' upon review of the complete record, the agency first determines that the findings were not based on 'substantial evidence.'"[129] Additionally, the Court held in *Blaine County* that the standard for a court on review "is not whether there is evidence to support findings different from those made by the trier of fact, but whether substantial credible evidence supports the trier's findings."[130] Though this scheme removes some final decision-making power from potentially out-of-touch judges,

122. Snell v. Mont.-Dakota Utils. Co., 643 P.2d 841, 844 (Mont. 1982); *see also* Martinez v. Yellowstone Cty. Welfare Dep't, 626 P.2d 242, 245 (Mont. 1981).

123. MONT. CODE ANN. § 49-2-504(1) (2021).

124. *Id.* § 49-2-504(2)(c).

125. *Id.* § 49-2-505(5).

126. KB Enterprises, LLC v. Mont. Human Rights Comm'n, 443 P.3d 498, 501 (Mont. 2019).

127. *Id.*

128. 394 P.3d 159 (Mont. 2017).

129. *Id.* at 165.

130. *Id.*

this gives too much deference to a single hearing officer's initial determinations.

Bachmeier demonstrates some potential flaws in this scheme. In *Bachmeier*, the majority likely misapplied Montana precedent when affirming the HRC's agency reversal of the hearing officer's findings.[131] The HRC reversed the hearing officer's finding that "it was Bachmeier alone who found the touching unreasonably interfered with his work performance."[132] To support this reversal, the HRC pointed to the fact that many employees found the touching inappropriate.[133] But as Justice McKinnon highlights, only Bachmeier testified to making changes in his work routine, such as moving his office to another building and adopting "closed body language."[134] According to Justice McKinnon, "No other employee testified that Templeton's touching caused such a change in their work performance."[135]

In *Bachmeier*, there was likely substantial evidence to support both the hearing officer's findings and the HRC's opposite findings. But the standard is not whether there is evidence to support *different* findings, but whether substantial evidence *supports* the findings first made by the trier of fact.[136] In *Bachmeier*, the hearing officer's initial findings should never have been reversed because substantial evidence supported their conclusions. *Bachmeier* shows there may be an over-reliance on the judgment of a hearing officer, since once a hearing officer makes a factual finding, it is difficult to overturn based on Montana's clearly erroneous finding of fact standard.[137]

Montana should consider modifying the procedures for employment discrimination claims to ensure a jury-based fact-finding process occurs. Whether the alleged harassment was severe or pervasive as to create a hostile work environment is "generally a question of fact for the jury."[138] Additionally, as this comment has repeatedly argued, a jury with diverse perspectives and employment experiences is better equipped than a single hearing officer to determine whether an individual experienced severe or pervasive harassment.

131. Mont. State Univ.-N. v. Bachmeier, 480 P.3d 233, 245 (Mont. 2021).

132. *Id.* at 241.

133. *Id.* at 261 (McKinnon, J., concurring and dissenting).

134. *Id.*

135. *Id.*

136. Blaine Cty. v. Stricker, 394 P.3d 159, 165 (Mont. 2017).

137. *See Bachmeier*, 480 P.3d at 242.

138. Johnson v. Advocate Health & Hosps. Corp., 892 F.3d 887, 901 (7th Cir. 2018).

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V. Conclusion

As seen in the cases discussed in Section II, individuals who endure serious and sustained harassment in the workplace are often denied justice in the courtroom under the severe or pervasive standard. Judges tend to reference older analogous decisions, which leads them to take the ultimate decision out of the jury's hands through summary judgment. As a result, the type of harassment that a reasonable person today would consider severe or pervasive gets brushed aside by the courts. For the severe or pervasive standard to remain a useful tool in Montana, judges should avoid comparing current cases to older, analogous federal cases. As seen in Justice McKinnon's dissent in *Bachmeier*, the use of standards established by decades-old cases can heighten the severe or pervasive standard to the point where it is out of touch with current societal expectations. Secondly, though Montana courts do not use summary judgment in cases under the MHRA, the deference given to the hearing officer's initial findings places too much power in the hands of a single individual. Juries, rather than a hearing officer, should be the primary fact finder in hostile work environments cases. The diverse employment experiences of twelve individuals will lead to decisions more faithful to current social standards of what constitutes actionable sexual harassment. By incorporating these suggestions, the severe or pervasive standard will become a more useful tool for employment discrimination cases in Montana.