Actionable Acts: "Severe" Conduct in Hostile Work Environment Sexual Harassment Cases

James Concannon

United States District Court for the Central District of Illinois

Follow this and additional works at: https://digitalcommons.law.buffalo.edu/bjglsp

Part of the Labor and Employment Law Commons, and the Law and Gender Commons

Recommended Citation


Available at: https://digitalcommons.law.buffalo.edu/bjglsp/vol20/iss1/3

This Article is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Journal of Gender, Law & Social Policy by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.
This paper examines the significant weight that courts accord proof of especially “severe” conduct in hostile work environment sexual harassment cases. Such conduct is often found by courts to satisfy the “severe or pervasive” test established by the Supreme Court in *Harris v. Forklift Systems, Inc.*, even if the plaintiff does not present proof that the harassing conduct occurred with great frequency.¹

Part I provides an introduction to the Supreme Court's hostile work environment jurisprudence and the origins of the severe or pervasive test. Part II begins the exploration into the disjunctive nature of the severe or pervasive test. Part II(a) examines instances when egregious verbal harassment has been found to satisfy the severe or pervasive test, despite the infrequency of such harassment. Part II(b) focuses on the severity of different types of physical harassment—harassment that involves the touching of the victim by the harasser. Part II(c) examines the role of implicit and explicit threats of physical harm in the severity calculus. Part III explores two types of “severe” conduct that are specific to high-risk professions. Part III(a) examines the severity of refusals to provide backup in such professions, while Part III(b) considers conduct that serves to diminish employees' authority and undermine cohesiveness in a way that some courts have found to pose a threat to the safety of the victims of the harassment and others.

---

I. INTRODUCTION TO HOSTILE WORK ENVIRONMENT
SEXUAL HARASSMENT AND THE "SEVERE OR PERVERSIVE" TEST

Although discrimination in employment based on sex was explicitly banned in the Title VII of the Civil Rights Act of 1964, it was not until 1982 that a circuit court recognized that sexual harassment was a violation of Title VII. In Henson v. City of Dundee, the Eleventh Circuit, reversing the lower court, found that "under certain circumstances the creation of an offensive or hostile work environment due to sexual harassment can violate Title VII irrespective of whether the complainant suffers tangible job detriment." The Supreme Court finally addressed the issue four years later in Meritor Savings Bank, FSB v. Vinson. In Meritor, the plaintiff alleged she had "constantly been subjected to sexual harassment" in the form of unwelcome touching, coerced sexual intercourse, and even rape, by a vice president of the bank over a four-year period. The Court affirmed the D.C. Circuit's reversal of the district court's grant of summary judgment in favor of the defendant, finding that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile working environment," and that "harassment leading to noneconomic injury can violate Title VII." In coming to the conclusion that "hostile work environment" discrimination was actionable under Title VII, the Court pointed to the Sexual Harassment Guidelines that had been promulgated by the Equal Employment Opportunity Commission (EEOC) in 1980. The EEOC Guidelines provide that

[unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2)

---

3 682 F.2d 897, 901 (11th Cir. 1982).
4 477 U.S. 57, 64 (1986).
5 Id. at 60.
6 Id. at 65-66 (emphasis added).
7 Id. at 65.
submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.  

The first category is known as “quid pro quo” harassment, where “the employer conditions a benefit on some form of sexual favor.” The second category is referred to as “tangible employment action,” a phrase drawn from the Supreme Court’s decision in Burlington Industries, Inc. v. Ellerth. In Ellerth, the Court held that an employer is vicariously liable for sexual harassment under Title VII if that harassment culminates in a tangible employment action against the employee-victim. The third category is the “hostile work environment claim.” In Ellerth the Court clarified that when a “claim involves only unfulfilled threats, it should be categorized as a hostile work environment claim which requires a showing of severe or pervasive conduct” to be actionable.

The “severe or pervasive” requirement was first used by the Supreme Court in the sexual harassment context in Meritor. There the Court noted that “[f]or sexual harassment to be actionable, it must be sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’” But what type of conduct is “sufficiently severe or pervasive” to create such an environment? The Court refused to draw bright lines in Meritor, instead pointing again to the EEOC Guidelines, which “emphasize that the trier of fact must determine the existence of sexual harassment in light of ‘the record as a whole’ and ‘the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged

8 29 C.F.R. § 1604.11(a) (2011).
9 ROTHSTEIN ET AL., supra note 2, at 297.
11 Id. at 762-63.
12 Id. at 754.
13 Id. (emphasis added).
14 Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 67 (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).
incidents occurred." However, the Court did establish that "[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were ‘unwelcome,’ not whether ‘sex-related conduct was ‘voluntary,’ in the sense that the complainant was not forced to participate against her will." This was an important point in Meritor, as the plaintiff there had been coerced into having sex with her superior, "unwelcome" conduct she "voluntarily" complied with out of fear of losing her job.

Despite Meritor, lower courts were left with relatively little guidance as to what constituted sufficiently severe or pervasive conduct. Seven years after Meritor the Supreme Court provided some direction on the issue of severity and pervasiveness, holding in Harris v. Forklift Systems, Inc. that while

[certainly Title VII bars conduct that would seriously affect a reasonable person's psychological well-being, ... the statute is not limited to such conduct. So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, ... there is no need for it also to be psychologically injurious.

Before Harris, at least three circuit courts had held that in order to be actionable as a hostile work environment, the employee's psychological well-being must be "seriously affected," or that the conduct in question led the plaintiff to "suffer injury." The Harris Court then put some meat on the bones of the objective and subjective requirements of the hostile work environment, holding that the conduct needed to be both "objectively hostile or abusive ... [productive of] an environment that a reasonable person would find hostile or abusive," and subjectively abusive to the victim. Still,

15 Id. at 69 (quoting 29 C.F.R. § 1604.11(b) (1985)).
16 Id. at 68.
17 Id.
19 Id. at 20. Compare Vance v. Southern Bell Telephone & Telegraph Co., 863 F.2d 1503, 1510 (11th Cir. 1989) (requiring conduct to have a serious effect on the plaintiff's psychological well-being), Rabidue v. Osceola Refining Co., 805 F.2d 611, 620 (6th Cir. 1986) (same), and Downes v. Fed. Aviation Admin., 775 F.2d 288, 292 (Fed. Cir. 1985) (same), with Ellison v. Brady, 924 F.2d 872, 877-78 (9th Cir. 1991) (rejecting the "serious effect" requirement).
20 Harris, 510 U.S. at 21-22.
the Court noted that the test for severity or pervasiveness “is not, and by its nature cannot be, a mathematically precise test.” However, the Court did provide some factors that courts could take into account in weighing the circumstances, including “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” Although Meritor was the first case to use the “severe or pervasive” language, Harris’s rather limited elaboration was apparently sufficiently decisive to gain credit for the origination of the severe or pervasive test.

The Supreme Court gave further substantive clues as to the type of conduct prohibited by Title VII in Oncale v. Sundowner Offshore Services, Inc., a same-sex sexual harassment case. Writing for a unanimous Court, Justice Scalia emphasized the importance of the context of the alleged harassment, noting that “the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff’s position . . . ” Justice Scalia cited Harris for this proposition, but the “plaintiff’s position” language was a new piece to the puzzle provided by the Court. Justice Scalia also pushed back against the defendant’s contention that Title VII was being turned into a “general civility code for the American workplace.” He noted that

[i]n . . . harassment cases, . . . [the] inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. A professional football player’s working environment is not severely or pervasively abused, for example, if the coach smacks him on the buttocks as he heads onto the field—even if the same behavior would

21 Id. at 22.
22 Id. at 23.
23 See, e.g., Weston v. Pennsylvania, 251 F.3d 420, 426 (3d Cir. 2001) (referring to the severe or pervasive test as “Harris’ ‘severe and pervasive’ test”).
25 Id. (emphasis added).
26 See id. (citing Harris, 510 U.S. at 22).
27 See id. at 80.
reasonably be experienced as abusive by the coach’s secretary . . . back at the office. . . . Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing . . . and conduct which a reasonable person in the plaintiff’s position would find severely hostile or abusive.28

Needless to say, the Court’s “use your common sense” directive probably provided little solace to lawyers defending employers in sexual harassment cases. Three months after Oncale was decided, the Court in Faragher v. City of Boca Raton reaffirmed that the inquiry was to be a factual one, and expressed its belief that such a standard would be sufficient to weed out meritless claims.29 The Court again pushed back against accusations that Title VII had been turned into a general civility code, stating that “[a] recurring point in . . . [this Court’s] opinions is that ‘simple teasing,’ . . . offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the ‘terms and conditions of employment.’”30

Three years after Oncale and Faragher the Supreme Court further stressed the importance of the “objectively hostile or abusive” component of a hostile work environment finding. The allegedly harassing conduct in Clark County School District v. Breeden consisted of one comment made while three employees—two men and one woman—were going over a job applicant’s file.31 A notation in the file indicated that the applicant had made the comment, “I hear that making love to you is like making love to the Grand Canyon.”32 One of the male employees read this out loud and chuckled with the other male employee.33 The female employee complained about the comment, and then was transferred to a position she found to be less desirable.34 She sued, claiming that the transfer was retaliatory in violation

28 Id. at 81-82.
30 Id.
32 Id. at 269.
33 Id.
34 See id. at 271-72.
The Supreme Court, in a per curiam opinion, reversed the Ninth Circuit, holding that "[n]o reasonable person could have believed that the single incident . . . violated Title VII's standard."36

As Justice O'Connor had noted in *Harris*, the "severe or pervasive" test handed down by the Supreme Court "is not, and by its nature cannot be, a mathematically precise test."37 Indeed, in his concurring opinion in *Harris*, Justice Scalia criticized the indeterminacy of the test, arguing that "[a]s a practical matter, today's holding lets virtually unguided juries decide whether sex-related conduct engaged in (or permitted by) an employer is egregious enough to warrant an award of damages."38 However, after pointing out its flaws, Justice Scalia concurred anyway, stating that "I know of no test more faithful to the inherently vague statutory language than the one the Court today adopts."39 In Justice Scalia's eyes, at least, the "severe or pervasive" test appears to be an example of the Court doing the best it can with what little Congress gave them to work with.

II. **SEVERE OR PERSVASE?—WHEN SEVERE BUT INFREQUENT HARASSMENT IS ACTIONABLE**

A. **Egregious Verbal Harassment**

With rather limited guidance from the Supreme Court, lower courts were tasked with adding substance to the "severe or pervasive" test that the Court had sketched out. One difficulty that courts faced was determining how to balance the severity of the harassment with its pervasiveness. In *Carrero v. New York City Housing Authority*, the Second Circuit held that a lack of frequency of offensive conduct did not prevent a plaintiff from succeeding on a hostile work environment claim if the conduct was sufficiently objectionable.40 The defendant in the case had argued that "federal law does not punish 'trivial behavior' consisting of only 'two kisses, three arm-

---

35 *See id.* at 270.
36 *See id.* at 271.
38 *Id.* at 24 (Scalia, J., concurring).
39 *Id.* at 25 (Scalia, J., concurring).
40 890 F.2d 569, 578 (2d Cir. 1989).
strokes,' several degrading epithets and other objectionable—but ultimately harmless—conduct.

The court disagreed:

We emphatically reject this argument. A female employee need not subject herself to an extended period of demeaning and degrading provocation before being entitled to seek the remedies provided under Title VII. It is not how long the sexual innuendos, slurs, verbal assaults, or obnoxious course of conduct lasts. The offensiveness of the individual actions complained of is also a factor to be considered in determining whether such actions are pervasive.

This is a somewhat puzzling way to phrase the rule. What the court appears to be saying, rather, is that the degree of offensiveness of the actions complained about—in other words, the severity of the actions—should be considered when one is determining whether the conduct was sufficiently severe or pervasive.

Many other courts have found that even relatively few incidents of harassing conduct can meet the severe or pervasive test when that conduct is particularly offensive or egregious. The bar for such conduct is especially high, as courts have pointed out that "isolated instances of harassment ordinarily do not rise to" the level of actionable harassment; "rather, the plaintiff must demonstrate either that a single incident was extraordinarily severe, or that a series of incidents were 'sufficiently continuous and concerted' to have altered the conditions of her working environment." As to how many incidents constitute such a "series," courts have repeatedly cautioned that "there is neither a threshold 'magic number' of harassing incidents that gives rise, without more, to liability as a matter of law nor a number of incidents below which a plaintiff fails as a matter of law to state a claim."

For instance, in *Rodgers v.*

---

41 Id.
42 Id.
43 Cruz v. Coach Stores, Inc., 202 F.3d 560, 570 (2d Cir. 2000) (internal citation omitted).
Western-Southern Life Insurance Co., a Seventh Circuit hostile environment race discrimination case, the court found that four remarks, only one of which was directed at the plaintiff, were sufficient to create a racially hostile work environment.\textsuperscript{45} The analysis focused on one comment in particular that the court found to be especially hostile: a "motivational speech" (as the defendant characterized it) in which the district sales manager told the plaintiff's employees that "[y]ou black guys are too fucking dumb to be insurance agents."\textsuperscript{46}

Similarly, in Smith v. Northwest Financial Acceptance, Inc., a Tenth Circuit hostile environment sex discrimination case, the court found that six comments directed at or made near the plaintiff were "sufficient for the court to conclude that a reasonable person would find Plaintiff's work environment hostile or pervasive."\textsuperscript{47} The court seemed to suggest that three of the "sexually disparaging remarks" made by a supervisor—telling the plaintiff to "get a little this weekend" so she would "come back in a better mood," that the plaintiff "would be the worst piece of ass that [he] ever had," and that the plaintiff "must be a sad piece of ass" who "can't keep a man"—when taken together would have been "severe enough to affect a reasonable person's identity as a woman."\textsuperscript{48} Although the offensiveness to which the plaintiff was subjected occurred rather infrequently, the court emphasized that the Meritor test "is a disjunctive one, requiring that the harassing conduct be sufficiently pervasive or sufficiently severe to alter the terms, conditions, or privileges of Plaintiff's employment."\textsuperscript{49}

\textsuperscript{45} 12 F.3d 668, 671, 673 (7th Cir. 1993). Although this paper focuses on hostile work environment sexual harassment, some examples of hostile environment race discrimination cases are used where the standards applied and inquiries engaged in by the courts are functionally the same as those applied and engaged in by courts in hostile work environment sexual harassment cases. Courts commonly use hostile work environment race discrimination claims while analyzing hostile work environment sexual harassment claims, and vice versa. See, e.g., Faragher v. City of Boca Raton, 524 U.S. 775, 787 (1998) ("Courts of Appeals in sexual harassment cases have properly drawn on standards developed in cases involving racial harassment.").

\textsuperscript{46} Rodgers, 12 F.3d at 675.

\textsuperscript{47} 129 F.3d 1408, 1414-15 (10th Cir. 1997).

\textsuperscript{48} Id. at 1413-14.

\textsuperscript{49} Id. at 1413.
Taken together, the above cases stand for the proposition that a significant showing of severity can overcome a relative lack of frequency (or "pervasiveness") of such conduct. This is so even if the conduct in question consists only of verbal harassment. This interpretation of the severe or pervasive test is faithful to the Supreme Court's statement in *Harris* that "whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances." If such circumstances indicate that especially egregious (but infrequent) verbal harassment "would reasonably be perceived, and is perceived,... [to be] hostile or abusive," a court may find that a plaintiff has satisfied the severe or pervasive test.

**B. Physical Harassment**

The language in the Supreme Court's decision in *Harris* seems to imply that physical harassment—harassment that involves the touching of the victim by the harasser—carries significant weight in a "severe or pervasive" analysis. After listing severity and pervasiveness as relevant considerations, the Court suggests that courts might also consider "whether . . . [the discriminatory conduct] is physically threatening or humiliating, or a mere offensive utterance." The EEOC Policy Guidance on Sexual Harassment addressed the issue more explicitly in 1990, asserting that "[t]he Commission will presume that the unwelcome, unintentional touching of a charging party's intimate body areas is sufficiently offensive to alter the conditions of her working environment . . . ." As to non-intimate conduct, the Commission found that "[w]hen the victim is the target of both verbal and non-intimate physical conduct, the hostility of the environment is exacerbated and a violation is more likely to be found."

Some "intimate physical conduct" has been found to be so severe as to allow for a "severe or pervasive" finding even

---

51 *Id.* at 22-23.
52 *Id.* at 23.
53 *Id.* (emphasis added).
55 *Id.* at 405:6691.
if the conduct occurred only once. The EEOC Policy Guidance specifically contemplates such situations, noting that “a single, unusually severe incident of harassment may be sufficient to constitute a Title VII violation . . . . This is particularly true when the harassment is physical.”56 In \textit{Ferris v. Delta Air Lines, Inc.}, the Second Circuit found that the “physical harassment” that took place in one incident was sufficiently severe to create a hostile work environment.57 \textit{Ferris} involved the drugging and rape of a flight attendant by her co-worker while the two were waiting to leave Rome to work on a flight bound for the United States.58 Judge Weinstein noted that “[a]lthough a continuing pattern of hostile or abusive behavior is ordinarily required to establish a hostile environment, a single instance can suffice when it is sufficiently egregious. We have no doubt that a single incident of rape can satisfy [the severe or pervasive test] . . . .”59 Similarly, in \textit{Al-Dabbagh v. Greenpeace, Inc.}, Judge Milton Shadur of the Northern District of Illinois found that a fellow employee’s beating, choking, and rape of the plaintiff created a hostile work environment.60 Also, in \textit{Little v. Windermere Relocation, Inc.}, the Ninth Circuit held that even if “three rapes in the course of one evening constitutes a ‘single’ incident” of harassment, such an incident “can support a claim of hostile work environment because the ‘frequency of the discriminatory conduct’ is only one factor in the analysis.”61

Not all successful single-incident claims involve rape, however. In \textit{Lockard v. Pizza Hut, Inc.}, the Tenth Circuit found that the actions of a customer against the plaintiff waitress—grabbing her hair, breast, and putting his mouth on her breast—constituted “physically threatening and humiliating behavior which unreasonably interfered with” the plaintiff’s work, and were “severe enough to create an actionable hostile work environment.”62 Similarly, in \textit{Jones v. U.S. Gypsum}, Chief Judge Mark Bennett of the Northern

56 \textit{Id.} at 405:6690.
57 277 F.3d 128, 136 (2d Cir. 2001).
58 \textit{Id.} at 131.
59 \textit{Id.} at 136.
61 301 F.3d 958, 967 (9th Cir. 2002).
62 162 F.3d 1062, 1072 (10th Cir. 1998).
District of Iowa found that the complaint of a male employee who had been intentionally struck in the groin by a female co-worker (who had struck other male employees similarly in the past) contained "sufficient allegations of a single episode severe enough to create an actionable hostile work environment."63

Still, cases in which a single incident was found to be sufficiently "severe or pervasive" to support a hostile work environment claim are exceedingly rare. This is so even when the conduct in question involves unwelcome and aggressive physical (and even intimate) touching. In the oft-cited case Brooks v. City of San Mateo, the Ninth Circuit held that a "reasonable woman" would not consider "the terms and conditions of her employment altered" if a male co-worker touched her bare stomach and then, upon being forcefully rebuffed, trapped her against her desk and forced his hands up her shirt and underneath her bra.64 In a recent case from the Northern District of Georgia, the court, citing Justice Scalia's comments in Oncale that Title VII "does not impose a 'general civility code for the American workplace,'" found that a plaintiff who had been cornered and groped in a manner similar to that in Brooks failed to establish "severe or pervasive" conduct on the part of the defendant.65

But proof of multiple acts of physical touching, or combinations of physical touching and instances of verbal harassment, are often devastating to defendants. This is the case even if the incidents took place over a relatively short period of time. For example, in Hostetler v. Quality Dining, Inc., the plaintiff alleged that a supervisor had harassed her on three occasions: once when the supervisor "grabbed her face and stuck his tongue down her throat"; again the next day when the supervisor "placed his hands on her back, grasped her brassiere, and began to unfasten it"; and a third time (during the same week as the other two incidents) when the supervisor publicly "told her, in crude terms, that he could perform oral sex on her so effectively

64 229 F.3d 917, 926 (9th Cir. 2000).
that she would do cartwheels." As to the severity of the supervisor’s harassment, the court stated that it had no doubt that the type of conduct at issue here falls on the actionable side of the line dividing abusive conduct from behavior that is merely vulgar or mildly offensive. Two of the three acts at issue in this case involved unwelcome, forcible physical contact of a rather intimate nature. . . . A reasonable person in Hostetler’s position might well experience that type of behavior as humiliating, and quite possibly threatening. . . . Even the lewd remark that . . . [the supervisor] allegedly made to Hostetler was more than a casual obscenity.67

After ruminating on the severity of the incidents, the court then turned to the question of whether the three acts complained of—all of which took place during one week—were “severe enough, without the added weight of repetition over time or cumulation with other acts of harassment, to stand alone as the basis for a harassment claim.”68 The court focused primarily on the physical conduct, noting that [p]hysical harassment lies along a continuum just as verbal harassment does. There are some forms of physical contact which, although unwelcome and uncomfortable for the person touched, are relatively minor. . . . Even more intimate or more crude physical acts—a hand on the thigh, a kiss on the lips, a pinch of the buttocks—may be considered insufficiently abusive to be described as “severe” when they occur in isolation. . . . [But] [w]hen the harassment moves beyond the sort of casual contact which (if it were consensual) might be expected between friendly co-workers, and manifests in more intimate, intrusive forms of contact, it becomes increasingly difficult to write the conduct off as a pedestrian annoyance.69

The court ultimately refused to “write the conduct off,” finding that “[t]he physical, intimate, and forcible character

---

66 218 F.3d 798, 802 (7th Cir. 2000).
67 Id. at 807-08.
68 Id. at 808.
69 Id.
of the acts at issue here persuades us that a factfinder could deem Hostetler's work environment hostile.

In another Seventh Circuit case, *Worth v. Tyer*, the court found that five instances of unwelcome touching of varying inappropriateness—the president of the company stroked the plaintiff's hand, rubbed her neck and shoulders for several minutes, stroked her face and hair, touched her "backside and leg," and then grabbed her breast—over the course of two days could be sufficiently severe or pervasive to create an objectively hostile work environment, despite the fact that the time period over which the conduct occurred was so short. In so finding, the court noted that "[t]he fact that . . . [this] conduct . . . involves touching as opposed to verbal behavior increases the severity of the situation." In *Barna v. City of Cleveland*, the Sixth Circuit applied the severe or pervasive test to a situation in which the plaintiff was frequently verbally harassed for a rather short period of time—two-and-a-half weeks—and physically grabbed once during that period. The court found "abundant evidence to support the jury's verdict" in favor of the plaintiff, noting that while most of the comments were "less 'severe' but certainly very 'frequent,'" two actions by the perpetrator of the harassment—one in which the plaintiff was "directly asked . . . for oral sex," and another in which the harasser "grabbed her and squeezed her" (apparently in some sort of bear hug)—were very severe and "alone might be enough to support a finding of a hostile environment, even apart from . . . [the harasser's] other comments."

The above cases stand for the general rule that physical harassment is usually considered to be severe. The type of physical harassment—whether it is intimate or non-intimate—will most likely play a significant role in a court's determination of how severe such conduct is, and, as a result, what showing of pervasiveness will be required to pass Harris's severe or pervasive test. Although the Seventh Circuit may have been correct in *Hostetler* when it stated

---

70 Id. at 808-09.
71 276 F.3d 249, 256-57, 268 (7th Cir. 2001).
72 Id. at 268.
74 Id.
that "[p]hysical harassment lies along a continuum just as verbal harassment does," 75 the "severity continuums" are not entirely parallel: significant verbal harassment, though certainly actionable in itself with a strong showing of pervasiveness, does not generally carry the same weight as significant physical harassment.

C. Threats of Physical Harm

Two types of physical threats are generally found in hostile work environment cases. First there are threats that in some way seem to directly relate to the sexual desire of the harasser. For instance, in Baskerville v. Culligan International Co., the Seventh Circuit noted in dicta that remarks that would otherwise be "merely mildly offensive . . . might acquire a sinister cast when . . . accompanied by threatening gestures . . . ." 76 In 2005, the Eleventh Circuit found that a harasser’s frequent sexual comments and three instances of physical touching were "sufficiently severe or pervasive as to alter the terms and conditions" of the plaintiff’s employment in Olson v. Lowe’s Home Centers, Inc. 77 After commenting on the vulgarity of the sexual comments that were directed at the plaintiff, the court noted that the harasser’s "conduct was also physically threatening . . . . [The harasser] rubbed his entire body (not merely a hand or hip) against Olson on two occasions. The rubbing was forcible and not mere brushes. Olson even sustained injuries from the kissing incident." 78 In an earlier Eleventh Circuit case, Johnson v. Booker T. Washington Broadcasting Service, Inc., the court found that a harasser’s behavior that included giving "Johnson unwanted massages, standing so close to Johnson that his body parts touched her from behind, and pulling his pants tight to reveal the imprint of his private parts" was behavior that could reasonably be deemed "physically threatening." 79 The Second Circuit found the physically threatening nature of a supervisor's interactions with the plaintiff important in

75 Hostetler, 218 F.3d at 808.
76 50 F.3d 428, 431 (7th Cir. 1995).
77 130 F. App’x 380, 388 (11th Cir. 2005).
78 Id.
79 234 F.3d 501, 509 (11th Cir. 2000).
Cruz v. Coach Stores, Inc. Along with harassing remarks, the supervisor “would stand very close to women when talking to them” while looking them up and down and would back them into corners. The court found that “the physically threatening nature of . . . [the supervisor’s] behavior, which repeatedly ended with him backing Cruz into the wall . . . brings this case over the line separating merely offensive or boorish conduct from actionable sexual harassment.”

The second type of physical threats found in hostile work environment cases involve implicit or explicit threats of physical violence that are unrelated to sexual desire. Although the majority of the cases discussed thus far have involved harassment that appears to be in some way related to sexual desire, it is important to note that “expressions of sex-based animus rather than misdirected sexual desire” are still “actionable under Title VII as long as there is evidence suggesting that the objectionable workplace behavior is based on the sex of the target.” As the Fourth Circuit pointed out in Smith v. First Union National Bank, an employee need only show that “she was harassed because of her ‘sex,’” and that “a woman’s work environment can be hostile even if she is not subjected to sexual advances or propositions.” The court emphasized that sex-based abuse that is not motivated by the harasser’s sexual desire should not be viewed as inherently any less repugnant or less violative of Title VII than abuse that is, as “[a] work environment consumed by remarks that intimidate, ridicule, and maliciously demean the status of women can create an environment that is as hostile as an environment that contains unwanted sexual advances.” Indeed, this was an important point in the Supreme Court’s decision in Oncale, in which Justice Scalia wrote that

harassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex. A trier of fact might reasonably find such

80 202 F.3d 560, 571 (2d Cir. 2000).
81 Id.
82 Id.
83 Smith v. Sheahan, 189 F.3d 529, 533 (7th Cir. 1999).
84 202 F.3d 234, 241-42 (4th Cir. 2000).
85 Id. at 242.
discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by a general hostility to the presence of women in the workplace.\textsuperscript{86}

In the \textit{Oncale} case there was no indication that the pervasive harassment delivered upon the plaintiff by members of his own sex was in any way based in sexual desire.\textsuperscript{87} Still, the Court found that such conduct could be actionable, so long as the actions could be shown to rise to the level of "discriminat[ion] . . . because of . . . sex."\textsuperscript{88}

Allegations of this second type of physical threat appear rather frequently in hostile environment sexual harassment cases, and proof of such threats often carries significant weight with courts. In \textit{Nieto v. Kapoor}, the Tenth Circuit found that a doctor’s numerous aggressive acts toward other hospital employees—including instances in which he “yelled at them, pointed his finger in their faces . . . threw charts, papers, and other objects” at them—were objectively physically threatening, and undoubtedly sufficiently severe to create a hostile work environment.\textsuperscript{89} In \textit{Smith v. First Union National Bank}, mentioned above, the plaintiff was subjected to frequent barrages of gender-based insults by her supervisor, some of which were directed at the plaintiff specifically, while others “reflected . . . [the harasser’s] hostile view of women in general.”\textsuperscript{90} But the plaintiff also presented evidence of even more sinister, physically threatening conduct:

Scoggins’ behavior toward Smith was often threatening. For instance, Scoggins began standing over Smith’s cubicle and barking orders at her. Scoggins often concluded his order to Smith with the remark, “or else you’ll see what will happen to you.” Scoggins also threatened Smith when he called her at home at 10:00

\textsuperscript{86} 523 U.S. 75, 80 (1998).
\textsuperscript{87} Id.
\textsuperscript{88} Id. at 81.
\textsuperscript{89} 268 F.3d 1208, 1219 (10th Cir. 2001).
\textsuperscript{90} 202 F.3d at 238.
p.m., accusing her of conspiring with his supervisor . . .
to "get him."91

Although the court considered the numerous biased remarks of the supervisor to be important, it gave special emphasis to the physically threatening nature of several of the supervisor's actions, at least one of which "a jury could find was a thinly veiled threat to kill Smith because of her gender in a way that made Smith feel that he was serious about harming her. . . ."92 The Fourth Circuit reversed the district court's grant of summary judgment to the defendant, noting that "the factors in Harris strongly weigh toward a finding that Scoggins' harassment, if proven at trial, was sufficiently severe or pervasive so as to create a hostile work environment."93

The type of threats in Nieto and First Union National Bank appear to stem from the harasser's general hostility to—and belief in the inferiority of—women. But often such physical threats are accompanied by a specific retaliatory intent. For instance, in Conner v. Schrader-Bridgeport International, Inc., the president of the company employing the plaintiff "slammed his clenched fist on his desk and screamed that he would fire her on the spot if she ever mentioned sexual discrimination again" after the plaintiff criticized his response to her allegations of disparate treatment and harassment.94 The court found this to be a physically threatening, "powerful incident of gender-based intimidation," which, when combined with various other (less severe) instances of harassment, provided "ample support for the jury finding of severe and pervasive conduct . . . . Indeed, in our view, the conduct evidenced here is extreme."95 In Kaytor v. Electric Boat Corporation, the plaintiff's supervisor repeatedly exposed her to various forms of harassment, including death threats.96 The Second Circuit emphasized one of these instances in particular, when the plaintiff finally confronted her harasser, and told him "that if he did not stop harassing her, she would

91 Id. at 239.
92 Id. at 243.
93 Id.
94 227 F.3d 179, 198 (4th Cir. 2000).
95 Id. at 198-99.
96 609 F.3d 537, 551 (2d Cir. 2010).
complain to higher management; she was deterred from doing so because he got a 'horrid look on his face' and said that if she reported him he would kill her.\textsuperscript{97}

Regardless of a harasser's motivations behind making them, all circuits appear to agree that "[t]he presence of . . . physical threats undeniably strengthens a hostile work environment claim"—usually significantly so.\textsuperscript{98} Southern District of New York Judge Robert L. Carter went so far as to hold that "when conduct in the workplace is physically threatening to an individual because of his membership in a protected class, that conduct will almost always create a hostile work environment."\textsuperscript{99} It seems, then, that threats to do physical harm—be they verbal or physical, implicit or explicit—are considered by courts to be substantially "severe," and so a showing of a limited number (or possibly even a single instance) of such threats would presumably count heavily towards a finding of severe or pervasive harassment.

III. SEVERE CONDUCT IN DANGEROUS JOBS

Thus far this paper has discussed three types of harassing conduct that have been deemed by courts to be especially severe—so much so that only limited showings of "pervasiveness" are required to pass the "severe or pervasive" test. First, especially offensive verbal harassment—such as the district sales manager's comment to black employees in Rodgers v. Western-Southern Life Insurance Co. that "[y]ou black guys are too fucking dumb to be insurance agents"—has been seen, on occasion, to rise to this level.\textsuperscript{100} Second, many types of physical harassment—conduct involving the touching of the victim by the harasser—have been found to be particularly severe. In the case of "non-intimate" physical harassment, when such harassment is coupled with verbal harassment—such as the bear hug and direct request for oral sex in Barna v. City of Cleveland—only a limited number of such incidents have been required in order to rise to the level of severe or

\textsuperscript{97} Id.

\textsuperscript{98} White v. BFI Waste Servs., LLC, 375 F.3d 288, 298 n.6 (4th Cir. 2004).


\textsuperscript{100} 12 F.3d 668, 671 (1993).
pervasive harassment. When the physical harassment is "intimate," courts have often required a showing of only a few incidents—the forcible kissing and undoing of the victim's brassiere in Hostetler v. Quality Dining, Inc.—or even one extremely severe incident—the rapes in Ferris v. Delta Air Lines, Inc. and Al-Dabbagh v. Greenpeace, Inc.—in order to satisfy the severe or pervasive test. Third, a harasser's threats, be they implicit or explicit, to do some sort of physical harm to the victim carry great weight with courts. This is the case regardless of whether the threats are apparently motivated by the sexual desires of the harasser—the leering and encroaching of the supervisor in Cruz v. Coach Stores, Inc., for example, by a harasser's general animus towards a particular sex—as was the case in the supervisor's thinly veiled threats to kill the plaintiff because of her gender in Smith v. First Union National Bank; or by retaliation for a victim's complaints of harassment—the company president's slamming of his fist upon the plaintiff's mention of sexual harassment in Conner v. Schrader-Bridgeport International, Inc.

These three types of conduct do not exhaust the universe of actions that courts have found to be particularly severe, however. In certain "high-risk" professions—those in which employees are subjected to regular, substantial risks of physical harm—courts have often found that two other types of conduct can prove to be particularly severe. The first type of such conduct is a refusal of the employee's colleagues to provide backup. This type of harassment appears to happen with some frequency between police officers, firefighters, and prison guards. Although refusal to provide backup differs from the traditional type of "physical threat" discussed above (as it usually—but not always—involves inaction/silence while traditional physical threats involve affirmative acts), it appears to be best analogized to physically threatening conduct, and courts seem to view a

---

102 218 F.3d 798, 802 (7th Cir. 2000).
104 202 F.3d 560, 571 (2d Cir. 2000).
105 202 F.3d 234, 239, 242 (4th Cir. 2000).
106 227 F.3d 179, 191 (4th Cir. 2000).
refusal of backup to be as severe as affirmative physical threats.

The second type of conduct involves acts taken by individuals that undermine the authority of the victim and disrupt the cohesion that is necessary for the effective functioning of individuals in high-risk professions. As with the refusal to provide backup, this harassment generally takes place between police officers, firefighters, and prison guards. The perceived severity of this conduct also appears to be comparable to harassment involving physical threats, though the focus of the harm somewhat differs: not only are the victims themselves put at risk by such conduct, but third parties (uninvolved co-workers, citizens in need of assistance, etc.) are as well.

A. The Severity of Refusals to Provide Backup in Dangerous Jobs

The existing case law on refusal to provide backup in high-risk professions is perhaps surprisingly robust. A representative example is *Semsroth v. City of Wichita*, a Tenth Circuit case in which three female police officers brought disparate treatment, disparate impact, retaliation, and hostile work environment claims against the city and the police chief. Officer Semsroth primarily relied on four instances of harassing conduct to support her hostile work environment claim: a retaliatory transfer, the use of the word “bitch” by other officers to refer to her, the failure of the department to discipline an officer who refused her backup, and an unpleasant “interrogation” by a supervising officer. In finding that these incidents were sufficient for the plaintiff’s hostile work environment claim to survive summary judgment, the court noted that

[0]f particular moment in considering the severity of the alleged harassment was the failure of Semsroth’s supervisors to discipline Officer Nixon for failing to provide backup for Semsroth. . . . Nixon’s failure to provide backup could have put Semsroth in physical danger. And a jury could find that her supervisor’s failure to address the issue adequately and discipline

---

107 304 F. App’x 707, 710 (10th Cir. 2008).
108 Id. at 722.
Nixon could create a risk that this conduct would be repeated.\textsuperscript{109}

Although the court found that all of the alleged incidents could support Semroth’s hostile work environment claim, it gave special emphasis to the failure of her fellow officer to provide her with backup.\textsuperscript{110}

In \textit{Zelinski v. Pennsylvania State Police}, the Third Circuit was faced with a similarly limited number of episodes of alleged harassing conduct.\textsuperscript{111} Zelinski, a state trooper, pointed to five instances in which she was harassed: one instance of non-intimate physical touching (of her leg), one unwelcome advance by a fellow officer, two inappropriate comments (that referred to Trooper Zelinski’s clothing), and one instance in which another officer allegedly failed to provide the plaintiff with assistance during an undercover drug operation.\textsuperscript{112} In reversing the district court’s grant of summary judgment to the defendant, the court found that

[ilf Weinstock failed to provide Zelinski with protection [during the undercover operation] and if there was a connection between Zelinski’s rejections of Weinstock’s advances and the failure to provide protection, then a reasonable jury may conclude that the harassment was sufficiently severe and pervasive. By failing to provide Zelinski with adequate protection in the dangerous and sometimes deadly world of drug law enforcement, Weinstock may have created a hostile work environment.\textsuperscript{113}

Language in \textit{Zelinski} suggests that even apart from the other instances of harassing conduct, if Zelinski was refused backup because of her sex, this conduct alone could be sufficient to create a hostile work environment in violation of Title VII.\textsuperscript{114}

\textsuperscript{109} \textit{Id.} at 726.
\textsuperscript{110} \textit{Id.}
\textsuperscript{111} 108 F. App’x 700, 704 (3d Cir. 2004).
\textsuperscript{112} \textit{Id.} at 704.
\textsuperscript{113} \textit{Id.}
\textsuperscript{114} \textit{Id.} at 704-05.
The Tenth Circuit placed a similarly strong reliance on the context of the harassment in *Apgar v. State of Wyoming.*\(^{115}\) Apgar, a former highway patrol officer, received unpleasant treatment by a number of Wyoming Highway Patrol officers who believed that, in the words of one of the male officers, “women did not belong in law enforcement.”\(^{116}\) However, most of the harassment, though frequent, was verbal, non-threatening, and not flagrantly outrageous.\(^{117}\) The court conceded that “this is a close case. The gender-based conduct laid out above does not appear particularly severe or pervasive when viewed in isolation and compared to the blatantly inappropriate behavior found in many hostile environment cases.”\(^ {118}\) But the court emphasized that in its analysis of the events as a whole,

we pay particular attention to the setting and context in which the discriminatory behavior occurred. . . . [W]e must evaluate the evidence presented in in the context of Ms. Apgar’s unique work environment—patrolling the nation’s highways as a law enforcement officer. . . . When viewed from this perspective, we hold a reasonable jury could infer Ms. Apgar’s co-workers and superiors made her work environment a hostile one because she was a woman.\(^ {119}\)

The court found that a reasonable person in Apgar’s position could view the environment as hostile, which was “especially true when considered in light of what Ms. Apgar describes as the failure to back her up during her search for [two escaped convicts] . . . . ”\(^ {120}\)

The above cases all concern situations involving police officers and the harassment they suffer at the hands of their fellow officers. But circuit courts have addressed similar claims of failure to provide backup in other contexts as well. In *Jemmott v. Coughlin*, a Second Circuit hostile work environment race discrimination case, the plaintiff, a corrections officer at a prison, alleged a number of


\(^{116}\) *Id.* at *1.

\(^{117}\) *Id.* at *2.

\(^{118}\) *Id.* at *5.

\(^{119}\) *Id.* (internal citations omitted).

\(^{120}\) *Id.* at *6.
discriminatory and retaliatory acts by white prison employees. In affirming the district court's denial of the defendant's motion for summary judgment, the court found that "[a]s alleged by Jemmott, each defendant intentionally jeopardized his ability to perform or even keep his job... or put him in danger of physical harm ([by] refusing to send requested back-up assistance, and humiliating him in front of prisoners he is required to control)." The court concluded that such harassment, if true, was "sufficiently severe to create a hostile or abusive work environment under the factors articulated in Harris."

Many district courts have also commented on the importance of effective backup assistance in high-risk jobs, and how "severe" a refusal to provide backup is considered to be. Collins v. Village of Woodridge presented a dramatic set of facts to the Northern District of Illinois: the estate of a female police officer sued the village and individuals employed by the police department for violations of Title VII and constitutional rights when the officer committed suicide because, as the officer's sister alleged, "her superior officer had made the work environment hostile to women and because of the way she was treated by other supervisory personnel in retaliation for complaining about the superior officer." The defendants argued that while they did not doubt that the officer (Frederiksen) subjectively believed the environment was hostile, no reasonable person could have regarded it as such. Although there was other alleged harassing conduct, the court relied almost entirely on one statement by one of Frederiksen's commanding officers, Sergeant Donald Janus. Less than a month into her employment with the police department, Janus had told Frederiksen that "women are the weaker sex and do not belong in law enforcement. You will have to prove yourself to be accepted by the guys, and they will probably let you get your ass kicked several times." The court responded with a powerful criticism of Janus's comment, explaining that although

121 85 F.3d 61, 63-64 (2d Cir. 1996).
122 Id. at 67.
123 Id.
125 Id. at 749.
126 Id. at 747 (emphasis added).
ACTIONABLE ACTS

perhaps isolated in the sense that they were not recurring, Janus' alleged comments cannot be divorced from their context. As a police officer, Frederiksen held a position in which her safety could be at risk at any time. Like all police officers, she would depend on her partner, fellow officers, and superiors to provide assistance and backup in potentially life-threatening situations. The officer on duty has to rely on the fact (not the mere hope or possibility) that such support will be forthcoming if and when she needs and asks for it. Seen in this light, Janus' statements to Frederiksen, though isolated, attacked the very foundations of her day-to-day existence and personal safety as a police officer. Indeed, his statement that Frederiksen would have to get her “ass kicked” before male officers—more or less everyone else in the Department—would accept her could be interpreted in an objective sense as creating the most hostile work environment imaginable . . . simply because she was a woman.¹²⁷

This explanation captures the extreme severity of refusals to provide backup: they are akin to physical threats, assurances that when one finds oneself faced with a potentially dangerous situation, one cannot count on assistance that others in similar situations would be provided. As such dangerous situations are almost assured in these types of high-risk professions, the “threat” is palpable: one’s life will be in the hands of one’s fellow officers, and those officers have indicated that they feel no obligation to fulfill their duties to provide backup.

In Hartley v. Pocono Mountain Regional Police Department, a Middle District of Pennsylvania case, the plaintiff, a female police officer, alleged that she had been subjected to a hostile work environment as a result of acts perpetrated by three fellow patrolmen.¹²⁸ The conduct the plaintiff complained of was not especially pervasive—one “public rebuke,” the refusal of the three officers to accept the plaintiff as a backup, their failure to back the plaintiff up when she was out on calls, and their falsely accusing the plaintiff of misconduct.¹²⁹ Still, the court found that

¹²⁷ Id. at 750 (second emphasis added).
¹²⁹ Id. at *2.
[a]lthough not compelling, Plaintiffs evidence, viewed in its entirety, is sufficient to create a jury question with the respect to the elements of a hostile work environment claim. In particular, evidence that certain male police officers failed to provide backup for Plaintiff could support a rational conclusion of severe or pervasive harassment. . . . Exposing a female police officer to handle calls without the protection of another officer can be a powerful means of intimidation.130

Despite the near total lack of the type of conduct usually present in hostile work environment cases—for example, the court found “no evidence of sexual advances or derogatory or demeaning comments”—the fact that backup had been refused changed a course of conduct that might otherwise have been viewed by a court to be merely unpleasant into actionable, “severe” harassment.131

These district court cases represent but a few of the cases in which courts have considered a refusal to provide backup to be especially “severe” conduct.132 Of course, not all cases in which a refusal to provide backup has been alleged survive summary judgment. In Chavez v. City of Osceola, for example, the court found that a former probationary police officer had failed to demonstrate that he was subjected to a racially hostile work environment, despite his allegation that he had been refused backup.133 The court found that there was simply no proof of such conduct, or of a plan to deny the plaintiff backup: the plaintiff merely alleged that “one stormy night” while on duty he did not receive requested backup, and he admitted that he “did not know why they did not respond.”134 Similarly, in Olsen v. Ammons,

130 Id. at *4 (emphasis added).
131 Id. at *2, *4.
132 See, e.g., King v. City of New Kensington, Civil Action No. 06-1015, 2008 WL 4492503, at *19 (W.D.Pa. Sept. 30, 2008) (finding that plaintiffs fellow officers refusal to provide plaintiff with backup was “pervasive or severe” discrimination); see also Kramarski v. Village of Orland Park, No. 00 C 2487, 2002 WL 1827637, at *9 (N.D. Ill. Aug. 9, 2002) (noting that individual incidents of harassment “may not seem so severe as to create an objectively hostile work environment,” but that the refusal to provide plaintiff with backup was “at least potentially physically threatening . . . and would unreasonably interfere with a novice police officer’s work”).
134 Id. at 996.
the court found that the plaintiff, a female former police officer, could not establish the existence of a hostile work environment despite her allegations of a "secret departmental policy" to deny certain individuals backup.\textsuperscript{135} The court noted that the plaintiff did "not allege that she was in fact denied backup; additionally, the policy was secret, so she was never threatened with being denied backup," so she could not have been "subjectively offended" by the conduct (if it had in fact occurred).\textsuperscript{136}

Despite the fact that the courts in Chavez and Olsen were not persuaded by the plaintiffs' allegations of refusals to provide backup, both of those courts took time to point out that their conclusions might very well have differed if the plaintiffs had presented sufficient evidence. In Chavez, the court noted that "Chavez' claim that Townsley failed or refused to provide backup, if true, would be a matter to be taken more seriously . . . ."\textsuperscript{137} The court in Olsen echoed this sentiment, asserting that it agreed "with Plaintiff that refusing to provide a fellow police officer with backup because of gender would support a hostile work environment claim because it would indicate severe or pervasive gender discrimination," and further stating that "[e]ven threatening a plaintiff police officer with denial of backup supports a hostile work environment claim."\textsuperscript{138}

What all of these cases collectively establish is that courts take refusals to provide backup in high-risk jobs very seriously. Such a refusal is considered to be an especially "severe" form of conduct, one that is comparable to affirmative threats to do physical harm to the victim. Because such conduct is considered to be so severe, a plaintiff who can establish that he or she has been denied backup—or has been threatened with the denial of backup—will stand a strong chance of surviving a defendant's motion for summary judgment.

\textsuperscript{136} Id. at *6.
\textsuperscript{137} Chavez, 324 F. Supp. 2d at 996.
\textsuperscript{138} Olsen, 2009 WL 4573581, at *6.
B. The Severity of Conduct that Diminishes Authority and Undermines Cohesion in Dangerous Jobs

A line of cases originating in the Second Circuit considers conduct that could undermine the cohesion that is necessary for the effective functioning of individuals in high-risk professions to be very severe. One frequently cited case, Howley v. Town of Stratford, comes from the Second Circuit, and involved a female lieutenant—the lone female in the Stratford Fire Department—who claimed that actions primarily taken by a subordinate, Holdsworth, created a hostile work environment in which she was subjected to sexual harassment. The district court had granted the defendant’s motion for summary judgment, primarily because the claim emphasized a single incident of especially severe verbal harassment. The Second Circuit reversed, noting that

[although Holdsworth made his obscene comments only on one occasion, the evidence is that he did so at length, loudly, and in a large group . . . . In an occupation whose success in preserving life and property often depends on firefighters’ unquestioning execution of line-of-command orders in emergency situations, the fomenting of gender based skepticism as to the competence of a commanding officer may easily have the effect . . . of diminishing the respect accorded the officer by subordinates and thereby impairing her ability to lead in the life-threatening circumstances often faced by firefighters.]

Note that the court was not exclusively addressing threats to Howley that could result from the undermining of her authority. The court seems here to be envisioning a breakdown of command that could endanger the safety of all individuals in an emergency situation, including Howley, her fellow firefighters, and those whom firefighters are tasked with protecting. In criticizing the town’s response to Holdsworth’s harassment, the court further emphasized

139 217 F.3d 141, 141, 149 (2d Cir. 2000).
140 Id. at 149.
141 Id. at 154.
142 As to this last interested party, the court later notes that Holdsworth’s insubordination “may have jeopardized the lives or property of persons he was supposed to help.” Id. at 155-56.
the particular threat that such conduct presented to firefighters:

Because the ordinary dangers of the profession involve emergency situations in which firefighters must rely on each other and have confidence in their commanding officers, the Town’s failure to take any remedial action . . . to remedy Holdsworth’s public attempt to undermine Howley’s authority may be viewed as an inappropriate response.143

Again, the threat here is not specific to Howley (although it certainly includes her). The severity of the conduct lies in the impact that it could have on the functioning of the department as a whole.

Another Second Circuit “undermining” case arose in the prison context. In Dawson v. County of Westchester, seven female correctional officers at a male facility alleged that they had been subjected to a hostile work environment and retaliation in violation of Title VII.144 The harassment allegedly began with a letter written by inmates of the facility—addressed to all of the female correctional officers—which “contained degrading, explicit, and violent sexual references to individual female COs” and featured an obscene drawing.145 A male sergeant apparently photocopied and disseminated this and another similar letter throughout the facility.146 The plaintiffs alleged that in the days following the dissemination “they were subjected to a barrage of inappropriate stares, whispers, laughter, and remarks from their colleagues,” including lewd, demeaning comments, and “sexually charged references” to their physical appearances.147 In granting the defendant’s motion for summary judgment, the district court had focused on the content of the inmate-written letters, finding that the female officers’ “chosen occupation necessarily places them in the company of prison inmates, ‘men not distinguished for commendable deportment or courtly display of social graces,’ and that as a result, ‘exposure to an occasional

143 Id. at 156.
144 373 F.3d 265, 267-68 (2d Cir. 2004).
145 Id. at 268.
146 Id.
147 Id. at 269.
‘embarrassing remark or situation’ is to be expected.”148 In reversing the district court, Judge Calabresi of the Second Circuit noted that “such behavior by prisoners is not, and cannot be, the benchmark against which to measure the conduct of plaintiffs’ own colleagues.”149 He continued:

[j]Indeed, in the prison context especially, officers must depend on their co-workers for mutual protection and rely upon them for their own ability to assert authority over others in potentially dangerous situations. In such a setting, actions of co-officers and superiors that undermine an officer’s sense of personal safety or compromise her capacity to command respect and obtain compliance from co-workers, subordinates, and inmates assume greater, not lesser, significance.150

Judge Calabresi noted that female officers were particularly vulnerable to this potential “diminution of authority,” not because of any inherent qualities “but rather because of stereotypical assumptions about the propriety of women exercising authority in traditionally male-dominated occupations.”151 Similar to Howley, the court appears here to be concerned with more than just the individual harassment victim’s safety, but rather with the safety hazards that could befall all officers as a result of the breakdown of control over the prison environment—a breakdown brought on by the weakening of intradepartmental cohesion through acts of sex-based harassment.

“Undermining” issues have also arisen in the hostile environment race discrimination context. In Cruz v. Liberatore, a Hispanic police officer alleged that a superior officer had created a hostile work environment by insulting Cruz about his ethnicity, selectively enforcing work rules against him, repeatedly humiliating him, and physically assaulting him (by slapping him in the face).152 Though it noted that “this is a very close case,” the court found that

148 Id. at 273 (quoting Dawson v. County of Westchester, 274 F. Supp. 2d 364, 375 (S.D.N.Y. 2003)).
149 Id.
150 Id.
151 Id.
“reasonable jurors could disagree about the conduct about which Officer Cruz complained,” as “Inspector Liberatore’s conduct, although not frequent or pervasive, was ‘severe,’ ‘physically threatening,’ and ‘humiliating.’” The court gave particular emphasis to the fact that “Inspector Liberatore’s alleged physical assault . . . occurred within the context of a paramilitary organization where trust between superiors and their subordinates, as well as an officer’s reputation amongst fellow officers, is of the utmost importance.”

These and other “undermining cases” support the proposition that some courts will view “threats” in a broader context in certain high-risk professions. The threat courts envision such conduct engendering is one that could certainly jeopardize the safety of the victims of the harassment. But courts see such conduct as posing a risk to the victim’s fellow officers/co-workers and the individuals that members of such professions are tasked with protecting. By creating a hostile work environment, harassers undermine the cohesion that is critical to the effective discharge of the duties of such professions.

CONCLUSION

Over time, courts have come to embrace the disjunctive nature of the severe or pervasive test. Although courts consider both the severity and pervasiveness of harassing conduct, a strong showing of severity—such as egregious verbal harassment, intimate physical touching, or threats to physically harm the target of the harassment—will often persuade courts that even a limited showing of pervasiveness will bring the harassment to a level that satisfies Harris’s test. In certain high-risk professions, courts have identified additional types of conduct that they

153 Id. at 518-19 (quoting Harris v. Forklift Sys., 510 U.S. 17, 23 (1993)).
154 Id. at 519.
155 See also Fairbrother v. Morrison, 412 F.3d 39, 51 (2d Cir. 2005) (finding that significant verbal harassment against a female employee at mental health facility “made Fairbrother and her patients ‘anxious,’ thereby creating a potentially dangerous work environment”); Tepperwien v. Entergy Nuclear Operations, Inc., 606 F. Supp. 2d 427, 438-39 (S.D.N.Y. 2009) (noting that alleged harassment took place between “armed security officers guarding a nuclear power plant that has been described as one of the nation’s highest consequence targets,” and finding that this is a relevant consideration in the assessment of the plaintiff’s claim).
have deemed to be especially severe: refusals to provide backup and other conduct that undermines the cohesion and authority that are necessary to preserve a safe environment in such contexts. Although courts sometimes vary unpredictably on what constitutes severe or pervasive conduct, the willingness of many courts to heavily weigh both the context in which the harassment occurs and the severity of that conduct against a lack of pervasiveness shows that such courts take seriously the Supreme Court's command to consider "all the circumstances" surrounding allegations of hostile work environment sexual harassment.