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Sticks and Stones May Break My Bones But are These Words Severe or Pervasive Enough to Hurt Me?

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I INTRODUCTION

Title VII of the Civil Rights Act of 1964 prohibits discrimination in the employment context.[1] The statute protects employees against various forms of discrimination ranging from as work assignments to discriminatory termination and unequal pay.[2] Title VII was amended by the Civil Rights Act of 1991, to expand remedies for intentional discrimination and unlawful harassment in the workplace.[3] But from its beginning it core prohibition declared that "it shall be an unlawful employment practice for an employer to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individuals race, color, religion, sex, or national origin[.]"[4]

In interpreting Title VII, the Supreme Court held that harassment leading to noneconomic injury can violate the statute. In *Meritor Sav. Bank, FSB v. Vinson*, the Supreme Court held that such harassment can violate Title VII as long as the sexual harassment is sufficiently severe or pervasive "to alter the conditions of [the victims] employment and create an abusive working environment.[5]" The Court reaffirmed this holding in *Harris v. Forklift Sys., Inc.*, where the Court reiterated that, when a workplace is permeated with discriminatory intimidation, ridicule and insults that are sufficiently severe or pervasive, Title VII is violated.[6]

[1] HAROLD S. LEWIS, JR. & ELIZABETH J. NORMAN, EMPLOYMENT DISCRIMINATION LAW AND PRACTICE 42 (2d ed. 2001).
[2] *Id.* at 43-44.
[3] *Id.* at 45.
[4] 42 U.S.C. §2000e-2 (Date).
[5] *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986) (quoting).
[6] *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993).

Despite these holdings, judges have had much trouble adjudicating these cases and applying the correct standard.[7] For example, The Third Circuit has applied inconsistent variations of the severe or pervasive standard such as "pervasive and regular," "severe and pervasive," (even though that court also spoke of "severe or pervasive standard" in the same opinion).[8] In *Castleberry v. STI Group*, the Third Circuit acknowledged this confusion and confirmed that the "severe or pervasive" standard was correct.[9] In that case, the court recognized that under the correct standard it is possible for one isolated incident to be enough to establish a hostile work environment.[10] While courts do hint at which context would allow for an isolated incident to be sufficient, courts lack the capacity to consistently determine when an incident is sufficiently severe or pervasive to amount to a change in the terms and conditions of employment.

First, this Note will provide a brief history of the severe or pervasive standard. Next, it will discuss how courts like the Third Circuit have misapplied the severe or pervasive standard. Subsequently, the note will demonstrate how judges are poor arbiters of severity and pervasiveness in the hostile work environment context. Lastly, the Note will discuss the implications of these decisions and ultimately argue that judges should be more disposed to allow these hostile work environment claims to be decided by juries, which are better equipped to determine when harassment is so severe or pervasive to warrant a hostile work environment claim.

[7] *See* Castleberry v. STI Group, 863 F.3d 259, 264- 65 (2017).

[8] *Id;see* Mandel v. M & Q Packaging Corp., 706 F.3d 157, 167 (3rd Cir. 2013)(stating that to succeed on a hostile work environment claim the plaintiff must establish that the discrimination was severe or pervasive); Andreoli v. Gates, 482 F.3d 641, 644 (3rd Cir. 2007)(stating that in order to state a claim under Title VII for hostile work environment, the employee must show the discrimination was pervasive and regular); Hare v. Potter, 220 Fed. Appx. 120, 132 (stating that plaintiffs claim may not be demonstrative of harassment that is severe and pervasive); Weston v. Pennsylvania, 251 F.3d 420, 426 (3rd Cir. 2001)(stating the standard to apply is pervasive and regular but then applied the severe or pervasive standard).

[9] Castleberry v. STI Group, 863 F.3d 259, 264- 65 (2017).

[10] *Id.*

II BACKGROUND

A. History of the Supreme Court and the Severe or Pervasive Standard.

In *Meritor Sav. Bank, FSB v. Vinson*, The Supreme Court declared for the first time that a hostile work environment case may violate Title VII, holding that to do so the harassment must be sufficiently severe or pervasive to alter the conditions of employment and create an abusive work environment.[11] In *Meritor*, plaintiff, Mechelle Vinson, an employee at Meritor Savings Bank, was discharged for excessive use of sick leave.[12] Vinson brought an action against Taylor, Vice President at Meritor Savings Bank, and the bank, contending that she was consistently subjected to sexual harassment by Taylor during her four years of employment in violation of Title VII.[13] Vinson alleged that Taylor repeatedly made demands for sexual favors, fondled her in front of employees, followed her into the restroom when she was alone, exposed himself to her, and even tried to forcibly rape her on multiple occasions.[14] Taylor denied all of the allegations and stated that they were merely a response to a business-related dispute.[15] The District Court denied relief and instead found that, if both parties did have an intimate or sexual relationship, it was voluntary and had nothing to do with plaintiff's continued employment.[16] Therefore, the District Court concluded that Vinson did not prove a Title VII violation, because the bank was without notice of the harassment.[17] Subsequently, the Court of Appeals for the District of Columbia reversed stating that a violation of Title VII can be predicated on two types of sexual harassment: (1) harassment which involves condition concrete employment benefits on the employee providing sexual favors;

[11] *See* Meritor, 477 U.S. at 67.
[12] *Id.* at 60.
[13] *Id.*
[14] *Id.*
[15] *Id.* at 61.
[16] *See* Meritor, 477 U.S. at 61.
[17] *Id.* at 62.

and (2) harassment that does not affect economic benefits, but creates a hostile work environment.[18] The Court of Appeals believed that Vinson's claim clearly fit the second category.[19] The Supreme Court agreed and held that sexual advances that create a hostile work environment are prohibited under Title VII.[20]

First, looking to the Equal Employment Opportunity Commission ("EEOC") guidelines, the Court stated, that Title VII is not limited to "'economic' or 'tangible' discrimination" and that sexual harassment is a form of sex discrimination prohibited by Title VII.[21] Quoting the Fifth Circuit's decision in *Rogers v. EEOC,* the Court stated:

> [T]he phrase "terms, conditions or privileges of employment" in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination . . . . One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers.[22]

The Court then declared that a plaintiff may establish a violation of Title VII by establishing sex based discrimination created a hostile work environment.[23] Despite this holding, the Court acknowledged that not all sex-related conduct constitutes a violation of Title VII.[24] The Court declared that, for a harassment claim to be actionable under Title VII, "it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[25]

[18] *Id.* at 62.
[19] *Id.*
[20] *Id.* at 66.
[21] *Id.* at 64.
[22] *Id.* at 65-66.
[23] *See* Meritor, 477 U.S. at 66.
[24] *Id.* at 67.
[25] *Id.*

In *Harris v. Forklift Systems*, the Supreme Court expounded on its definition of a discriminatorily hostile work environment under Title VII.[26] In *Harris*, Teresa Harris, a manager at Forklift Systems, was found to have been subjected to gender-based insults and unwanted sexual innuendos.[27] Specifically, Hardy, Forklift's Systems President, on several occasions said to Harris in the presence of other employees that "'you're a woman, what do you know' and 'We need a man as the rental manager'; at least once, he told her she was a 'dumb ass woman.'"[28] Additionally, Hardy also suggested that the two of them go to a hotel to negotiate Harris' raise.[29] Harris complained to Hardy about his conduct and was assured that he would stop this behavior.[30] Despite her complaints, the verbal harassment continued until she quit the job.[31] Harris then sued under Title VII alleging that Hardy's conduct created a hostile work environment because of her gender.[32]

The District Court held that Hardy's conduct did not create an abusive environment.[33] It held that, while Hardy's comments would offend a reasonable woman, they were not:

> [S]o severe as to be expected to seriously affect [Harris'] psychological well-being…. [H]is conduct would not have risen to the level of interfering with that person's work performance. Neither do I believe that [Harris] was subjectively so offended that she suffered injury . . . . Although Hardy may at times have genuinely offended [Harris], I do not believe that he created a working environment so poisoned as to be intimidating or abusive to [Harris].[34]

The Sixth Circuit Court of Appeals affirmed.[35]

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[26] *See* Harris v. Forklift Systems, 510 U.S. 17 (1993).
[27] *Id*. at 19
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *See* Harris, 510 U.S. at 19.
[32] *Id.*
[33] *Id.* at 19-20.
[34] *Id.*
[35] *Id.* at 20.

The Supreme Court granted certiorari to decide whether a hostile work environment claim requires that the conduct affect the psychological well-being of the plaintiff.[36] The Court held that a hostile work environment claim brought under Title VII is not limited to conduct that is psychologically injurious to a reasonable person's well-being.[37] The Court, looking to its decision in *Meritor*, stated that conduct that is not severe or pervasive enough to create an objectively hostile work environment is beyond the scope of Title VII.[38] Additionally, if the victim does not subjectively believe the environment to be abusive, the conduct has not altered the conditions of their employment resulting in no Title VII violation.[39] Thus, the *Harris* Court created both a subjective and objective component to establishing a hostile work environment claim.[40] The Court further noted that there is no "mathematically precise test" in determining whether a work environment is sufficiently hostile.[41] Instead, this determination can be made only by looking at circumstances such as: (1) the frequency of the discriminatory conduct; (2) its severity; (3) whether it is physically threatening or humiliating or a mere offensive utterance; and (4) whether the conduct unreasonably interferes with the employees work performance.[42] While the Court noted that these relevant factors should be taken into account, it made clear that no single factor is required.[43]

Finally, in *Oncale v. Sundower Offshore Services, Inc.*, the Supreme Court found that in judging the real social impact of workplace behavior, fact finders cannot solely rely on the words

[36] *See Harris*, 510 U.S. at 20.
[37] *Id.* at 22.
[38] *Id.* at 21.
[39] *Id.*
[40] *Id.*
[41] *See Harris*, 510 U.S. at 20.
[42] *Id.* at 23.
[43] *Id.*

used or the acts performed but instead must look at the totality of the circumstances.[44] Joseph Oncale, a roustabout on an eight man crew working on an oil platform, alleged that he quit his job because during his employment he was harassed because of his sex.[45] Specifically, Oncale alleged that on various occasions he was subjected to humiliating sex-related actions by his coworkers in the presence of the rest of his crew and was also physically assaulted in a sexual manner by his coworkers.[46] Oncale contended that his complaints to supervisory personnel were fruitless and eventually quit, asking that his pink slip reflect that his voluntary termination was caused by the sexual harassment he suffered at the hands of his coworkers.[47] Oncale subsequently filed a complaint stating that he was discriminated against because of his sex.[48]

The District Court held that "'Mr. Oncale has no cause of action under Title VII for harassment by male co-workers.'"[49] In other words, the court held, relying on Fifth Circuit precedent, that Oncale had no claim because that person could not discriminate based on sex against their own gender.[50] The Fifth Circuit Court of Appeals, relying on the same precedent, affirmed the district court's decision.[51]

The Supreme Court disagreed with the lower courts' holdings, providing examples where same-sex harassment could lead to an inference of discrimination based on sex.[52] The Court stated that harassing conduct does not have to be motivated by sexual desire to create an inference of sex discrimination for the fact finder.[53] The Court explained that a trier of may find that sex

[44] *See* Oncale v. Sundower Offshore Servs., Inc., 523 U.S. 75, 81-82 (1998).
[45] *Id.*
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *See* Oncale, 523 U.S. at 77.
[50] *Id.*
[51] *Id.*
[52] *Id.* at 80.
[53] *Id.*

discrimination exists when a female victim is harassed by another woman using sex-specific and derogatory terms derived from a general hostility to women in the workplace. The Court also explained that a plaintiff who alleges same-sex harassment may also offer direct comparative evidence about how the alleged harasser treated members of both sexes differently in the workplace. The Court emphasized that the fact finder must consider all of the circumstances when judging the objective severity of the harassment.[54] The Court stated:

> A professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field-even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office. The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of [of a class], and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.[55]

Despite these instruction on considering the totality of the circumstances, the cases below illustrate judges' inability to do so.

B. The Third Circuit's Clarification of the Severe or Pervasive Standard and its likely implications.

The Supreme Court has determined that, to violate the statute, conduct must be sufficiently severe or pervasive to alter one's employment.[56] Nonetheless, the Third Circuit has incorrectly used many variations of the Supreme Court's severe or pervasive standard: (1) pervasive and

[54] *Id.* at 81-82.
[55] *See* Oncale, 523 U.S. at 77.
[56] *See* Meritor, 477 U.S. at 22.

regular;[57] (2) severe and pervasive;[58] (3) pervasive and regular (even though that court also spoke of "severe or pervasive standard" in the same opinion).[59] Despite the similarity in the phrasing *Castleberry v. STI Group.*, acknowledged that the different standards lead to different results.[60]

In *Castleberry*, the plaintiffs, two African American males, were hired as general laborers by STI Group.[61] The plaintiffs alleged that on several occasions an anonymous person wrote insulting racial comments on the company sign-in sheets and that they were often permitted only to clean around the pipelines instead of working on them (despite having more pipeline experience then their non-African American counterparts).[62] Moreover, plaintiffs alleged that a supervisor told the plaintiffs that "if they had 'nigger-rigged' the fence, they would be fired."[63] Plaintiffs contended that, after they reported the offensive conduct, they were fired without any explanation.[64]

Plaintiffs brought a harassment suit in the District Court against STI but their claims were dismissed for failure to state a claim, because the alleged harassment was not sufficiently "pervasive and regular."[65] Although the District Court may have been relying on prior Third Circuit precedent in using this standard,[66] the Third Circuit clarified that the proper standard was

[57] *See* Ocasio v. Lehigh Valley Family Health Ctr., 92 Fed.Appx 876 (3d Cir. 2004)(finding that to establish a *prima facie* case for employment discrimination due to a hostile work environment the discrimination must be pervasive and regular.); *see also* Andreoli v. Gates 482 F.3d 641, 643 (3d. Cir. 2007); Cardenas v. Massey 269 F.3d 251, 260 (3d Cir 2001).
[58] *See* Hare v. Potter 220 Fed. Appx. 120, 131-32 (3d Cir. 2012) (finding that appellants claims may not have risen to the level of harassment that is "severe and pervasive").
[59] *See* Weston v. Pennsylvania, 251 F.3d 420, 426 (3d Cir 2001) (stating that that the discrimination must be severe or pervasive establish a hostile work environment claim but then applying the pervasive or regular standard in evaluating the claim.).
[60] *See* Castleberry, 863 F.3d at 264- 65.
[61] *Id*. at 262
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *See* Castleberry, 863 F.3d at 262
[66] *Id.*

the "severe or pervasive" test, which had been adopted by the Supreme Court in *Harris*.[67] Thus, to establish a hostile work environment claim in the Third Circuit, a plaintiff mush show:

> 1) The employee suffered intentional discrimination because of his/her [race], 2) the 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 [meaning the employer is responsible].[68]

Under this standard, the Third Circuit noted that one isolated incident, if severe enough, could establish a hostile work environment claim.[69] Specifically, the Third Circuit stated:

> Indeed the distinction means that severity and pervasiveness are alternative possibilities: some harassment may be severe enough to contaminate an environment even if not pervasive; other less objectionable, conduct will contaminate the workplace only if it is pervasive.[70] Whether an environment is hostile requires looking at the totality of 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[71]….The Supreme Court's decision to adopt the severe or pervasive standard -- thereby abandoning the regular requirement -- lends support that an isolated incident of discrimination(if severe) can suffice to state a claim for harassment.[72]

After deciding on the correct standard and its implications, the Third Circuit addressed plaintiffs' allegations.[73] It decided that plaintiffs' allegations of their supervisor's use of the racially charged slur in front of them and their non-African American workers in conjunction with the use of the racial slur which was accompanied by threats of termination was sufficiently severe to create a hostile work environment.[74] Additionally, the Third Circuit noted that plaintiffs' allegations also satisfied the pervasive alternative because their supervisor made the derogatory comments, on several occasions their sign in sheets had racially discriminatory comments; and

[67] *Id.* at 264.
[68] *Id.* at 263.
[69] *Id.* at 264.
[70] *See* Castleberry, 863 F.3d at 264 (citing Jensen v. Potter, 435 F.3d 444, (3d. Cir. 2006)).
[71] *See* Castleberry, 863 F.3d at 264 (quoting Harris, 510 U.S. at 23).
[72] *See* Castleberry, 863 F.3d at 265.
[73] *Id.* at 265-66.
[74] *Id.* at 265.

they were required to do menial tasks while their less experienced white colleagues were delegated more complex tasks.[75] Thus, the Third Circuit declared that plaintiffs alleged the necessary elements of a hostile workplace environment claim and should not have been dismissed at the 12(b)(6) stage.[76]

Although it is important that Third Circuit noted that one isolated incident can be sufficient in establishing a hostile work environment claim,[77] it was not the first circuit to come to this conclusion.[78] Other circuits have adopted a similar approach. For example, *Boyer-Liberto v. Fountainebleu Corp.*, the Fourth Circuit found that the use of the phrase "porch monkey" to an African American worker was severe enough to by itself create a hostile work environment.[79] In that case, the plaintiff, a cocktail waitress at the Clarion Resort Fontainebleau Hotel, alleged that she was called a "porch monkey" twice within a twenty-four-hour period by a white coworker and was subsequently fired shortly after she complained to the company's human resources director.[80] Plaintiff filed a complaint in the United States District Court for the District of Maryland asserting a Title VII hostile work environment claim against the employer.[81] The District Court, relying on a prior Fourth Circuit precedent,[82] awarded the defendants summary judgement because the "[coworkers] conduct was not so severe or pervasive as to create a hostile work environment."[83]

[75] *Id.* at 265-266.
[76] *See* Castleberry, 863 F.3d at 268.
[77] Max Mitchell, *Potential Litigation Uptick Seen From 3rd Circuit's Workplace Slur Ruling*, The Legal Intellgencer, http://www.law.com/thelegalintelligencer/sites/thelegalintelligencer/2017/07/31/potential-litigation-uptick-seen-from-3rd-circuits-workplace-slur-ruling/?back=law.
[78] *See* Boyer- Liberto v. Fontainebleau Corp., 786 F.3d 264,268 (4th Cir. 2015) (finding that an "isolated incident of harassment, if extremely serious, can create a hostile work environment.); Adams v. Austal, U.S.A., LLC, 754 F.3d 1240, 1254 (11th Cir. 2014) (finding that "although his carving was an isolated act, it was severe. A reasonable jury could find that Williams's work environment was objectively hostile.); Ayissi-Etoh v. Fannie Mae, 712 F.3d 573, 577 (D.C. Cir. 2013) (acknowledging that that the use of the n-word by a supervisor might have been sufficient to establish a hostile work environment.).
[79] *See* Boyer-Liberto v. Fontainebleau Corp., 786 F.3d 264, 280 (4th Cir. 2015).
[80] *Id.* at 269-270.
[81] *Id.* at 271.
[82] Jordan v. Alternative Resources Corp., 458 F.3d 332 (4th Cir. 2006).
[83] *See* Liberto 786 F.3d at 274.

The Fourth Circuit expressly abrogated the prior decision the lower court had relied on[84] and reversed the summary judgment:[85] It stated that "a reasonable jury could find that [the coworker's] two uses of the porch monkey epithet – whether viewed as a single incident or as a pair of discrete instances of harassment- were severe enough to engender a hostile work environment."[86]

These Third and Fourth Circuit decisions appreciate the power of one isolated incident to poison the workplace, but others seem to be more concerned about the implications of these decisions. For example, Judge Paul Niemeyer's dissent in *Liberto* predicted that the "holding will generate widespread litigation over the many offensive workplace comments made every day that employees find to be humiliating."[87] Although others respond that these cases largely just clarify the Supreme Court's prior decisions,[88] the implications of cases like *Castleberry* for plaintiffs are significant. Specifically, the *Castleberry* decision may make it more likely that harassment claims will survive a motion to dismiss;[89] however, they may have incidentally increased the chances of a plaintiff's claim to be dismissed at summary judgment.

C. The Use of Summary Judgment in Hostile Work Environment Claims

a. Background on Summary Judgement

[84] *Id.* at 284.
[85] *Id.* at 280-281.
[86] *Id.* at 280.
[87] *Id.* at 304.
[88] Max Mitchell, *Potential Litigation Uptick Seen From 3rd Circuit's Workplace Slur Ruling*, The Legal Intellgencer, http://www.law.com/thelegalintelligencer/sites/thelegalintelligencer/2017/07/31/potential-litigation-uptick-seen-from-3rd-circuits-workplace-slur-ruling/?back=law
[89] Max Mitchell, *Potential Litigation Uptick Seen From 3rd Circuit's Workplace Slur Ruling*, The Legal Intellgencer, http://www.law.com/thelegalintelligencer/sites/thelegalintelligencer/2017/07/31/potential-litigation-uptick-seen-from-3rd-circuits-workplace-slur-ruling/?back=law

With the likely uptick in hostile work environment claims stemming from *Castleberry*,[90] summary judgment may be more important as a tool judges may utilize (whether appropriately or inappropriately) to dispose of these hostile work environment claims. According to Rule 56 of the Federal Rules of Civil Procedure, "court[s] shall grant summary judgement if the movant shows that there is no genuine dispute as to any material fact and the movant is entitle to judgment as a matter of law."[91] In 1986 the Supreme Court decided three cases - *Anderson v. Liberty Lobby, Inc.*,[92] *Celotex Corp. v. Catrett*,[93] and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,[94] which provided clarity on the burdens associated with the use of summary judgment. Prior to 1986, when these three cases were decided, many questioned whether the use of summary judgement actually served its purpose which is to "weed out" insufficient claims prior to trial.[95]

In the wake of these decisions, the three cases have become the cornerstone of modern summary judgment practice.[96] The first inquiry in determining whether summary judgement is appropriate is to determine which facts are material.[97] The materiality of the facts changes based on what the substantive law requires and only disputes over the facts which affect the outcome of the suit will preclude the entry of summary judgment.[98] In other words, summary judgment should not be granted if a reasonable jury could return a verdict for the non-moving party.[99] "If the

[90] Max Mitchell, *Potential Litigation Uptick Seen From 3rd Circuit's Workplace Slur Ruling*, The Legal Intellgencer, http://www.law.com/thelegalintelligencer/sites/thelegalintelligencer/2017/07/31/potential-litigation-uptick-seen-from-3rd-circuits-workplace-slur-ruling/?back=law
[91] Fed.R. Civ. P. 56(a).
[92] *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).
[93] *See* Celotex Corp. v. Catrett, 477 U.S. 317 (1986).
[94] *See* Matsushita Elec. Indus. Co., LTD. v. Zennith Radio Corp. 475 U.S. 574 (1986).
[95] STEVEN S. GENSLER, Federal Rules of Civil Procedure, Rules and Commentary Rule 56 (Feb. 2017 Update).
[96] STEVEN S. GENSLER, Federal Rules of Civil Procedure, Rules and Commentary Rule 56 (Feb. 2017 Update).
[97] *See* Anderson, 477 U.S. at 247-248.
[98] *Id.* at 248.
[99] *Id.*

undisputed facts support a legal ruling on a dispositive issue, then "all other facts are immaterial."[100] The moving party always has the burden of proving that there is no genuine issue of material fact. When the moving party has met its burden, the non-moving party to defeat the motion must establish that it can adduce sufficient evidence for the trier of fact to find in its favor under the relevant standard of proof. . "As the Supreme Court has famously extolled, 'summary judgment procedure is properly regarded not as a disfavored shortcut, but rather as an integral part of the Federal Rules as a whole."[101] However, while summary judgment may be an essential tool for courts, judges do not always utilize the proper amount of "caution" that is necessary in deciding when summary judgment is proper.

b. Summary Judgment in Hostile Work Environment Cases

Studies have shown that more than seventy percent of defendants' summary judgment motions in employment cases are granted.[102] Courts frequently dismiss plaintiff's hostile work environment claims based on their "failure" to adduce sufficient evidence to satisfy one or more of the elements. Specifically, courts often find that plaintiffs fail to satisfy the severe or pervasive elements of a hostile work environment claim.[103]

While one isolated incident may be enough to establish a hostile work environment claim,[104] courts often have demonstrated extreme difficulties in determining whether a verbal or physical act should be characterized as being sufficiently severe or pervasive. Since the inquiry as to whether an incident(s) is sufficiently severe or pervasive is very fact sensitive, courts often find

[100] Celotex 323
[101] STEVEN S. GENSLER, Federal Rules of Civil Procedure, Rules and Commentary Rule 56 (Feb. 2017 Update).
[102] Judge Nancy Gertner & Melissa Hart, *Employment Law Implicit Bias in Employment Litigation 80 in Implicit Racial Bias Across the Law* (Justin D. Levinson & Robert J. Smith eds., 2012)
[103] Theresa M. Beiner, *The Misuse of Summary Judgement*, 34 Wake Forest L. Rev. (1999).
[104] *See e.g.* Castleberry, 863 F.3d at 264.

themselves balancing the facts rather than staying true to their role in the summary judgment process, which is to determine whether or not there is actually a genuine issue for trial. The cases below demonstrate this point.

In *Ayissi-Etoh v. Fannie Mae*, the United States Court of Appeals for the District of Columbia Circuit, reversed the grant of summary judgement on plaintiff's hostile work environment claim.[105] The ultimate result, therefore, was favorable to the plaintiff, but the district court's determination illustrates the problem. Plaintiff, an African-American, alleged that, after working at Fannie Mae for about three months, he received a promotion.[106] However, he did not receive the same pay increase as others similarly situated.[107] Plaintiff alleged that soon after he stepped into his new role, he and his manager began arguing on a regular basis due to the fact that he was still doing staff level work despite his promotion.[108] Concerned about receiving negative reviews and his lack of a raise, the plaintiff met with Jaqueline Wagner, the Chief Audit Executive, on several occasions.[109] The plaintiff alleged that, when he asked why he had not received a raise, Wagner, a white male, responded "for a young black man smart like you, we are happy to have your expertise; I think I'm already paying you a lot of money."[110] Subsequently, plaintiff met with Fannie Mae's Vice President of Internal Audit, Thomas Cooper, to discuss the fact that he was still receiving staff level assignments. The meeting allegedly quickly became heated and ended with Thomas Cooper yelling "Get out of my office nigger."[111] The District Court held that:

> it is clear that defendants are entitled to summary judgment on plaintiff's hostile work environment claim. As distasteful as Cooper's use of a racial epithet to address plaintiff is, no reasonable jury could find a hostile work environment claim based on that single

[105] *See* Ayissi-Etoh v. Fannie Mae, 712 F.3d 572, 574 (D.C. Cir. 2013).
[106] *Id.* at 574
[107] *Id.*
[108] *Id.*
[109] *Id.* at 575.
[110] *See* Ayissi-Etoh, 712 F.3d at 575.
[111] *Id.* at 575.

> utterance- even taking into consideration the fact that Cooper was plaintiff's superior and the fact that the epithet was directly addressed to plaintiff.[112]

The Court of Appeals for the D.C. Circuit reversed stating that a reasonable jury could find that plaintiff Cooper and Wagner's behavior was severe or pervasive enough to create a hostile work environment.[113] The court acknowledged that the use of deeply offensive racial epithet targeted at plaintiff may alone have been sufficient to establish a hostile work environment.[114] Additionally, the D.C. Circuit also found that Wagner's "young black man" comment was also sufficient to support plaintiffs claim.[115] Despite the happy outcome for plaintiff,[116] it is obviously problematic that the District Court thought that it was "clear" that defendants were entitled to summary judgment because plaintiff's proof could not be found by a jury to be sufficiently severe or pervasive to establish a hostile work environment.[117]

In *Adams v. Austal*, the Eleventh Circuit also reviewed a District Court's grant of summary judgment on a hostile work environment claim.[118] In that case, twenty-four African-American current and former employees filed complaints of racial discrimination against Austal, U.S.A. L.L.C.[119] The employees alleged that vulgar racial graffiti frequently appeared in the men's bathroom.[120] The graffiti included phrases such as "How do you starve a nigger to death? Hide his food stamp card in his work boots[.]"[121] Additionally, several of the employees also saw or heard about nooses found in the break room.[122] The employees also complained about their coworkers

[112] *See* Etoh v. Fannie Mae, 883 F. Supp. 2d 17, 38 (D.D.C. 2011).
[113] Ayissi-Etoh, 712 F.3d at 577.
[114] *Id.*
[115] *Id.*
[116] *Id.* at 578
[117] Supra at note 146.
[118] *See* Adams v. Austal, U.S.A., L.L.C., 754 F.3d 1240, 1248 (11th Cir. 2014).
[119] *Id.* at 1244
[120] *Id.*
[121] *Id.* at 1246
[122] *Id.*

referring to them or another African-American employee as "boy" or "monkey."[123] The District Court granted summary judgements against the claims of thirteen of the employees stating that "a reasonable jury could not find that the harassing conduct was frequent and severe."[124] In arriving at this decision, the District Court evaluated each claim of a hostile work environment based on the "'the specificity and quantity of evidence presented by each plaintiff.'"[125]

The Eleventh Circuit held that seven of the employees had presented sufficient evidence to establish a hostile work environment claim but affirmed the summary judgements against the remaining six employees.[126] In regard to plaintiff, Tesha Hollis, the Eleventh Circuit found that the record presents a genuine dispute of material fact that Hollis' work environment was objectively hostile.[127] Hollis offered proof that, in the three years she worked at Austal, she was subjected to various forms of severe harassment:[128] 1) she discovered a noose in the breakroom and another noose that someone hung on one of the ships; 2) her supervisor pretended to masturbate in her presence while telling her about a racist perverse drawing in the men's room which stated "yall got a bad ass nigger bitch working over here….[A] white man like me would like to split that dark oak"; 3) she heard white employees, most of whom were supervisors, call black employees "boy" on "many" occasions; 4) she heard someone say over the walky-talky system, "[S]end some monkeys over here."; 5) she observed a white employee who called black employees "boy" and "monkey," kick a black employee, and 6) every morning she saw white employees on her crew wearing clothing with the confederate flag on it.[129] The Eleventh Circuit

[123] *See* Adams, 754 F.3d at 1246.
[124] *Id.* at 1246.
[125] *Id.* at 1246; For the sake of brevity, this note will not analyze all of the employees separate claims but will instead analyze a few of the most illustrative examples.
[126] *See* Adams, 754 F.3d at 1245.
[127] *Id.* at 1252.
[128] *Id.*
[129] *Id.*

found that Hollis' harassment was frequent, severe and humiliating and thus, found that a "reasonable jury could find that her workplace was objectively hostile."[130]

Similarly, the Eleventh Circuit also found that the record presented a genuine dispute of material facts as to whether plaintiff, Frederick Williams's work environment was objectively hostile.[131] Williams alleged that he: 1) saw one coworker wear a confederate flag; 2) saw racist graffiti in the men's room regularly; 3) reported the graffiti to his supervisor only to be told "it's always been like that and if [he] didn't like it [he] could quit[,]"; and 4) witnessed his supervisor carve the word porch monkey in the aluminum of the ship.[132] The Eleventh Circuit found that although his supervisor's carving was an "isolated act," it was severe.[133]

In these cases, there were a collection of acts, which might have been found pervasive even if not severe, although the court viewed some, like the carving, as severe. However, in regard to another plaintiff, Robert Adams, the Eleventh Circuit found that the record failed to establish a disputed issue in relation to his work environment.[134] Adams alleged that in his two years working for Austul he: 1) saw coworkers wear the confederate flag on frequent basis; 2) heard people say the slur "nigger," a "few times" over two years; 3) heard about the noose in the break room; and 4) frequently saw the racist graffiti in the men's restroom.[135] The Eleventh Circuit found that, although Adams saw the racist graffiti and frequently saw the confederate flag, Austal regularly cleared the graffiti and his exposure to the Confederate flag was not threatening.[136] The Eleventh

[130] *Id.* at 1252.
[131] *See* Adams, 754 F.3d at 1254.
[132] *Id.* at 1253-54.
[133] *Id.* at 1254.
[134] *Id.*
[135] *Id.*
[136] *See* Adams, 754 F.3d at 1254.

Circuit also explained that, because Adams heard the slur "nigger" only a few times over several years, it did not create a genuine issue of material fact.[137]

While it may seem extremely surprising that a District Court would grant summary judgment on Tesha Harris' claims, what is even more surprising is that the Eleventh Circuit was willing to recognize that an isolated incident can be severe enough to establish a claim but not ready to acknowledge that hearing one's coworkers utter derogatory racial slurs was sufficiently severe. This is especially true given the fact that other courts have recognized that the n-word goes a long way in making a work environment hostile. Indeed, even if a reasonable juror may decide that the occasional use of that word may not be severe, it would be hard to imagine, looking at the totality of the circumstances, that a juryt would not also find that the incidents which Adams experienced were not adequately pervasive.

In *Cooler v. Layne Christensen Co.,* the Eleventh Circuit was again tasked with determining whether a plaintiff pled enough to create a genuine issue on a hostile work environment claim.[138] In that case, Cooler, an African American driller helper at Layne's Pensacola, described various events in which he was subjected to racial harassment.[139] Cooler alleged: 1) when he complained about overheating and cramps, his supervisor instructed him to cool down in a toolshed (a hot metal container) instead of the air conditioned car in which the supervisor and another white male sat;[140] 2) that Alpo Joiner, a white male who was Cooler's supervisor at another project site, would often refer to Cooler as "you people" or "boy";[141] 3) that his white supervisors used the n-word while talking to him to see how he would react to their use

[137] *Id.* at 1254.
[138] *See* Cooler v. Layne Christensen Co., No. 16-17773, 2017 WL 4512159, at *1 (11th Cir. 2017).
[139] *Id.* at 1.
[140] *Id.*
[141] *Id.*

of the word;[142] 4) Cooler alleged that he was delegated tasks by a person known as the "grand wizard" of the warehouse who refused to speak with him directly but instead would only tell a white person what Cooler should do while in his presence;[143] 5) he was told that he was not welcome in the breakroom;[144] 6) when he complained to other supervisors about the inappropriate conduct nothing was done about it;[145] 7) he was subject to inappropriate comments about his hair, which was long and braided;[146] 8) he was given more degrading assignments than his white coworkers; and 9) he was mistreated because of his relationship with a white woman and was subjected to various other forms of harassment.[147]

The District Court found that Cooler failed to allege that his harassment was severe or pervasive enough to alter the conditions of his employment.[148] The Eleventh Circuit acknowledged that its prior decisions state that "in isolation, the use of a racial epithet on one occasion is not enough evidence of severe or pervasive harassment to make a hostile work environment claim."[149] The court then explained its decision in *Adams* as creating a distinction between using slurs like the word "nigger" to humiliate a plaintiff and use of the word in ways that were not threatening or demeaning.[150] The Eleventh Circuit found that because the supervisors used the word as a means of getting a reaction out of Cooler, "a reasonable person could perceive their intent was to humiliate Cooler."[151] The court also noted that, while the use of the term boy in referring to a black man "is not always evidence of racial animus," it is important to look at the context in which the

[142] *Id.*
[143] *See* Cooler, No. 16-17773, 2017 WL 4512159, at *1.
[144] *Id.* at 1.
[145] *Id.*
[146] *Id.* at 2.
[147] *Id.*
[148] *See* Cooler, No. 16-17773, 2017 WL 4512159, at *1
[149] *Id.* at 5.
[150] *Id.*
[151] *Id.*

word is used.[152] The Eleventh Circuit held that the plaintiff failed to acknowledge the context in which the word boy was used given that the one referring to Cooler as "boy" was the one people referred to as the "grand wizard."[153] The court held that, given the totality of the circumstances, Cooler created a genuine dispute of material fact and thus, reversed the District Courts summary judgment on the hostile work environment claim.[154]

While the Eleventh Circuit seems to have set a pretty high bar when it comes to establishing a hostile work environment claim, other circuits have been more willing to find a genuine dispute of material fact on the issue. In *Zetwick v. County of Yolo*, the Ninth Circuit found that a plaintiff who was subjected to unwelcome hugs adduced enough evidence to create a claim for a hostile work environment.[155] Victoria Zetwick, a Yolo County sergeant, alleged that from 1999 to 2012 defendant, the county sheriff, subjected her to "numerous hugs and at least one unwelcome kiss that, taken as a whole, created a sexually hostile work environment."[156] Zetwick contended that between 2003 and 2011 defendant hugged her at least 100 times.[157] While defendant contended that he hugged Zetwick only during public outings[158], Zetwick alleged that defendant had a tendency to hug only females and give males only handshakes.[159] In response to these allegations, defendants argued that his conduct was "not objectively severe or pervasive enough to establish a hostile work environment, but merely an innocuous, socially acceptable conduct."[160] The District Court granted defendant's motion for summary judgment.[161] The Ninth Circuit reversed, stating

[152] *Id.* at 5.
[153] *See* Cooler, No. 16-17773, 2017 WL 4512159, at *1.
[154] *Id.* at 5.
[155] *See* Zetwick v. County of Yolo, 850 F.3d 436 (2017).
[156] *Id.* at 439.
[157] *Id.*
[158] *Id.*
[159] *Id.*
[160] *See* Zetwick, 850 F.3d at 439.
[161] *Id.* at 439.

that the District Court failed to consider whether hugs, which included chest to breast contact, of that frequency could allow a reasonable juror to find a hostile work environment.[162] The Ninth Circuit concluded that "giving the record proper consideration, a reasonable juror could conclude that the differences in hugging men and women were not, as the defendants argue, just 'genuine but innocuous differences in the ways men and women routinely interact with members of the same sex and of the opposite sex.'"[163]

Since determining the degree of severity or pervasiveness is primarily fact sensitive, many courts have, as illustrated above, denied hostile work environment claims on the theory that there is inadequate evidence to support a hostile work environment claim.[164] Contrarily, other courts have decided that since "no bright line exist, these questions should be given to a jury so long as the district court judge is satisfied that the alleged conduct was made because of [the protected class]."[165] In the next section, this note will illustrate why the latter is the better approach.

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III ANALYSIS

Courts should be willing to acknowledge their own limitations in deciding whether a plaintiff's allegations are sufficiently severe or pervasive. Many scholars and commentators have proposed that courts are inappropriately granting summary judgment motions on a consistent basis in the employment discrimination context.[166] The plethora of scenarios in which discrimination

[162] *Id.* at 444.
[163] *Id.* at 442.
[164] Heyser 13; Norman 108.
[165] Norman 107 – 108.
[166] *See* Hon. Denny Chin, *Summary Judgment in Employment Discrimination Cases: A Judge'sPerspective*, 57 N.Y.L. SCH. L. REV. 671, 672 (2012-2013);Judge Nancy Gertner & Melissa Hart, *Implicit Bias in Employment Litigation*, in IMPLICIT RACIAL BIAS ACROSS THE LAW 80, 89-94 (Justin D. Levinson & Robert J. Smith eds., 2012) (explaining how the biases and assumptions judges bring to their analysis in employment

can exist in the work place renders daunting the task of determining when a discriminatory incident is sufficiently severe or pervasive. Due to the many faces of discrimination, the Supreme Court was correct in stating that the determination of whether a hostile work environment exist cannot be reduced to a "mathematically precise test."[167] However, while a mathematically precise test may not be the answer, perhaps a different numbers game can help reduce the inconsistencies in these determinations. In this section I will propose that judges should limit their use of summary judgment in the hostile work environment context so that a more numerous and socially diverse jury can decide when the evidence a plaintiff alleges is sufficient to create a hostile work environment. While some may criticize this approach as being unworkable or an oversimplification of a highly complex problem, I contend that this is the better approach because juries, who have different life experiences, are, from a practical standpoint, better suited to identify discriminatory conduct that may seem neutral to one who is unfamiliar with the conduct's meaning in a given context.

Although the Third Circuit's decision in *Castleberry v. STI Group* to acknowledge the ability of one isolated incident to establish a hostile work environment is a step in the right direction, a judge's inability to identify when these incidents are adequately "severe or pervasive" in effect nullifies any positive impact a decision like *Castleberry* can make. As the foregoing cases illustrate, there has been a great disparity in what judges consider "severe or pervasive." Scholars have pointed to various causes for the granting of summary judgment in employment discrimination cases such as: 1) judges may believe that we live in a post-racial and post-sexist

discrimination cases can be determinative as to whether a case gets thrown out on the pleadings); Theresa M. Beiner, *The Misuse of Summary Judgment In Hostile Environment Cases,* 34 WAKE FOREST L. REV. 71, 119-120 (199) (stating that the lack of diversity on the bench is one of the many reasons courts show increasing hostility to hostile environment claims).

[167] *See* Harris, 510 U.S. at 20.

society; 2) most employment discrimination cases are viewed as frivolous claims; 3) the non-frivolous claims may be taken to state court because state laws are more employee friendly; 4) The Supreme Court may have narrowed the law in a way that protects employers; 5) the managerial pressures on judges may create biases against these cases; 6) lack of diversity within the federal bench; and 7) courts often ignore the contextual realities of modern language and thus fail to recognize the employee discrimination.[168]Although the causes may seem multifaceted, at least four of the seven explanations can be resolved by a judge's deferral to a jury.

The Supreme Court has hinted at the fact that judges have been having problems analyzing the contextual impact of a defendant's actions in the workplace.[169] In *Ash v. Tyson Foods, Inc*., the Court addressed the ability of the word "boy" to carry racial implications.[170] The Court vacated and remanded the Eleventh Circuit's decision, stating that the Eleventh Circuit erred in holding that only when the use of the word boy is paired by a racial classification like "black" or "white" is evidence of discriminatory intent.[171] The Supreme Court stated that, "[a]lthough it is true [the word boy] will not always be evidence of racial animus, it does not follow that the term, standing alone is always benign….[its] meaning may depend on various factors including context,

[168] Nancy Gertner, The Judicial Repeal of the Johnson/Kennedy Administration's "Signature" Achievement 2-4 (Mar. 9, 2014) (unpublished manuscript) (offering five potential causes as to why employment discrimination cases fare worse than other kinds of cases: 1) judges' believe we live in a post racial and post sexist society; 2) many employment discrimination cases may be frivolous; 3) good cases are taken to state court because state laws are more employee friendly;4) the Supreme Court may have narrowed the law in ways that protect employers; 5) managerial pressures on judges may create biases against these cases); Theresa M. Beiner, *The Misuse of Summary Judgment In Hostile Environment Cases,* 34 WAKE FOREST L. REV. 71, 119-120 (1999) (stating that the lack of diversity on the bench is one of the many reasons courts show increasing hostility to hostile environment claims); Leora F. Eisenstadt, *The N-Word at Work: Contextualizing Language in the Workplace*, 33 BERKELEY J. EMP. & LAB. L. 299, 320-21 (2012) ("courts tend to ignore the contextual realities of modern language use and even the historical meaning of words when evaluating the discriminatory implications of such language rings true throughout district and appellate court opinions.").

[169] *See generally* Ash v. Tyson Foods, Inc., 546 U.S. 454 (2006).
[170] *Id.*
[171] *Id. at 456-458*

inflection, tone of voice, local custom, and historical usage."[172] While this statement leaves much to be desired, a closer look at the procedural history of *Ash v. Tyson Foods, Inc.*, further illustrates judges' issues with interpreting the contextual meaning of discriminatory conduct.

The *Ash v. Tyson* saga centers on allegations of race discrimination that took place in a Tyson Foods processing plant.[173] At trial two plaintiffs, Anthony Ash and John Hithon, each brought promotion discrimination claims.[174] The jury found for the plaintiffs and returned identical awards of compensatory and punitive damages for each.[175] Subsequently, Tyson filed a motion for judgment as a matter of law contending that plaintiffs' evidence was insufficient to sustain the jury's findings that plaintiffs were the victims of promotion discrimination.[176] Plaintiffs brought forward the use of discriminatory conduct by Tyson's Manager, the one making the promotion decisions, as a way to refute the supposedly non-pretextual reason for the manager's decision.[177] Among the evidence of this discriminatory conduct were incidents where the manager referred to both the plaintiffs, whom were African Americans, as "boy."[178] The district court stated that, even if the manager did make those statements, the word "boy" could not be found to be evince discriminatory bias without more.[179] Ultimately, the district court agreed with Tyson and granted judgment in its favor as a matter of law.[180]

[172] *Id.* at 456.
[173] *See e.g.* Ash v. Tyson Foods, Inc., Civ.A. 96-RRA-3257-M, 2004 WL 5138005, at *3-10 (N.D.Ala. Mar. 26, 2004).
[174] *Id.* at *1.
[175] *Id.*
[176] *Id.*
[177] *Id.* at *5-9.
[178] Ash v. Tyson Foods, Inc., Civ.A. 96-RRA-3257-M, 2004 WL 5138005, at *6 (N.D. Ala. Mar. 26, 2004).
[179] *Id.* at *6.
[180] *Id.* at *10.

Plaintiffs appealed the district court decision to the Eleventh Circuit.[181] The Eleventh Circuit also addressed the manager's use of the word "boy."[182] It also found that the use of the word "boy" standing alone is not evidence of discrimination.[183] The court stated that, "while the use of 'boy' when modified by a racial classification like 'black' or 'white' is evidence of discriminatory intent, the use of 'boy' alone is not evidence of discrimination."[184]

The Supreme Court granted review of the Eleventh Circuit's decision as to whether the word "boy" was potentially probative of discriminatory animus and whether the plaintiffs' claimed superior qualifications for the positions in question could potentially demonstrate that they were not hired for pretextual reasons.[185] As to the use of the word "boy" by the Tyson manager, the Court stated

> [a]lthough it is true the disputed word will not always be evidence of racial animus, it does not follow that the term, standing alone, is always benign. The speaker's meaning may depend on various factors including context, inflection, tone of voice, local custom, and historical usage.[186]

While the Court did not delve into the historical context as to how the word "boy" was used to belittle black men, the Court's message in this rather short statement is clear. It directed judges to look not only at the immediate context in which the word was used but also the word's local custom and historical usage.[187] Thus, the Court vacated the Eleventh Circuit's decision and remanded the case for further proceedings consistent with the Supreme Court's opinion.[188]

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[181] Ash v. Tyson Foods, Inc., 129 Fed. Appx. 529, 532 (11th Cir. 2005).
[182] *Id.* at 533.
[183] *Id.*
[184] *Id.*
[185] Ash v. Tyson Foods, Inc., 546 U.S. 454, 456-58 (2006).
[186] *Id.* at 456.
[187] *Id. at* 456.
[188] *Id.* at 458.

The Eleventh Circuit, on remand, concluded once again that the use of the word "boy" did not provide a reasonable basis for a jury to conclude that Tyson's reasons for not promoting the plaintiffs were based on racial discrimination.[189] It characterized the use of the word "boy" as conversational and "even if somehow construed as racial, we conclude that the comments were ambiguous stray remarks… and are not sufficient circumstantial evidence of bias."[190] Thus, the Eleventh Circuit reinstated its prior decision, which affirmed the district court's grant of judgment as a matter of law in favor of Tyson on Ash's discrimination claims.[191] As to Hithon, the court affirmed the district court's order granting a new trial because there was insufficient evidence to support the jury's punitive damages award, and the compensatory damages were deemed excessive.[192]

In the new trial proceedings, the district court bifurcated the case into liability and damages phases.[193] After plaintiff presented his evidence at the liability phase, Tyson moved for judgment as a matter of law suggesting that plaintiff failed to present enough evidence of discrimination for his claim to go to a jury.[194] The district court denied this motion and the jury returned a verdict against Tyson on Hithon's discrimination claim, awarding him recovery totaling $335,000 in compensatory damages and $1,000,000 in punitive damages.[195] The district court then denied Tyson's renewed judgment as a matter of law as to the compensatory damages but granted the motion regarding the punitive damages. [196]

[189] Ash v. Tyson Foods, Inc., 190 Fed.Appx. 924, 926 (11th Cir. 2006).
[190] *Id.* at 926.
[191] *Id.* at 927.
[192] *Id.* at 927.
[193] Ash v. Tyson Foods, Inc., 392 Fed.Appx. 817, 819 (11th Cir. 2010).
[194] *Id.* at 819.
[195] *Id.*
[196] *Id.*

Unhappy with the district court's decision, both parties appealed to the Eleventh Circuit.[197] Hithon appealed the court's decisions to set aside the punitive damages and Tyson cross-appealed the court's denial of their renewed motion as a matter of law. [198] The Eleventh Circuit again found that the use of the term "boy" was not enough to create a jury issue as to whether Tyson's reason for not choosing the plaintiff for the promotion was pretextual. [199] The court found that, under the law of the case doctrine, it could review its decision only if new and substantially different evidence of the use of the word "boy" was presented at trial.[200] Despite Hithon's new testimony regarding how the word "boy" is comparable to the N-word given the historical context, the Eleventh Circuit found that this was not new or substantially different enough to revisit the conclusion.[201] Ultimately, the Eleventh Circuit reversed the district court's decision and remanded for entry of judgment in favor of Tyson.[202]

Surprisingly, the *Ash v. Tyson Foods, Inc.*, saga did not end with that decision.[203] The Eleventh Circuit reversed itself in response to a petition for rehearing en banc by Hinthon. [204] Although the Eleventh Circuit, in a prior opinion, stated that the evidence presented at the second trial was not "new and substantially different enough for us to revisit the conclusion of law[,]" the court retracted this statement by saying "we now reach a different conclusion." The Eleventh Circuit recognized that there was enough evidence in the record for a jury to find that Tyson discriminated against the plaintiff on the basis of his race and reversed itself.

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[197] *Id*.
[198] Ash v. Tyson Foods, Inc., 392 Fed.Appx. 817, 819 (11th Cir. 2010).
[199] *Id.* at 831-32.
[200] *Id.* at 832.
[201] *Id.* at 833.
[202] *Id.*
[203] Ash v. Tyson Foods, Inc., 664 F.3d 883 (11th Cir. 2011).
[204] *Id.*

The procedural history of *Ash v. Tyson*, illustrates the problem judges have with recognizing how certain instances of conduct can be discriminatory. In analyzing this case, one may ask why it took the Eleventh Circuit four times to come to the right conclusion, which the jury made right away. This issue is not unique to *Ash v. Tyson*, and can be seen across many appellate level decisions. While scholars may debate on what the cause of phenomenon, it is worth noting that the jury reached the correct verdict twice within this series and thus, suggests that they may well be better than judges in consistently determining when a work environment is sufficiently severe or pervasive to sustain a hostile work environment claim.

IV. CONCLUSION

Since the beginning of the use of the severe or pervasive standard in hostile work environment claims, judges have been rendered incapable of consistently determining when a hostile work environment is sufficiently severe or pervasive. While some judges are willing to acknowledge a question of fact when a plaintiff complains of being excessively hugged, other judges grant summary judgment in cases where a supervisor, someone in a position of control, uses racist remarks towards an employee. Since judges cannot consistently measure the hostility of work environments, it is essential that judges defer to a jury when contemplating to grant summary judgment.