GENDER-NEUTRAL PRONOUNS: THEY ARE HERE TO STAY

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I. INTRODUCTION

It was an uphill battle for Tamara Lusardi, a military veteran working as a software engineer with the United States Army, after she decided to come out as a transgender woman to her co-workers.[1] Tamara's employer prevented her from using the women's bathroom and her supervisor consistently and deliberately misgendered her—called her by her former name and male pronouns—in disrespect of her gender identity.[2] In a 2015 interview, Tamara recounted how her supervisor would intentionally misgender her: "We'd be in a meeting, [and] he'd say '*Todd*, I need you to answer this.'"[3] On camera, Tamara imitated the way she remembers the supervisor would sarcastically smirk after calling her by her former name.[4] Tamara recalled that some of her co-workers might query, "who's Todd?" and the supervisor would reply something to the effect of, "Oh, I meant Tamara, you know, *he* just changed *his* name."[5]

Tamara went on to file a complaint with the Equal Employment Opportunity Commission (EEOC), asserting that she was subject to hostile work environment sexual harassment because she was "repeatedly referred to her by male pronouns."[6] Tamara was ultimately successful; the EEOC held that the Army violated Title VII by cultivating a hostile work environment when it allowed a supervisor to

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1 *See generally* Lusardi v. McHugh, EEOC Appeal No. 0120133395, 2015 WL 1607756 (Apr. 1, 2015).

2 *Id.* at *2–3.

3 American Federation of Government Employees, *Tamara's Tale: Transgender Veteran Fights for Equal Rights at Work*, YOUTUBE (June 24, 2015), https://youtu.be/S1ee049xHmw.

4 *Id.*

5 *Id.*

6 *Lusardi*, 2015 WL 1607756, at *1.

"intentionally and repeatedly . . . refer to [Tamara] by male names and pronouns . . . well after he was aware that [Tamara's] gender identity was female."[7] In the 2015 interview, Tamara stated, "We're sending a clean [sic] message that says we want to be judged on how we do our work and be our true selves . . . and not be judged on things that do not affect our work performance. It allows me to do my job. It allows me to be my true self."[8] In a different interview, Tamara shared, "As a disabled veteran, I take great pride in my work making sure our soldiers are safe, and I want to be able to focus on doing a good job without worrying about harassment in the workplace . . . ."[9]

Tamara's case depicts the type of harassment many transgender people face at work. While Tamara was ultimately successful in her harassment claim, the law in this area is largely unsettled; no federal court of appeals has ever explicitly answered whether intentionally calling someone by the wrong gender pronouns constitutes sexual harassment under Title VII. For many years, it was unclear whether transgender people were even protected under Title VII at all,[10] but the June 2020 Supreme Court decision, *Bostock v. Clayton County*, resolved that question.[11] In *Bostock*, the Court concluded that "[b]ecause discrimination on the basis of . . . transgender status requires an employer to intentionally treat individual employees differently because of their sex, an employer who intentionally penalizes an employee for being . . . transgender also violates Title VII."[12] In light of the *Bostock* decision, this Comment will argue that refusal to use an employee's chosen[13] name or pronoun and intentional misgendering may constitute sexual harassment under Title VII. Such conduct creates a hostile work environment by fostering sex stereotypes—that a person must use the gender pronoun that conforms with the sex they were assigned at birth—when misgendering rises to a sufficiently severe and pervasive level as to alter the conditions of an individual's employment.

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[7] *Id.* at *13.

[8] American Federation of Government Employees, *supra* note 3.

[9] Leada Gore, *Transgender Army Civilian at Redstone Arsenal Awarded Settlement in EEOC Discrimination Suit*, AL.COM (Apr. 10, 2015, 9:35 PM), https://www.al.com/news/huntsville/2015/04/transgender_army_civilian_at_r.html.

[10] *See* Michael J. Vargas, *Title VII and the Trans-Inclusive Paradigm*, 32 LAW & INEQ. 169, 169–70 nn.3–4 (2014).

[11] 140 S. Ct. 1731 (2020).

[12] *Id.* at 1735. See *infra* Part II for a brief overview of *Bostock*.

[13] This Comment uses the term "chosen" and not "preferred," which people often use in this context as the antithesis to a person's legally documented or assumed name or pronoun, to avoid implying that gender identity is merely a preference, and to recognize that gender is usually deeply ingrained within a person's sense of self.

By way of background, gender identities come in many forms. A person's gender identity is their internal sense of their gender, which may or may not align with the gender they were assigned at birth.[14] The adjective "cisgender" generally applies to individuals whose gender identity corresponds with the sex they were assigned at birth.[15] The adjective "transgender" generally applies to individuals whose gender identity is different from the sex they were assigned at birth.[16] While many transgender people may identify as men or women, others may identify as nonbinary or gender nonconforming.[17] The term "intersex" applies to people who have a variety of physical sex traits, such as variations in chromosomes or anatomy, "that do not conform with a binary construction of sex as either male or female."[18] A person possessing intersex characteristics need not identify as nonbinary; being intersex does not determine a person's gender identity.[19] Moreover, there is no single way to define what it means to have a nonbinary gender identity since identifying as nonbinary might mean something different to different people.[20] For instance, certain individuals might identify with gender hybridity, "combining gender roles into non-traditional configurations [such as] bigender, pangender, and androgynous identities."[21] Others might reject gender altogether, declining to conform with any "traditional gender categories," identifying as gender-neutral or unisex.[22] Some might experience gender as a dynamic notion and identify as "gender fluid."[23] Some transgender and nonbinary people may experience gender dysphoria, which is clinically described as a feeling of distress a person may experience when their gender as assigned at birth does not align with the gender with which they identify.[24]

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14 Shirley Lin & Ezra Cukor, *LGBTQIA+ Discrimination*, *in* EMPLOYMENT DISCRIMINATION LAW & LITIGATION 2020 § 27:5 (2020).

15 Megan Brodie Maier, *Altering Gender Markers on Government Identity Documents: Unpredictable, Burdensome, And Oppressive*, 23 U. PA. J.L. & SOC. CHANGE 203, 211 (2020).

16 *Id.*

17 Lin & Cukor, *supra* note 14, at 43.

18 *Id*. at 48; *see also* Jessica A. Clarke, *They, Them, And Theirs*, 132 HARV. L. REV. 894, 898 (2019) ("While some nonbinary people have intersex variations, not all do, and many people with intersex variations have male or female gender identities.").

19 Lin & Cukor, *supra* note 14, at 48.

20 Clarke, *supra* note 18, at 905.

21 Clarke, *supra* note 18, at 906.

22 *Id.* at 906.

23 *Id.* at 906–07.

24 *Glossary of Terms*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/glossary-of-terms (last visited Oct. 8, 2021).

While gender identity refers to someone's internal sense of their gender, gender expression refers to the ways in which a person presents themselves through their appearance, such as through their clothing, hair, name, pronouns, or other similar characteristics. Gender expression "may or may not conform to socially defined behaviors and characteristics typically associated with being either masculine or feminine."[25] While a person's gender identity and gender expression are not necessarily the same, many people may express their gender identity through their gender expression.[26] Accordingly, with various gender identities come various gender pronouns: most people who identify as female use the pronouns she/her; most people who identify as male use the pronouns he/him; people who identify as nonbinary or gender nonconforming may use various pronouns, including they/them or ze/zir.[27]

The population of transgender and gender nonconforming people in the United States is significant and appears to be rising.[28] According to a 2016 study conducted by UCLA School of Law, approximately 1.4 million people identify as transgender in the United States, making up about 0.6% of the population.[29] The study also found that "younger adults are more likely than older adults to identify as transgender."[30] According to a 2015 study conducted by the Pew Research Center, about 18% of adults in the United States say they personally know someone who goes by gender-neutral pronouns,[31] and according to the National Center for Transgender Equality's 2015 U.S. Transgender Survey, approximately "35% of respondents indicated that their gender identity

[25] *Id.*; Lin & Cukor, *supra* note 14, at 16 n.91.

[26] Lin & Cukor, *supra* note 14, at 16 n.91.

[27] Clarke, *supra* note 18, at 958. In addition, Dennis Baron, a professor of English and linguistics at the University of Illinois, proposes a universal gender nonconforming pronoun in the pronoun "they." DENNIS BARON, WHAT'S YOUR PRONOUN? BEYOND HE AND SHE 149–83 (2020).

[28] ANDREW R. FLORES ET AL., THE WILLIAMS INST., HOW MANY ADULTS IDENTIFY AS TRANSGENDER IN THE UNITED STATES? 6 (2016), https://williamsinstitute.law.ucla.edu/publications/trans-adults-united-states (While the study shows the estimate of transgender people in the U.S. doubled between a 2011 study and the 2016 study, "[a] perceived increase in visibility and social acceptance of transgender people may increase the number of individuals willing to identify as transgender on a government-administered survey.").

[29] *Id.* The study only accounted for people eighteen-years-old and older.

[30] *Id.*

[31] A.W. Geiger et al., *About One-in-Five U.S. Adults Know Someone Who Goes by a Gender-Neutral Pronoun*, PEW RSCH. CTR. (Sept. 5, 2019), https://www.pewresearch.org/fact-tank/2019/09/05/gender-neutral-pronouns.

was best described as nonbinary."[32] Some states have taken various actions to protect transgender and nonbinary individuals, including recognizing a third gender category and passing legislation that permits people to use "nonbinary" or "x" as a designation on certain identification documents.[33]

Advocates have long asserted that discrimination based on gender nonconformity, or discrimination "against men perceived as feminine or women perceived as masculine," remains "a harmful type of sex discrimination that the law should redress."[34] Misgendering—referring to someone as a gender different than the gender with which they identify—would fall into this kind of discrimination. This is one mechanism that advances the gender-based stereotype that individuals should go by the names or pronouns that conform with the sex they were assigned at birth.

Misgendering is a persistent issue that detrimentally affects many transgender people in the workplace. The National Center for Transgender Equality's 2011 report on transgender discrimination found that 45% of respondents reported having been misgendered "repeatedly and on purpose" at work.[35] The National Center for Transgender Equality's 2015 report stated that "[m]ore than three-quarters (77%) of respondents" had taken "steps to avoid mistreatment in the workplace, such as hiding or delaying their gender transition or quitting their job."[36] Being misgendered is generally considered psychologically harmful and can lead to feelings of negative affect, low appearance state self-esteem, and stigmatization.[37]

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[32] SANDY E. JAMES ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL., THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 45 (2016) [hereinafter 2015 U.S. TRANSGENDER SURVEY], https://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf. The National Center for Transgender Equality's 2015 survey "is the largest survey examining the experiences of transgender people in the United States." *Id.* The organization planned to release an updated version of the survey in 2020, but the COVID-19 pandemic delayed its efforts. An updated version of the survey is scheduled to be published in 2021.

[33] Clarke, *supra* note 18, at 896–97.

[34] *Id.* at 900.

[35] JAMIE M. GRANT ET AL., NAT'L CTR. FOR TRANSGENDER EQUAL., INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY 62 (2011), https://www.thetaskforce.org/wp-content/uploads/2019/07/ntds_full.pdf.

[36] 2015 U.S. TRANSGENDER SURVEY, *supra* note 32, at 148.

[37] *See* Kevin A. McLemore, *Experiences with Misgendering: Identity Misclassification of Transgender Spectrum Individuals*, 14 SELF AND IDENTITY 1 (2014); *see also* M. Paz Galupo et al., *"Every Time I Get Gendered Male, I Feel a Pain in My Chest": Understanding the Social Context for Gender Dysphoria*, 5 STIGMA & HEALTH 199, 205 (2020) (concluding that being misgendered can increase gender dysphoria, while recognizing "that not all of the distress [caused by triggers such as being misgendered] originates from gender

Many employers have already adopted internal policies to prohibit employee misgendering.[38] Additionally, some local jurisdictions have recognized the importance of preventing misgendering and have specifically enacted provisions to protect transgender people from misgendering in the workplace. For example, Washington D.C. passed a regulation stating that "[d]eliberately misusing an individual's preferred name[,] form of address or gender-related pronoun" may qualify as "evidence of unlawful harassment and hostile environment" when considering the totality of the circumstances.[39] These circumstances include "the nature, frequency, and severity of the behavior" under an objective standard, "focusing on whether the behavior was sufficiently severe or pervasive to alter the conditions of the victim's employment[.]"[40] Similarly, New York City's Human Rights Law "requires employers . . . to use the name, pronouns, and title (e.g., Ms./Mrs./Mx.) with which a person self-identifies, regardless of the person's sex assigned at birth, anatomy, gender, medical history, appearance, or the sex indicated on the person's identification."[41] Nevertheless, this Comment posits that employees across the country should not have to rely only on employers' internal policies or local laws for redress, but should also have a federal remedy in Title VII for intentional misgendering in the workplace.

Part II of this Comment will provide an overview of the Supreme Court's landmark decision in *Bostock v. Clayton County*. Part III will discuss the development of gender discrimination, sex stereotyping, and sexual harassment law under Title VII. Part IV will survey the EEOC's approach to Title VII hostile work environment claims based on misgendering. Part V will discuss federal case law relevant to misgendering. Part VI will analyze some challenges that may arise as more employers and employees consider workplace pronoun policies to comply with Title VII. Part VII will follow with a call to action for employers and employees: for employers to adopt and enforce inclusive pronoun practices, and for employees to make their pronoun details a part of their work lives, if they wish.

incongruence per se, but may instead originate from stigma stress associated with negotiating social interactions in a cisnormative context").

[38] *Corporate Equality Index 2020*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/corporate-equality-index (last visited Oct. 8, 2021).

[39] D.C. MUN. REGS. tit. 4, §808.2 (2020).

[40] *Id.*

[41] 47 R.C.N.Y. § 8-102 (2019).

II. AN OVERVIEW OF *BOSTOCK V. CLAYTON COUNTY*

On June 15, 2020, the Supreme Court held in its landmark decision, Bostock v. Clayton County, that Title VII of the Civil Rights Act of 1964's prohibition against discrimination in employment "on the basis of . . . sex" applies to discrimination based on sexual orientation and gender identity.[42] The Court decided three cases in Bostock: two relating to Title VII protection based on sexual orientation, and one relating to Title VII protection based on gender identity.[43] Bostock v. Clayton County and Zarda v. Altitude Express, Inc. posed similar issues; in both cases, the plaintiffs' employers fired them shortly after finding out the plaintiffs were gay.[44] In R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, the plaintiff was fired after informing her employer that she was transgender and planning to transition from male to female.[45]

Ultimately, Justice Gorsuch, writing for the Bostock majority, held that "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex."[46] Despite the defendant-employers' contention that in 1964, when Congress passed the Civil Rights Act, few would have expected Title VII to reach issues of sexual orientation and gender identity, the majority held that the statutory language plainly prohibits such discrimination.[47] In the context of this Comment, it would follow that an employer who intentionally treats an employee worse on the basis of sex—such as by refusing to call a transgender employee by their chosen name and pronoun while referring to cisgender employees by their chosen name and pronouns without question—would also violate Title VII if the conduct contaminates the conditions of the employee's work.

The Court also stated that Title VII "makes each instance of discriminating against an individual employee because of that individual's sex an independent violation of Title VII," regardless of any consideration of sex stereotyping. "So just as an employer who fires both Hannah and Bob for failing to fulfill traditional sex stereotypes doubles rather than eliminates Title VII liability, an employer who fires

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42 *Bostock*, 140 S. Ct. at 1737.

43 *Id.* at 1737–38.

44 *Id.*

45 *Id.* at 1738.

46 *Id.* at 1741.

47 *Id.* at 1749–51, 1754 (The majority posited that "because few in 1964 expected today's result, we should not dare to admit that it follows ineluctably from the statutory text." Moreover, the majority highlighted that it couldn't have been the case that "no one" would have expected Title VII to reach matters of gender identity in 1964, stating that "[n]ot long after the law's passage, . . . transgender employees began filing Title VII complaints, so at least some people foresaw this potential application.").

both Hannah and Bob for being . . . transgender does the same."[48] This statement implies that the sex stereotyping doctrine is still up for use when considering discrimination against transgender people in the workplace. In its decision, however, the majority also clarified that it was not specifically addressing any other potentially adjacent Title VII matters such as gender-based workplace dress codes or restroom rules.[49]

Justice Alito, in his dissent, disagreed with the majority's textual analysis and lamented the decision's inevitable implications, including how the decision might change the way people use gender pronouns.[50] Justice Alito posited that the majority's decision might unduly change how "employers address their employees" and how "teachers and school officials address students."[51] Under traditional English, "two sets of sex-specific singular personal pronouns are used to refer to someone in the third person (he, him, and his for males; she, her, and hers for females)."[52] Justice Alito highlighted that "several different sets of gender-neutral pronouns have now been created and are preferred by some individuals who do not identify as falling into either of the two traditional categories."[53]

In any event, Bostock has been seen as a source of optimism for the transgender community as it exemplifies a shift in the law that may require increased protection for transgender people in various areas even beyond the workplace, including housing, education, healthcare, and credit.[54]

III. DEVELOPMENT OF GENDER DISCRIMINATION, SEX STEREOTYPES, AND SEXUAL HARASSMENT LAW UNDER TITLE VII

Title VII of the Civil Rights Act of 1964 prohibits an employer from discriminating against "any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[55] Title VII does

48 *Bostock*, 140 S. Ct. at 1742–43 (emphasis added).

49 *Id.* at 1753.

50 *Id.* at 1755–56, 1782–83 (Alito, J., dissenting).

51 *Id.* at 1782.

52 *Id.*

53 *Id.*

54 *See generally* Susan Bisom-Rapp, *The Landmark* Bostock *Decision: Sexual Orientation and Gender Identity Bias in Employment Constitute Sex Discrimination Under Federal Law*, COMPAR. LAB. L. AND POL'Y J., Aug. 2020, at 9; CHRISTY MALLORY, ET AL., LEGAL PROTECTIONS FOR LGBT PEOPLE AFTER *BOSTOCK V. CLAYTON COUNTY* (July 2020), https://williamsinstitute.law.ucla.edu/publications/state-nd-laws-after-bostock/.

55 42 U.S.C. § 2000e–2.

not apply to all employers, but only those "engaged in an industry affecting commerce who ha[ve] fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . . ."[56] This Part will discuss the development of sex stereotyping and sexual harassment under Title VII, and how the Court came to embrace sex stereotyping as a basis for finding hostile work environment sexual harassment.

A. *Development of Sex Stereotyping Jurisprudence under Title VII*

Before her time on the Supreme Court, Justice Ruth Bader Ginsburg successfully argued multiple cases asserting that "writing sex-based stereotypes into the laws of the land was sex discrimination in violation of equal protection[.]"[57] In line with Justice Ginsburg's early construction of sex discrimination as based on stereotypes, the law under Title VII developed to similarly recognize "a gender stereotyping theory, under which workplace penalties and harassment of individuals for failing to conform to gender stereotypes may be actionable sex discrimination."[58]

In *Price Waterhouse v. Hopkins*, the Supreme Court expanded Title VII's reach in a plurality decision, positing that taking adverse employment action based on sex stereotypes was a prohibited form of sex discrimination under Title VII.[59] The Court found that the employer violated Title VII when it relied on stereotypes about how women are societally expected to present themselves in denying Hopkins (a cisgender female manager) a partner position.[60] Because the partners reviewing her qualifications deemed she was not "feminine" enough, the Court found the employer had discriminated against Hopkins by sex stereotyping.[61] Ultimately, because Hopkins's gender was a motivating factor to her employer's decision to not promote her, the employer violated Title VII.[62] The Court noted that "[i]n forbidding employers to

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56 42 U.S.C. § 2000e.

57 Stephanie Bornstein, *The Law of Gender Stereotyping and the Work-Family Conflicts of Men*, 63 HASTINGS L.J. 1297, 1299 (2011).

58 Bornstein, *supra* note 57, at 1299.

59 490 U.S. 228, 251 (1989).

60 *Id.* at 272 (O'Connor, J., concurring).

61 *Id.* One partner described Hopkins as too "macho," and another recommended that she should walk, talk, and dress more femininely, wear make-up, style her hair, and wear jewelry to better suit herself for the role. *Id.*

62 *Id.* Relating to causation, the *Hopkins* plurality held that a plaintiff does not need to prove that gender was the but-for cause of an adverse employment decision to succeed on a Title VII claim, but just that gender was a motivating factor in taking the adverse action. *Id.* at 250. The Title VII "motivating factor" causation standard was later codified in the Civil Rights Act of 1991. 42 U.S.C. § 2000e-2(m) (2018) ("[A]n unlawful

discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."[63]

B. *Development of Sexual Harassment Jurisprudence Under Title VII*

Alongside the development of sex stereotyping jurisprudence, the Supreme Court also began developing its sexual harassment law under Title VII. Sexual harassment jurisprudence consists of two categories: "quid pro quo" and "hostile work environment" claims.[64] Quid pro quo sexual harassment occurs when an employer conditions employment benefits on submission to "[unwelcome] sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."[65] Hostile work environment harassment occurs when an employer fosters or fails to prevent offensive behavior in the workplace, such as "discriminatory intimidation, ridicule, and insult," that is so severe and pervasive that it "alter[s] the conditions of [the victim's] employment and create[s] an abusive working environment."[66] Misgendering cases would fall under the hostile work environment category.

In *Meritor Savings Bank v. Vinson*, the Court formally recognized sexual harassment as a form of sex discrimination that violates Title VII, holding that "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment."[67] The Court elaborated 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

employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin, was a motivating factor for any employment practice, even though other factors motivated the practice."). Despite the hope that this laxer causation standard would make Title VII claims easier for plaintiffs to win, the motivating factor standard did not change much in the way of plaintiff success. *See* Charles A. Sullivan, *Making Too Much of Too Little?: Why "Motivating Factor" Liability Did Not Revolutionize Title VII*, 62 ARIZ. L. REV. 357 (2020). Additionally, the *Bostock* majority applied "but for" causation in making its determination, suggesting that either standard could apply. 140 S. Ct. at 1740, 1742.

63 *Hopkins*, 490 U.S. at 251 (quoting Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).

64 Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986). *But see* Burlington Indus. v. Ellerth, 524 U.S. 742, 752 (1998) (noting that nothing in the statutory text expressly separates sexual harassment claims into these two categories, and that the terms are "helpful . . . in making a rough demarcation between cases . . . but beyond this are of limited utility").

65 *Meritor*, 477 U.S. at 65 (quoting 29 § C.F.R. 1604.11(a)).

66 *Id.* at 65, 67.

67 *Id.* at 66.

environment.'"[68] Moreover, the Court asserted that Title VII's protection of the "terms, conditions, or privileges of employment" is not limited to "economic" or "tangible" discrimination but to "the entire spectrum of disparate treatment" in employment.[69]

In its unanimous decision in *Harris v. Forklift Systems, Inc.*, the Court elaborated on what it means for a workplace to be "hostile" and further developed the "severe or pervasive" standard.[70] In *Harris*, a cisgender female manager was constantly subjected to negative gender-based comments, such as "[y]ou're a woman, what do you know," and sexual innuendos by the president of the company.[71] The Court granted certiorari on Harris's gender-based hostile work environment claim to resolve a circuit split on whether an employer's conduct "must 'seriously affect [an employee's] psychological well-being' or lead the plaintiff to 'suffer injury'" to rise to the level of abusive work environment harassment.[72] The Court responded in the negative: to violate Title VII, an employer needs only to act in a way that may "detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers."[73] The discriminatory conduct must be "severe or pervasive" and the work environment must "reasonably be perceived, and is perceived, as hostile or abusive" under the totality of the circumstances.[74] No one factor is required, but a court may consider "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."[75] While evidence of "[t]he effect on an employee's psychological well-being is relevant to

[68] *Id.* at 67 (quoting Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)). The *Meritor* Court also cited *Rogers v. EEOC* as the first instance where a hostile work environment claim was recognized, in holding that a workplace rampant with ethnic or racial discrimination was so offensive as to "destroy completely the emotional and psychological stability of minority group workers . . . ." *Id.* at 66 (citing Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971)). Based on *Rogers*, the *Meritor* Court held that "[n]othing in Title VII suggests that a hostile environment based on discriminatory sexual harassment should not be likewise prohibited." *Meritor*, 477 U.S. at 66.

[69] *Meritor*, 477 U.S. at 64 (quoting Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)).

[70] 510 U.S. 17, 22 (1993).

[71] *Id.* at 19.

[72] *Id.* at 22.

[73] *Id.*

[74] *Id.* at 22–23.

[75] *Id*. at 23.

determining whether the employee actually found the environment abusive," it is not required.[76]

Under this standard, a transgender individual facing severe or pervasive intentional misgendering would not have to prove that their workplace harmed their psychological well-being, or that they experienced new or increased gender dysphoria. Although such a claim would serve as evidence in support of the severe or pervasive nature of the misgendering, the individual would need only to demonstrate that the misgendering was reasonably perceived as abusive and "detract[ed] from [their] job performance, discourage[ed] [them] from remaining on the job, or [kept] them from advancing in their career[]."[77] Severe and pervasive misgendering can conceivably make someone want to quit their job, not show up to work, or not want to work with a particular person.

In *Oncale v. Sundowner Offshore Services, Inc*., male supervisors subjected the plaintiff, who was also male, to repeated physical harassment.[78] There, the Court held that "nothing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant . . . are of the same sex."[79] While recognizing that "male-on-male sexual harassment" was not necessarily one of Congress's concerns when enacting Title VII, the Court wrote that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils . . . ."[80] The Court emphasized that the severity of the conduct "should be judged from the perspective of a reasonable person in the plaintiff's position . . . ."[81] In light of the *Bostock* decision, this concept would transfer to misgendering cases. While Congress was not expressly trying to rid the workplace of misgendering when enacting Title VII, it is a reasonably comparable evil to other forms of sex stereotyping that hold people back from participating and advancing in the workplace.

Considering *Bostock* and the Supreme Court's sexual harassment precedent together, the thesis of this Comment—that intentional misgendering may be grounds for a hostile work environment claim because it may rise to a sufficiently severe and pervasive level as to alter the conditions of an individual's employment—fits within the sexual harassment framework. Because Title VII protects transgender and

76 *Harris*, 510 U.S. at 23.
77 *Id*. at 22.
78 523 U.S. 75, 77 (1998).
79 *Id.* at 79.
80 *Id.*
81 *Id.* at 81.

gender-nonconforming people from disparate treatment in the workplace, an employer cannot intentionally call an employee by the wrong pronoun without violating Title VII in some respect. Such misgendering is either discrimination per se or relies on the sex stereotype that an employee's pronouns should not deviate from cisgender male and female expectations. This framework requires the removal of the entire spectrum of disparate treatment between employees of all gender identities, including practices that grant only cisgender employees the protection of being called by their chosen name and pronoun, at least when they are sufficiently severe or pervasive to contaminate the work environment.

As to when an employer may be liable to a victim-employee for hostile work environment sexual harassment, the Court held in *Burlington Industries, Inc. v. Ellerth* that an employer may be vicariously liable to an employee when a supervisor creates a hostile work environment, even when the victim suffers no "tangible" employment consequences, such as being fired or demoted.[82] An employer may be held liable if it intended the consequences of the supervisor's harassment, the employer was negligent or reckless in preventing the harassment, the harassment occurred within the scope of a non-delegable duty of the employer, or the employee "purported to act or to speak on behalf of the principal[.]"[83] As a defense, an employer may demonstrate that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and . . . that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise."[84] An employer may also be held liable for hostile work environment sexual harassment even when a nonsupervisory co-worker or third party is the harasser; in this case, an employee would have to prove that the employer was negligent in preventing the harassment.[85] Therefore, plaintiffs have the potential to bring hostile

[82] 524 U.S. 742, 745 (1998).

[83] *Id.* at 758.

[84] *Id.* at 765. Similarly, in *Faragher v. Boca Raton*, decided on the same day as *Burlington*, the Court applied the same liability rule: "[A]n employer is vicariously liable for actionable discrimination caused by a supervisor, but subject to an affirmative defense looking to the reasonableness of the employer's conduct as well as that of a plaintiff victim." 524 U.S. 775, 780 (1998). The Court held that the employer had failed to take reasonable care to prevent the harassment, as the city did not keep track of supervisors' conduct, failed to disseminate its sexual harassment policy among its employees, and did not have a reasonable complaint procedure in place for employees to take advantage of. *Id.* at 808.

[85] The Court further developed its Title VII vicarious liability framework in *Vance v. Ball State University*, holding that an employer is not liable for the actions of supervisors

work environment claims even when the employer did not intend to cause a hostile work environment but fosters one as a consequence of unchecked offensive workplace behavior.

The *Burlington* liability framework would not consider misgendering a "tangible" employment action, like hiring or firing would be. In a situation where a supervisor consistently calls an employee by the incorrect pronoun, an employer would have to prove that it "exercised reasonable care to prevent and correct promptly [the misgendering], and . . . that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid [the misgendering] otherwise."[86] In a situation where a co-worker consistently calls an employee by incorrect pronouns, an employer may be held liable for sexual harassment if it was negligent in controlling the working conditions by not taking action to prevent and correct the misgendering, or failed to provide corrective opportunities.[87] Examples of employers failing to exercise reasonable care might include failing to provide training or providing ineffective training regarding pronoun usage, failing to put in place an adequate complaint system, or ignoring or dismissing employee complaints of misgendering. Ultimately, if an employer knew or should have known about the harassment—no matter if the harasser is a supervisor, co-worker, or third party—and failed to take reasonable care to stop the harassment, the employer may be liable to the victim-employee based on its negligence.[88]

Evidence of a supervisor's or co-worker's intentional misgendering (as opposed to accidental misgendering) would make a "severe or pervasive" argument significantly stronger. Under the severe and pervasive framework—requiring that the harassment be so offensive as to alter the conditions of the employee's work—if a supervisor or co-worker makes an honest mistake by calling an employee the wrong pronoun, even if they are previously aware of their gender identity, their conduct likely would not rise to a sufficiently severe or pervasive level

without the authority to make tangible employment decisions, such as hiring and firing, because such an employee does not fit into the traditional definition of a supervisor. 570 U.S. 421, 424 (2013). But the *Vance* Court still makes clear that supervisors are not the only ones who can cause harassment; an employer is liable under Title VII if it is "negligent in failing to prevent harassment from taking place" and that "[e]vidence that an employer did not monitor the workplace, failed to respond to complaints, failed to provide a system for registering complaints, or effectively discouraged complaints from being filed" are relevant considerations." *Id.* at 448–49.

86 *Burlington*, 524 U.S. at 765.

87 *Vance*, 570 U.S. at 448–49.

88 *Burlington*, 524 U.S. at 765.

to constitute harassment.[89] And, arguably, if an employee never explicitly shared their gender identity or pronouns, they likely would not have taken the requisite preventative actions to avoid the hostile treatment under the framework. This is because in many instances, "the use of gendered language . . . relies on assumptions made based on appearance."[90] The delicate fact of the matter in this instance is that a person's gender identity is not necessarily evident based on their gender expression; this may apply whether the individual cares deeply about whether others treat them in accordance with their gender identity or the individual wishes to reject the concept of gender altogether.

IV. EEOC GUIDANCE

The EEOC was established in 1964, as mandated by Title VII of the Civil Rights Act, and was tasked with enforcing the provisions of Title VII.[91] The EEOC "is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy, *transgender status*, and sexual orientation), national origin, age (40 or older), disability or genetic information."[92] The EEOC investigates charges of discrimination, and if it determines that discrimination has occurred, it will try to foster a settlement between the parties. It also has the authority to file a lawsuit if the parties cannot agree on a settlement.[93] While EEOC decisions are binding on federal agencies and departments,

[89] Alternatively, there may be the potential for a disparate impact claim. While most disparate impact claims "involve[] challenges to an employer's qualification standards or selection practices for hiring or promoting employees, rather than challenges to the conditions of employment," the amendment to Title VII in the Civil Rights Act of 1991 "to include an express prohibition of 'a particular employment practice that causes a disparate impact'" leaves open the possibility for employees to make disparate impact claims when their employer follows an employment practice that discriminatorily affects the conditions of their work; "the phrase 'employment practice' is certainly broad enough to include challenges to employment conditions[.]" Kelly Cahill Timmons, *Sexual Harassment and Disparate Impact: Should Non-Targeted Workplace Sexual Conduct Be Actionable Under Title VII?*, 81 NEB. L. REV. 1152, 1190–91 (2002). Considering a hypothetical workplace-discrimination policy that is silent on protecting transgender employees or involves a custom of failing to correct employees who misgender co-workers or of ignoring misgendering complaints, there is the possibility of a successful sexual harassment claim based on disparate impact, since cisgender employees would be unlikely to face the same misgendering that a transgender employee might.

[90] Chan Tov McNamarah, *Misgendering as Misconduct*, 68 UCLA L. REV. DISCOURSE 40, 52 (2020).

[91] Civil Rights Act of 1964, 42 U.S.C. § 2000e–4.

[92] *Overview*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/overview (emphasis added).

[93] *Id.*

they are not binding upon the courts, although "[t]he administrative interpretation of [Title VII] by the enforcing agency is entitled to great deference."[94]

The EEOC's approach to misgendering claims under Title VII aligns with the thesis of this Comment. An EEOC brochure released in 2014 asserted that "it is illegal for an employer to . . . permit harassment because . . . [a]n employee is planning or has made a gender transition from female to male or male to female."[95] And more recently, in guidance released after the *Bostock* decision, the EEOC stated that

> [I]f an employer fires an employee because that person was identified as male at birth, but uses feminine pronouns and identifies as a female, the employer is taking action against the individual because of sex since the action would not have been taken but for the fact the employee was originally identified as male.[96]

In 2012, in *Macy v. Holder*, the EEOC held that transgender discrimination constitutes sex discrimination under Title VII for the first time.[97] In 2013, in *Jameson v. U.S. Postal Service*, the EEOC reasoned that "[i]ntentional misuse of [an] employee's new name and pronoun may cause harm to the employee, and may constitute sex-based discrimination and/or harassment."[98] As discussed in the Introduction, in 2015, the EEOC determined in *Lusardi v. Dep't of the Army* that an employee who is subject to intentional and repeated misgendering is subject to hostile work environment sexual harassment.[99]

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[94] Griggs v. Duke Power Co., 401 U.S. 424, 433–34 (1971); *see* Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (While agency interpretations are not authoritatively controlling upon the courts, they "do constitute a body of experience and informed judgment to which courts . . . may properly resort for guidance. The weight of such a judgment . . . will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and . . . it['s] power to persuade . . . .").

[95] U.S. EQUAL EMP. OPPORTUNITY COMM'N, PREVENTING EMPLOYMENT DISCRIMINATION AGAINST LESBIAN, GAY, BISEXUAL OR TRANSGENDER WORKERS (BROCHURE) (April 29, 2014), https://www.eeoc.gov/laws/guidance/preventing-employment-discrimination-against-lesbian-gay-bisexual-or-transgender [hereinafter EEOC LGBTQ DISCRIMINATION BROCHURE].

[96] U.S. EQUAL EMP. OPPORTUNITY COMM'N, SEXUAL ORIENTATION AND GENDER IDENTITY (SOGI) DISCRIMINATION, https://www.eeoc.gov/sexual-orientation-and-gender-identity-sogi-discrimination (last visited Oct. 8, 2021).

[97] Macy v. Holder, No. 0120120821, 2012 WL 1435995, at *11 (E.E.O.C. April 20, 2012).

[98] Jameson v. Donahoe, No. 0120130992, 2013 WL 2368729, at *2 (E.E.O.C. May 21, 2013).

[99] *Lusardi*, 2015 WL 1607756, at *13.

To provide more insight on Ms. Lusardi's claims relating specifically to the misgendering assertions, Lusardi asserted that her supervisor repeatedly called her "by her former male name, by male pronouns, and as 'sir.'"[100] In addition, Lusardi asserted that there were at least seven instances where the supervisor did not correct himself after misgendering her, and that there were at least four instances where he did correct himself.[101] The supervisor misgendered Lusardi in front of her co-workers, during meetings, during heated arguments, and via email.[102] Lusardi confessed that she did not always correct the supervisor because she thought she might suffer an adverse employment action.[103] The supervisor admitted to misgendering Lusardi but alleged that these instances were just accidents and a "slip of the tongue."[104] But Lusardi asserted that "there were occasions when [the supervisor] intentionally used male pronouns . . . in order to elicit a response from her[,]" such as during arguments.[105] Moreover, during an email conversation in which Lusardi expressed to the supervisor that she believed "her team members did not treat her as an equal[]" and that she believed the supervisor was "on the side of other employees who do not treat her as an equal," the supervisor responded, "Sir, not on anyone's side."[106] Witnesses testified that they observed the supervisor misgendering Lusardi well after she notified her colleagues of her transition, and that Lusardi shared with a co-worker that she felt "she was working in a hostile or uncomfortable environment."[107]

The EEOC maintains that an employer violates Title VII when "intentionally and persistently failing to use the name and gender pronoun corresponding to an employee's gender identity as communicated to management and employees[]."[108] In Lusardi, the EEOC contrasted the impact of accidental and intentional misgendering; specifically, "inadvertent and isolated slips of the tongue likely would not constitute harassment . . . ."[109] In Ms. Lusardi's case, it was found that the use of incorrect pronouns "was not accidental, but instead was intended to humiliate and ridicule [her]."[110] Consequently, the

100 *Id.* at *3.
101 *Id.* at *3.
102 *Id.*
103 *Id.*
104 *Id.*
105 *Lusardi*, 2015 WL 1607756, at *3.
106 *Id.*
107 *Id.* at *4.
108 EEOC LGBTQ DISCRIMINATION BROCHURE, *supra* note 95.
109 *Lusardi*, 2015 WL 1607756, at *11.
110 *Id.*

supervisor's "repeated and intentional conduct was offensive and demeaning . . . and would have been so to a reasonable person in [Ms. Lusardi's] position."[111] The EEOC also emphasized that "supervisory or co-worker confusion or anxiety cannot justify discriminatory terms and conditions of employment."[112] This justifies the concept that employers may be liable for hostile work environment sexual harassment even when the hostile work environment was an unintentional consequence of unchecked, offensive workplace behavior. This also justifies the suggestion that employers must provide gender discrimination training and foster inclusive workplace practices.[113]

V. FEDERAL CASE LAW DEMONSTRATES THAT TITLE VII PROHIBITS INTENTIONAL MISGENDERING IN THE WORKPLACE

Federal courts have held that persistent sex stereotyping and misgendering of cisgender employees constitutes sexual harassment and, therefore, violates Title VII. Likewise, at least one federal district court has held that intentional misgendering of transgender people also constitutes sexual harassment under Title VII.

In Nichols v. Azteca Restaurant Enterprises, Inc., a cisgender male employee sued his former employer, alleging sexual harassment in violation of Title VII.[114] The employee asserted "that he was verbally harassed by [his] male co-workers and a supervisor because he was effeminate and did not meet their views of a male stereotype."[115] These employees repeatedly called the plaintiff "she" and "her," and degraded him in both Spanish and English, calling him, among other things, a "fucking female whore."[116] These affronts "occurred at least once a week and often several times a day."[117] Ultimately, the Ninth Circuit held that the plaintiff-employee brought a successful hostile work environment sexual harassment claim since he was persistently harassed, including being misgendered, by co-workers for failing to conform to sex stereotypes, and the employer failed to adequately deter future harassment or correct the harassment.[118] Post-Bostock, the same reasoning as applied in Nichols would apply to a situation where a transgender or nonbinary person is referred to by the incorrect

111 *Id.*
112 *Id*. at *9.
113 *See infra* Part VII.
114 Nichols v. Azteca Rest. Enters., Inc., 256 F.3d 864, 869 (9th Cir. 2001).
115 *Id.*
116 *Id.* at 870.
117 *Id.*
118 *Id.* at 874–77.

pronouns; if it is unreasonable and offensive to call a cisgender male by the incorrect pronouns "she/her," it would also be unreasonable and offensive to call a transgender male by "she/her." In both instances, the victims fail to conform with traditional cisgender-based stereotypes of how men and women should act.

There have been some relevant cases at the district court level, as well. Milo v. CyberCore Techs., LLC was decided only months before the Bostock decision. As such, the district court declined to hold whether Title VII prohibits discrimination based on gender identity.[119] Nevertheless, the district court found that the plaintiff, a transgender woman, did not provide adequate evidence to prove the harassment she faced was severe and pervasive enough to create a hostile work environment, despite multiple claims of misgendering and negative comments about her female-expressive appearance.[120] Specifically, the plaintiff was subjected to intentional misgendering, negative comments about her dresses and heels, and was told that "what [she thinks is discriminatory] really doesn't matter."[121] Of all these negative comments, only one—a comment that the plaintiff's skirt was too short—was attributed to her direct supervisor, while the others were made by various subcontractor employees at a company where she was also working as a subcontractor.[122]

While the plaintiff-employee's hostile workplace claim was unsuccessful, it is arguable that she would have been successful under different circumstances; the structure of the plaintiff's work environment—made up of mostly subcontractor co-workers from various companies—was a barrier to her claim because almost all the discriminatory conduct was by individuals not employed by the plaintiff's direct employer or subcontractor employer.[123] Accordingly, the court determined that neither the direct employer nor subcontractor employer knew or should have known about the conduct because the plaintiff did not take the requisite action to report the conduct to either employer.[124] Ultimately, there is a likelihood the case could have turned out differently if the plaintiff had provided more specific factual instances of misgendering, instead of merely stating that

119 Milo v. CyberCore Techs., LLC, No. SAG–18–3145, 2020 U.S. Dist. LEXIS 5355, at *10–11 (D. Md. Jan. 13, 2020).

120 *Id.* at *10–12.

121 *Id.* at *4–5.

122 *Id.* at *14.

123 *Id.* at *14–15.

124 *Id.* at *15.

she was misgendered in general.[125] The potential oversimplification of many of the plaintiff's allegations did not provide the court with enough information to determine whether the misgendering was sufficiently severe or pervasive to constitute hostile work environment sexual harassment.[126]

Conversely, in Doe v. Triangle Doughnuts, LLC, the court cited to Bostock, which had just been decided a month earlier.[127] The plaintiff, referred to as Jane Doe, was a transgender woman who identifies "by a female name and female pronouns."[128] Doe worked at a Dunkin' Donuts, owned by the franchise company Triangle Doughnuts, LLC, for two months.[129] Within those two months, Doe alleged that she was subject to "harassment and discrimination by coworkers and customers."[130] Specifically, Doe alleged that her "[supervisors and] coworkers regularly misgendered [her] with a male name and male pronouns despite her requests to use her female name and female pronouns."[131] Customers also misgendered Doe regularly, "sometimes [on a] daily basis."[132] Doe's supervisors prohibited her from using the women's restroom and subjected her "to a stricter dress code than other female and cisgender employees."[133] Doe was also subjected to threatening interactions with co-workers and customers; in one instance, a co-worker threatened to beat her up, and in another, a group of customers threatened to kill her.[134] Instead of taking action to prevent these misgendering and gender stereotyping affronts by co-workers or customers, "Doe's supervisors . . . reassigned her to duties that were out of the view of customers."[135] In the end, Doe's manager told her she could go home if she did not feel safe but then fired her after Doe left work for the day, later asserting that she was fired for violating the company's time off policy.[136]

The court provided the following hostile work environment framework: the plaintiff must sufficiently plead that "1) the employee suffered intentional discrimination because of his/her [gender], 2) the

125 *Milo*, 2020 U.S. Dist. LEXIS 5355, at *18.
126 *Id.* at *18–19.
127 Doe v. Triangle Doughnuts, LLC, 472 F. Supp. 3d 115, 129 (E.D. Pa. 2020).
128 *Id.* at 122.
129 *Id.*
130 *Id.*
131 *Id.*
132 *Id.*
133 *Triangle Doughnuts*, 472 F. Supp. 3d at 122–23.
134 *Id.* at 123.
135 *Id.* at 122.
136 *Id.* at 123–24.

discrimination was severe or pervasive, 3) the discrimination detrimentally affected the plaintiff, 4) the discrimination would detrimentally affect a reasonable person in like circumstances, and 5) the existence of respondeat superior liability."[137] A court must review the claim under the totality of the circumstances, which may include considering the factors set forth in Harris, 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."[138] Ultimately, the court found that Doe "adequately pleaded a hostile work environment claim based upon gender stereotyping in violation of Title VII," highlighting the intentional misgendering as a major factor.[139]

The contrast between the extreme facts pled in Doe and the vaguer allegations made in Milo exemplifies the high bar plaintiffs facing misgendering harassment must hurdle to be successful in a hostile work environment sexual harassment claim. In any event, Doe v. Triangle Doughnuts provides an illustration of how, in light of Bostock, Title VII does provide an avenue for recourse in face of intentional misgendering in the workplace.

In various contexts, courts have described misgendering as damaging. Intentional misgendering has been described as a hostility,[140] "objectively offensive,"[141] "not a light matter [and] laden with discriminatory intent,"[142] "degrading, humiliating, invalidating, and mentally devastating" to transgender individuals.[143] Likewise, misgendering can make a person feel "depressed [and] disrespected,"[144] and "being referred to by the wrong gender pronoun is often incredibly distressing"[145] for a transgender person and can be "traumatic" to someone with gender dysphoria.[146] In the context of a student

[137] *Id.* at 128 (quoting Henley v. Brandywine Hosp., LLC, No. CV-18-4520, 2019 WL 3326041, at *6 (E.D. Pa. July 24, 2019)).

[138] *Triangle Doughnuts*, 472 F. Supp. 3d at 128 (quoting Suri v. Foxx, 69 F. Supp. 3d 467, 480 (D.N.J. 2014)).

[139] *Id.* at 129–30.

[140] Tudor v. Se. Okla. State Univ., No. CIV-15–324-C, 2017 U.S. Dist. LEXIS 177654, at *4 (W.D. Okla. Oct. 26, 2017).

[141] Rumble v. Fairview Health Servs., No. 14-CV-2037 (SRN/FLN), 2015 U.S. Dist. LEXIS 31591, at *72 (D. Minn. Mar. 16, 2015).

[142] Doe v. City of N.Y., 42 Misc. 3d 502, 506–507 (N.Y. Sup. Ct. 2013).

[143] Hampton v. Baldwin, No. 3:18-CV-550-NJR-RJD, 2018 U.S. Dist. LEXIS 190682, at *7 (S.D. Ill. Nov. 7, 2018).

[144] *Id.* at *47.

[145] Prescott v. Rady Child.'s Hosp.-San Diego, 265 F. Supp. 3d 1090, 1096 (S.D. Cal. 2017).

[146] Monroe v. Baldwin, 424 F. Supp. 3d 526, 545 (S.D. Ill. 2019).

intentionally misgendering a teacher, misgendering was described as "pure meanness."[147] None of the cases discussed in this Comment provided instances where misgendering alone was the sole factor causing a hostile work environment. But if facing persistent misgendering in the workplace can make an individual feel depressed, disrespected, or humiliated, it follows that the misgendering could significantly "alter the conditions of [that individual's] employment and create an abusive working environment" as set forth in the Supreme Court's hostile work environment jurisprudence.[148]

VI. POTENTIAL CHALLENGES

While individuals should be able to bring hostile work environment sexual harassment claims under Title VII based on misgendering, plaintiff-employees may confront certain defenses or challenges. These defenses or challenges may include confronting linguistic challenges for individuals who use gender-neutral pronouns, such as "they/them/theirs," which are increasingly, but still not extensively, used; freedom of speech defenses by defendants who may assert that workplace pronoun policies unconstitutionally forbid or compel speech under the First Amendment; and religion-based defenses by defendants who may assert that their religious beliefs bar them from recognizing certain gender identities.

A. *Language Challenges*

As nonbinary gender identities have become more visible in American and global culture, there has been a "growing acceptance of gender-neutral pronouns, such as 'they, them, and theirs.'"[149] But in his dissent in *Bostock*, Justice Alito lamented that the use of gender-neutral pronouns will forcibly change the way people are required to address each other, in a way that is inconsistent with "established English usage" of pronouns.[150] Justice Alito wrote that "two sets of sex-specific singular personal pronouns are used to refer to someone in the third person (he, him, and his for males; she, her, and hers for females)."[151] He expressed worry that "several different sets of gender-neutral pronouns have now

147 T.B. v. Prince George's Cnty. Bd. of Educ., 897 F.3d 566, 577 (4th Cir. 2018).

148 Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986) (quoting Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

149 Clarke, *supra* note 18, at 895.

150 Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1782 (2020) (Alito, J., dissenting).

151 *Id.*

been created and are preferred by some individuals who do not identify as falling into either of the two traditional categories."[152]

But Justice Alito overlooked the notion that language can change over time and is evolving to become more open to the use of gender-neutral pronouns. As mentioned in the Introduction, about 18% of adults in the United States say they personally know someone who goes by gender-neutral pronouns.[153] Approximately 29% of the 27,715 respondents to the 2015 National Center for Transgender Equality survey reported using "they/their" as their pronouns.[154] Additionally, the American Psychological Association (APA) has officially embraced "'they' as a singular third-person pronoun . . . ."[155] Merriam Webster declared "they" as its "Word of the Year" for 2019, noting that "*they* has been used [as a gender-neutral pronoun] for over 600 years" and that searches for the word on their website "increased by 313% in 2019."[156] The Associated Press Stylebook advises journalists to refer to "people who identify as neither male nor female or ask not to be referred to as he/she/him/her" to "[u]se the person's name in place of a pronoun, or otherwise reword the sentence, whenever possible. If they/them/their use is essential, [a writer should] explain in the text that the person prefers a gender-neutral pronoun."[157] The Chicago Manual of Style states that while writers should be wary of using the word "they" in a singular sense, the use of "they" as such has "become common in informal usage . . . and [is] steadily gaining ground."[158] The Manual continues that "[f]or references to a specific person, the choice of pronoun may depend on the individual. Some people identify not with a gender-specific pronoun but instead with the pronoun they and its forms or some other gender-neutral singular pronoun; any such preference should generally be respected."[159] In addition, the Manual

152 *Id.*

153 A.W. Geiger et al., *supra* note 31.

154 2015 U.S. TRANSGENDER SURVEY, *supra* note 32, at 4, 49.

155 Chelsea Lee, *Welcome, Singular "They*," APA STYLE (Oct. 3, 2019), http://apastyle.apa.org/blog/singular-they.

156 *Merriam-Webster's Words of the Year 2019*, MERRIAM-WEBSTER, https://www.merriam-webster.com/words-at-play/word-of-the-year-2019-they (last visited Oct. 8, 2021).

157 Travis M. Andrews, *The Singular, Gender-Neutral 'They' Added to the Associated Press Stylebook*, WASH. POST, (Mar. 28, 2017), https://www.washingtonpost.com/news/morning-mix/wp/2017/03/28/the-singular-gender-neutral-they-added-to-the-associated-press-stylebook/.

158 CHICAGO MANUAL OF STYLE ¶ 5.256, at 360 (17th ed. 2017).

159 *Id.*

provides various techniques for achieving gender neutrality in writing.[160]

Moreover, the gender-neutral honorific "Mx." has become more widely used.[161] On a similar note, the honorific Ms.—as opposed to either Mrs. or Miss—which is now widely used, was at one point not commonly used. It only reached mainstream usage in the 1970s after feminist activists called for its adoption to deal with sex-biased honorifics usage that focused only on a woman's marital status.[162] Oxford Languages contends that it "aims to describe, rather than prescribe, the way languages are used by people around the world" and "take[s] an evidence-based approach to language content creation, looking at real examples of the ways words are used in context to provide an accurate picture of a language."[163] Arguments that people cannot be "forced" to use pronouns like they/them or ze/zir or honorifics like Mx. because they are "made up," will not have teeth once they are widely used in regular society and recognized by well-regarded research organizations.

B. *Free Speech Challenges*

On a similar note, some argue that workplace pronoun policies unconstitutionally control speech under the First Amendment. In his *Bostock* dissent, Justice Alito expresses concern that employers might feel unduly pressured to suppress the speech of employees who may disagree with a co-worker's decision to use chosen pronouns.[164] Law professor Joshua Michael Blackman argues that requiring people to use pronouns that align with a person's gender identity "in effect impose ideas about gender identity on speakers" and that "[r]equiring people to voice beliefs that they do not hold, or even understand, is a flagrant and unacceptable violation of the freedom of speech."[165]

For example, in *Meriwether v. Hartop*, a university professor argued that his employer violated his constitutional right to freedom of speech when the employer disciplined him for refusing to call one of his

160 *See* CHICAGO MANUAL OF STYLE ¶ 5.255, at 359–60 (17th ed. 2017).

161 *See* Katy Steinmetz, *This Gender-Neutral Word Could Replace 'Mr.' and 'Ms.,'* TIME (Nov. 10, 2015), https://time.com/4106718/what-mx-means/.

162 Ben Zimmer, *Ms.*, N.Y. TIMES (Oct. 23, 2009), https://www.nytimes.com/2009/10/25/magazine/25FOB-onlanguage-t.html?smid=tw-share.

163 *How We Create Language Content*, OXFORD LANGUAGES, https://languages.oup.com/about-us/how-we-create-language-content (last visited Sept. 5, 2021).

164 *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1783 (2020) (Alito, J., dissenting).

165 *See* Josh Blackman, *Opinion*: *The Government Can't Make You Use 'Zhir' or 'Ze' in Place of 'She' and 'He,'* WASH. POST, (June 16, 2016), https://wapo.st/1tt4rWZ.

students, a transgender woman, by female pronouns.[166] The district court held that the university did not retaliate against the professor in violation of his freedom of speech, reasoning that the professor's statements misgendering the student did not constitute speaking on a public concern.[167] The court found that the statements were made in the inconsequential context of an individual classroom and that his "refusal to address a student in class in accordance with the student's gender identity [did] not implicate broader societal concerns" or actually convey his beliefs about gender identity.[168] In dismissing the professor's compelled speech claim, the district court reasoned that the university did not compel the professor to say anything in particular, as the professor was not forced to express a belief about gender identity with which he did not agree; he could have decided to call the student by her name or to stop using gender-based titles for the whole class.[169]

The Sixth Circuit reversed, finding the university did violate the professor's First Amendment right to free speech.[170] The court first emphasized the public university's special place within First Amendment jurisprudence, holding that public university professors maintain free speech rights "at least when engaged in core academic functions, such as teaching and scholarship."[171] Next, the court found that the professor's decision not to use the student's chosen pronoun did constitute speaking on a "matter of public concern" because his "choices touch[ed] on gender identity—a hotly contested matter . . . that 'often' [came] up during class discussion in [his] political philosophy courses."[172] The court stated that "titles and pronouns carry a message."[173] In particular, the university wanted "its professors to use pronouns to communicate [the] message [that] [p]eople can have a gender identity inconsistent with their sex at birth. But [the professor did] not agree with that message, and he [did] not want to communicate it to his students."[174] Ultimately, the court decided that the professor's interest in refusing to use the student's chosen pronoun, based on his

166 Meriwether v. Hartop, 992 F.3d 492, 501, 503 (6th Cir. 2021).

167 Meriwether v. Trs. of Shawnee State Univ., No. 18-CV-753, 2019 U.S. Dist. LEXIS 151494, at *44, *49–50 (S.D. Ohio Sept. 5, 2019).

168 *Id.* at *49–50.

169 *Id.* at *53–54.

170 *Hartop*, 992 F.3d at 498.

171 *Id.* at 504–05.

172 *Id.* at 506.

173 *Id.* at 507.

174 *Id.*

religious and philosophical beliefs, outweighed the university's interest in preventing discrimination against its transgender students.[175]

While the Sixth Circuit reversed the district court's decision in *Meriwether*, neither court ruled out that there may be some middle ground of pronoun policy that would have satisfied both courts' standpoints, at least in the public university context. For instance, the university's policy did not actually require the plaintiff to use pronouns at all, reasoning that professors have many different ways to address students, such as by their names.[176]

C. *Religious Freedom Challenges*

Some have argued that religious affiliations should exempt certain employers from complying with workplace pronoun rules.[177] Justice Gorsuch's majority opinion in *Bostock* implies that the case may have been decided differently if a First Amendment free exercise or Religious Freedom Restoration Act (RFRA) argument had been presented: "Because RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII's commands in appropriate cases."[178] Justice Gorsuch did not touch further on this topic, though, deciding that how questions of religious liberty stand up against Title VII are "questions for future cases . . . ."[179] Justice Gorsuch wrote that "while other employers in other cases may raise free exercise arguments that merit careful consideration, none of the employers before us today represent in this Court that compliance with Title VII will infringe their own religious liberties in any way."[180]

That was because Harris Funeral Homes did not pursue the RFRA claim it had raised unsuccessfully in the Sixth Circuit.[181] The Sixth Circuit held that RFRA is not a valid excuse for employment discrimination, citing *Burwell v. Hobby Lobby* and emphasizing the *Hobby Lobby* majority's signaling "that its decision should not be read as providing a 'shield' to those who seek to 'cloak[] as religious practice'

175 *Id.* at 509.

176 *See* Meriwether v. Trs. of Shawnee State Univ., No. 1:18-cv-753, 2019 U.S. Dist. LEXIS 151494 at *53–54.

177 *See* Paige Smith, *Pronouns Spur Fight Over Transgender, Religious Work Rights*, BLOOMBERG L. (Feb. 18, 2020, 6:16 AM), https://news.bloomberglaw.com/daily-labor-report/pronouns-prompt-fight-over-transgender-religious-rights-at-work.

178 Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1754 (2020).

179 *Id.*

180 *Id.*

181 *Id.*

their efforts to engage in 'discrimination in hiring . . . .'"[182] The Sixth Circuit concluded that because Title VII aims to safeguard "'an equal opportunity to participate in the workforce without regard to' . . . an array of . . . protected traits," any Title VII enforcement action "will necessarily defeat RFRA defenses to discrimination made illegal by Title VII."[183] Applying the Sixth Circuit's rationale to a misgendering claim, it would follow that RFRA is not a valid excuse for employers with religious affiliations to allow intentional misgendering, as misgendering that rises to a severe and pervasive level impedes transgender and nonbinary employees from an equal opportunity to participate in the workforce without regard to their gender identity.

VII. A RECOMMENDATION ON HOW EMPLOYEES AND EMPLOYERS SHOULD MOVE FORWARD

Appreciating that receiving respect and dignity in the workplace is essential to employees' wellbeing and that prophylactic compliance with Title VII is important for employers to maintain a happy and strong workforce, this Comment ends with a call to both employers and employees to adopt proactive gender-inclusive pronoun practices.

Employers should create opportunities for new employees to share their pronouns if they wish, such as inquiring through the onboarding process, encouraging employees to include their pronouns in their email signature lines, and encouraging employees to share their pronouns during introductory meetings.[184] Providing such opportunities takes the onus off an employee—who might be anxious about being misgendered at work, but might not know how to approach sharing their pronouns—from having to announce their pronouns with each new interaction.[185] An employer can encourage employees to share

182 EEOC v. R.G., 884 F.3d 560, 595 (6th Cir. 2018) (quoting Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 686 (2014)).

183 *Id.* at 595.

184 *See Talking About Pronouns in the Workplace*, HUM. RTS. CAMPAIGN FOUND., https://hrc-prod-requests.s3-us-west-2.amazonaws.com/files/assets/resources/TalkingAboutPronouns_onesheet_FINAL.pdf?mtime=20200713142932&focal=none (last visited Sept. 5, 2021) (discussing ways to create opportunities for pronoun sharing in the workplace); *see also The Survey is In: Gen Z Demands Diversity and Inclusion Strategy*, TALLO (Oct. 21, 2020) https://tallo.com/blog/genz-demands-diversity-inclusion-strategy/. Through a survey on Generation Z's perspectives on companies' diversity and inclusion practices, the networking platform Tallo found that 88% of respondents agree that it is "important that recruiters or potential employers ask people about their preferred gender pronouns," and 65% of respondents "strongly agree with that statement." *Id.*

185 Julia Carpenter, *What It's Like to Be Labeled the Wrong Gender at Work*, CNN BUS. (Oct. 9, 2018), https://www.cnn.com/2018/10/09/success/lgbtq-misgendering-workplace/index.html.

their pronouns, but it should not be mandatory.[186] If shared, employers may wish to maintain records of employees' names and pronouns to "ensure that whenever possible, appropriate terms will be used for personnel and administrative purposes, such as directories, email addresses, and business cards."[187] Additionally, employers should deliver diversity and inclusion training to all employees and include language in their employee handbooks to ensure "that proper pronoun usage is part of creating an environment in which all employees feel valued and respected."[188] Moreover, employers should establish a sound process where employees can come forward in the event they are being misgendered; employers should recall that "the mere existence of a grievance procedure" and an inclusive pronoun policy, "coupled with [a victim's] failure to invoke that procedure, [does not] insulate [an employer] from liability."[189] These procedures must be reasonably designed "to encourage victims of [misgendering] to come forward."[190] Taking such proactive measures to prevent supervisory and nonsupervisory employees from misgendering another employee is required under Title VII's *Burlington*/*Faragher*/*Vance* liability standard framework.[191]

In relation to employees and supervisors who might think their gender identity is "obvious" from their gender expression or their use of a traditionally gendered name, it still may be beneficial for them to introduce themselves with their pronouns or include them in their email signature to help normalize using pronouns and foster a more inclusive workplace. Employees should remember that while misgendering should always be avoided, honest mistakes are bound to happen; the best practice is to "apologize, move on, and make sure to get it right the next time."[192]

If an employee thinks it would help in preventing misgendering, and if they feel comfortable, the employee should share their pronouns upon meeting new people and include their pronouns in their email signature line or video conferencing platform; employees should be

186 Tat Bellamy Walker, *How to Support Nonbinary and Trans Colleagues at Work, and the Email Template to Use If You Accidentally Misgender Them*, BUS. INSIDER (June 10, 2020), https://www.businessinsider.com/how-to-support-trans-nonbinary-coworkers-misgendering-at-work.

187 Christian N. Thoroughgood et al., *Creating a Trans-Inclusive Workplace*, HARV. BUS. REV. (Mar. 1, 2020), https://hbr.org/2020/03/creating-a-trans-inclusive-workplace.

188 *Id.*

189 Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986).

190 *Id.* at 73.

191 *See supra* Part III.

192 Thoroughgood, *supra* note 187.

aware that to succeed in a Title VII claim based on misgendering, they may need to demonstrate that they took some level of preventative action to avoid misgendering under Title VII's liability framework.[193] In addition, while likely challenging and emotionally exhausting,[194] an employee who has been misgendered should correct supervisors and co-workers if they use the incorrect pronouns, as the *Burlington*/*Faragher*/*Vance* framework looks to see that employees have taken corrective action to avoid harm.[195] If necessary, employees should report misgendering to someone within the chain of command, or if available, follow any corrective action procedures provided by the employer, as again, employees are generally required to seek corrective opportunities to avoid misgendering to be successful in a hostile work environment sexual harassment claim.[196] If the employer's preventative or corrective measures are not effective and the misgendering becomes severe or pervasive, employees seeking redress based on misgendering in the workplace may, along with considering state and local remedies, look to the *Bostock* decision and sex stereotyping precedents in making a hostile work environment claim under Title VII.

VIII. CONCLUSION

The Supreme Court's decision in *Bostock v. Clayton County* made clear that employees of various gender identities are protected from harassment under Title VII. Employees who face pervasive misgendering in the workplace now have a stronger avenue to redress via the *Bostock* decision's strong textualist holding, in combination with the Court's longstanding sex stereotyping doctrine. This proposition is further supported by the EEOC's explicit guidance that intentional misgendering constitutes sexual harassment under Title VII. Additionally, federal courts have recognized that misgendering may rise to a sufficiently severe and pervasive level to create a hostile work environment, and that misgendering is offensive, disrespectful, and degrading in various contexts. Ultimately, employers should be on notice that intentional misgendering, as well as failure to prevent such mistreatment, may constitute hostile work environment sexual harassment, as it advances the archaic stereotype that a person must

193 *See supra* Part III.

194 Mary Retta, *Work Sucks, Especially When People Get Your Pronouns Wrong*, VICE (June 21, 2019) https://www.vice.com/en/article/kzmy39/pronouns-at-work-trans-nonbinary.

195 *See supra* Part III.

196 *See supra* Part III.

use the gender pronouns that conform with the sex they were assigned at birth.