

“THAT’S WHAT SHE SAID”: USING “THE OFFICE” TO TEACH HOSTILE WORK ENVIRONMENT LAW

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I. INTRODUCTION

Michael Scott, the lead character of the hugely popular television situational comedy “The Office,” is simultaneously offensive and caring, incompetent and effective. Michael is the regional manager of the Dunder Mifflin paper office in Scranton, Pennsylvania. His character is infamous for his timely injection of the statement, “that’s what she said,” into day-to-day conversation. The comment would transform an innocuous statement between co-workers into a sexualized joke by reframing the statement into something a woman would say about her sex partner. The joke carried so much cultural significance that, a decade after the series ended, the *Rolling Stones* dedicated an article ranking each of the 41 times that Michael used “that’s what she said” throughout the lifespan of the show.¹ This comedic tension sets the tone for the activity described in this article, which uses a provocative episode of *The Office* to teach the hostile work environment theory of discrimination.

The Office is one of the most popular television shows in the 21st century, initially running from March 2005 through May 2013. Even years after the show ended, it continued to capture the public’s attention and gain new generations of fans. *The Office* was the most watched show on TV in 2020, during the height of COVID, and was streamed on Netflix for 57.1 billion minutes in 2020 alone.² Yes, that is *billion* with a “b” and is equivalent to over 950 million hours watched in a single year. *The Office*’s relevance and cultural significance was further cemented when Peacock streaming service purchased the exclusive rights to the show in 2021 for \$500 million which was accompanied by increased viewership that year.³

Much of the popularity of *The Office* comes from contrasting absurdity and offensive moments with moments of authenticity and genuine connection. The driving character, Michael Scott, is a study in contrasts. He is an often incompetent and unprofessional boss with poor judgment and social skills while, at the same time, a kind and caring person who succeeds at his job in important moments. This dichotomy that creates comic tension also serves a useful basis to analyze the legal issues that arise in such a fast-and-loose workplace culture.

This teaching activity pulls on the comedic and narrative tension depicted in an episode of *The Office* called “Diversity Day” to help students learn and apply policies and laws governing harassment and hostile work environment in a specific workplace context.⁴ Students are placed in the shoes of a new human resources employee charged with investigating a potentially hostile

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¹ Barry Levitt, ‘*The Office*’: A Definitive Ranking of Every ‘That’s What She Said’ Joke, *ROLLING STONE*, May 16, 2023.

² Todd Spangler, ‘*The Office*’ Was by Far the Most-Streamed TV Show in 2020, Nielsen Says, *VARIETY*, Jan 12, 2021.

³ Julia Alexander, *Are The Office and Friends bets paying off for Peacock and HBO Max? / Two shows, \$1 billion, one simple strategy*, *THE VERGE*, Feb 23, 2021.

⁴ B.J. Novak, *Diversity Day*, *THE OFFICE* (Mar. 29, 2005).

work environment setting. They are tasked with identifying the unprofessional and potentially harassing conduct, evaluating the company's potential legal exposure, articulating a response to the situation, and recommending future action to corporate leadership. Section II of the article identifies the learning outcomes, discusses the teaching schedule and process, and introduces the student handout and case study facts. Section III provides detailed guidance to teach the activity. It explains the legal requirements to prove and defend against harassment and hostile work environment claims, applies those principles to the specific conduct depicted in the episode, and identifies and evaluates possible actions available to the company. Section IV provides the grading and evaluation recommendations, and Section V concludes the article.⁵

II. THE TEACHING ACTIVITY AND STUDENT HANDOUT

A. The Learning Outcomes

By the end of this activity, students should be able to accomplish the following:

1. Articulate and apply the standard to determine whether an employer is liable under a quid pro quo or adverse employment action theory.
2. Analyze the law and facts of the case to determine whether the employer is liable under a hostile work environment theory.
3. Examine and evaluate the facts of the case to determine whether the employer can assert an affirmative defense to avoid hostile work environment liability.
4. Identify and implement an effective response the employer should take to respond to the situation and prevent future hostile work environment concerns.
5. Recognize conflicting business, ethical, and legal interests at play in the case study.

The target audience of this activity is students in undergraduate Business Law, Human Resource Management, Public Policy, and Gender Studies classes as well as students in Master of Business Administration, Master of Public Policy, and other graduate programs studying legal and practical issues involving discrimination and harassment in the workplace. This teaching activity has been taught in undergraduate legal environment of business courses, employment law courses, and MBA courses.

This activity follows a long line of case studies using television shows and movies to examine and apply particular legal concepts.⁶ These case studies are ripe territory to create

⁵ The initial student handout and directions, a written assignment, and grading materials are included in the Appendices.

⁶ Jennifer C. Thor & Michael Griener, *How Legal Knowledge Can Ruin a TV Show: An Issue-Spotting Exercise for the Legal Environment of Business Course*, 27 ATLANTIC L. J. 121 (2024); Margaret B. Sherman, *When the Shark Bites: Using the TV Show "Shark Tank" to Teach Business Entities*, 23 ATLANTIC L. J. 198 (2021); Shelley McGill, *The Social Network and the Legal Environment of Business: An Opportunity for Student-Centered Learning*, 30 J. LEGAL STUD. EDUC. 45, 56 (2013); Michael R. Fricke, *HBO for ADR: Using Television's Silicon Valley to Teach Arbitration*, 36 J. LEGAL STUD. EDUC. 359 (2019); Judith K. Ruud, William N. Ruud, & Farzad Moussavi, *You've Got A Deal! Using the Film Draft Day to Teach Fundamental Contract Law and Analytical Skills*, 34 J. OF LEGAL ST. IN ED. 41 (2017); Christine

interactive activities to help students identify, apply and understand theoretical and business concepts.⁷

B. Setting Up and Administering the Activity

This class activity is designed to take place in a few contexts. It is primarily designed to be taught over two class periods of 50 to 65 minutes or a single two-hour class period. The first 60 – 75 minutes of the activity is dedicated to the students reviewing the assignment handout, watching the 22-minute “Diversity Day” episode, and working in groups to evaluate the legal and practical considerations raised in the video and handout. The second period is designed to lead a class discussion that deeply analyzes the episode and hostile work environment law.

For the students to get the most out of this activity, it will be helpful to expose them to the legal standards for unlawful harassment and hostile work environment claims beforehand. The author recommends that the students read a brief primer on hostile work environment law before attending the first class. This might include the federal regulations defining hostile work environment law,⁸ EEOC guidance on harassment,⁹ or excerpts from a chapter of the class textbook or an open access textbook.¹⁰

At the beginning of the initial class, the instructor should provide students the introductory memorandum setting up the activity, which is located in Appendix 1. It should take 5 to 8 minutes for the students to read the memorandum. The instructor should have access to The Office episode and be prepared to play the video in the classroom (Episode 2, Season 1 entitled “Diversity Day”).¹¹ Before showing the video, the instructor should remind the students to watch it with the eye of an investigator and prepare to work in groups to address the questions raised in the handout.

C. The Student Handout / Case Study

The following memorandum should be provided to the students before showing the Diversity Day episode. A more complete handout that identifies the various employees is included in Appendix 1.

MEMORANDUM TO NEW DIRECTOR OF HUMAN RESOURCES

RE: Your Assignment – Investigate and Report on the Scranton Office Work Environment

Corcus, *Columbo Goes to Law School: Or, Some Thoughts on the Uses of Television in the Teaching of Law*, 13 *LOY. L.A. ENT. L. REV.* 499 (1993).

⁷ Kamille Wolff Dean, *Teaching Business Law in the New Economy: Strategies for Success*, 8 *J. BUS. & TECH. L.* 223, 240 (2013); see also Justin Blount & Kristen Waddell, *Smithereen, Incorporated—An Employment Negotiation Exercise*, 40 *Journal of Legal Studies in Business*, 195 (2023) (negotiation activity addressing issues of race and sex discrimination)

⁸ 29 CFR § 1604.11 (sexual harassment guidelines); 29 CFR § 1606.8 (national origin harassment guidelines).

⁹ *Enforcement Guidance on Harassment in the Workplace*, EQUAL EMP’T. ENFOR. COMM’N, No. 915.064, (Apr. 29, 2024) https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace#_ftnref279 (last visited May 1, 2024); see also *Harassment*, EQUAL EMP’T. ENFOR. COMM’N, <https://www.eeoc.gov/harassment> (last visited May 1, 2024).

¹⁰ See, e.g., Don Mayer, et al., *BUSINESS LAW AND THE LEGAL ENVIRONMENT*, 1801- 1821 (Saylor Found. 2012), <https://open.umn.edu/opentextbooks/textbooks/273> (last visited Apr. 28, 2024).

¹¹ Novak, *supra* note 4. “Diversity Day” is the second episode of season one of The Office. At the time of writing, the episode is available on Peacock or can be purchased through iTunes or Amazon Prime.

You recently started as the Director of Human Resources for Dunder Mifflin, Inc., a middle-market paper company. Up to this point, Dunder Mifflin has used an outside vendor to provide most of its human resources needs.

While you are new to Dunder Mifflin, you have already begun to hear rumblings about the fast-and-loose culture of the Scranton, Pennsylvania branch.

Although Kris Dickinson, your boss and the Chief Operating Officer, knows the paper industry, he is not well schooled in employment laws. The employee handbook is five pages long and includes a statement that “the Company will not tolerate any unlawful discrimination or harassment,” “employees are expected to treat each other with respect,” and the company will “discipline employees who engage in unlawful activity and punish violators to the fullest extent available at law.”

Kris explains that the Scranton branch has the highest sales volume and profitability of the company’s regional offices. While the other offices are struggling, Scranton is gaining market share. Kris praises the Scranton branch for its “fun culture,” and said that he wants to find a way to reproduce the culture across the other branches. He attributes much of the office’s success to the regional manager, Michael Scott, who he has characterized as a “hysterical guy with a lot of heart.” Kris “does *not* want to shake things up” at Scranton or undermine its success.

Although you have heard various complaints of personality conflicts at the Scranton branch, there are no written documents in the personnel or Human Resources files. Nothing of note that stands out in the personnel records or the annual reviews, they are mostly generic and positive. You have also heard rumors of romantic relationships and pranks that may have “gone a bit overboard” in the Scranton office, but you are unsure if the rumors are true or if they have caused any problem.

Dunder Mifflin has historically contracted with an outside company, Diversity, Inc., to offer trainings and seminars designed to improve workplace culture. In response to a recent report that Michael Scott told an inappropriate joke a few weeks ago, the company is sending Mr. Brown, a consultant at Diversity, Inc., to conduct a diversity training for the office. The training is designed around the acronym HERO, which stands for Honesty, Empathy, Respect and Open-mindedness.

Kris has instructed you to accompany Mr. Brown and to conduct your own investigation into the Scranton branch to independently determine whether there are any potential legal concerns and, if so, to recommend the next steps.

YOUR SPECIFIC TASK – CONSIDER AND REPORT BACK

1. *Issue - Primary Questions.*

Is there any problem of *hostile work environment harassment* at the Scranton office? If so, what actions should the company take?

2. *Rule - Identify the Relevant Law and Legal Standard.*

State the applicable legal standard to determine whether unlawful harassment has occurred or whether the company faces a legal risk. Make sure to specifically consider the legal standard for a hostile work environment claim as well as the criteria to assert an affirmative defense to such a claim.

3. *Key Facts.*
Identify the essential relevant facts you discovered in your investigation. Make sure to identify the people involved and identify specific troubling actions or statements.
4. *Application - Analysis.*
Analyze the facts according to the legal standard to determine whether the company faces any legal risks of unlawful harassment. Be prepared to report your findings and to identify the primary risks and possible exposure to the company.
5. *Conclusion - Recommendations.*
State your recommendations for the company. Be specific. Make sure to discuss steps that need to be taken at an individual, office, or corporate level. Also feel free to discuss the business implications of your recommendations.¹²

III. LEADING THE CLASSROOM DISCUSSION AND DEBRIEFING THE ACTIVITY

One of the key goals of this activity is to distinguish between unfair, boorish, and mean-spirited behavior and illegal harassment. Students will often focus on crude and bullying type behavior but will not know whether it crosses a legal line. This activity helps students differentiate between their intuitive reaction and the more systematic analysis based on discrimination law.

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of sex, race, color, religion, and national origin.¹³ Hostile work environment harassment is a form of unlawful discrimination."¹⁴ The Supreme Court first articulated the hostile work environment theory in *Meritor Savings Bank v. Vinson*, explaining 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."¹⁵ "For 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 work environment.'"¹⁶

To establish a prima facie case for a hostile work environment, employees must prove: (1) they belong to a protected group; (2) they were subject to unwelcome harassment; (3) the harassment was based on a protected class; (4) the harassment was sufficiently severe or pervasive to alter the terms and conditions of the employment; and (5) there is a basis for holding the employer liable for the harassment.¹⁷

A. What Protected Classes are at Issue?

1. The Law

The starting point of any discrimination or harassment claim is to determine whether the conduct in question is based on, or because of, a protected class. For an employer to be liable

¹² The handout in Appendix 1 also includes a chart with the names and photographs of the employees.

¹³ 42 U.S.C. § 2000e-2(a)(1); *Harassment, supra note 9.*

¹⁴ *Vance v. Ball State Univ.*, 570 U.S. 421, 452 (2013) (citing *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 78 (1998) and *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64-65 (1986)).

¹⁵ *Id.*, *Meritor*, at 66.

¹⁶ *Id.* at 67.

¹⁷ *Id.* at 66-67; *Furcron v. Mail Ctrs. Plus, LLC*, 843 F.3d 1295, 1304-05 (11th Cir. 2016).

under equal opportunity statutes for harassment, the harassment must relate to a protected category and affect a “term, condition, or privilege” of employment.¹⁸ A “hostile behavior . . . cannot support a claim of hostile work environment unless there exists some linkage between the hostile behavior and the plaintiff’s membership in a protected class.”¹⁹

Title VII of the Civil Rights Act, as amended, protects employees and job applicants from employment discrimination based on race, color, religion, sex, or national origin.²⁰ The Supreme Court has interpreted “sex” to include sexual orientation and gender identity.²¹ Other federal laws protect additional classes of employees. For instance, the Americans with Disability Act as Amended covers disability and the Age Discrimination in Employment Act includes age as protected classes.²² The Genetic Information Nondiscrimination Act of 2008 prohibits discrimination on genetic information, and the Uniformed Services Employment and Reemployment Rights Act prohibits civilian employers from discrimination based on a person’s military service.²³

Several states have passed human rights laws that protect additional classes and categories of people. For instance, in addition to the federal classes, the New Jersey Law Against Discrimination also prohibits discrimination based on an individual’s creed, ancestry, marital status, civil union status, domestic partnership status, affectional or sexual orientation, gender identity or expression, or atypical hereditary cellular or blood trait of any individual.²⁴ The Minnesota Human Rights Act also extends protection to people who receive public assistance, familial status (someone who lives with their child or guardian), and membership or activity in a local commission.²⁵ Because the Dunder Mifflin office in this case study is located in Scranton, Pennsylvania, students should be aware that the Pennsylvania Human Rights Act prohibits discrimination based on race, color, religious creed, ancestry, age, sex, national origin, non-job related handicap or disability, or the use of a guide or support animal.²⁶

Harassment often occurs across multiple intersecting classes. For instance, an employee might be simultaneously subjected to harassment due to their sex, gender identity, race, religion, and national origin, or some combination thereof. In some instances, courts have evaluated the misconduct one protected class at a time and, as such, ignored or downplayed the impact of intersectionality and intersectional discrimination.²⁷ With this said, employers should act to protect employees from harassment based on all protected categories.²⁸

¹⁸ 42 U.S.C. § 2000e-2(a)(1) (identifying protected classes).

¹⁹ *Motley -Ivey v. District of Columbia*, 923 F. Supp. 2d 222, 233 (D.D.C. 2013) (quoting *Na'im v. Clinton*, 626 F. Supp. 2d 63, 73 (D.D.C. 2009)).

²⁰ 42 U.S.C. § 2000e-5.

²¹ *Bostock v. Clayton County*, 140 S. Ct. 1731, 1740-41 (2020).

²² 42 U.S.C. § 1211 et seq. (ADA); 29 USC § 621 et seq. (ADEA); 42 U.S.C. § 2000ff-6(a) (GINA).

²³ 42 U.S.C. § 2000ff (GINA); 29 C.F.R. Part 1635 (GINA); 38 U.S.C. § 4311 (USERRA).

²⁴ N.J. LAD § 10:5-12. Some states also protect age discrimination at a younger age. For example, Minnesota law protects employee who are 18 years old and older from age discrimination. Minn. Stat. § 363A.03, subd. 2.

²⁵ Minn. Stat. § 363A.08, subd. 2.

²⁶ 43 Pa. Stat. § 955.

²⁷ Bradley Areheart, *Intersectionality and Identity: Revisiting a Wrinkle in Title VII*, 17 GEO. MASON U. CIV. RTS. L.J., 199, 199-200 (2006); Jamillah Williams, *Maximizing #MeToo: Intersectionality and the Movement*, 62 B.C. L. Rev. 1797, 1822-25 (2021) (citing cases that undermine women of color’s ability to assert hostile work environment claims based on an intersectional analysis).

²⁸ *Id.*, Areheart at 225-229 (examining the various and inconsistent approaches that courts take towards intersectional claims in hostile work environment claims); *cf.* *Mosby-Grant v. City of Hagerstown*, 630 F.3d 326, 335-36 (4th Cir. 2010) (concluding that race-based and sex-based conduct should be considered cumulatively by the

2. Application to the Facts and Analysis

“Diversity Day” raises several problematic and awkward moments, many of which involve protected classes. It is helpful to start class discussion by having students list of each of the concerning interactions, identify the instigator and the target of the interaction, and examine whether the interaction implicates a protected class.

It is worth noting that “Diversity Day” was one of the most important and controversial episodes of the entire series. The series pilot skewed closely to the earlier British version of the show which the U.S. show was based on. As the second episode of the entire series, Diversity Day started taking the show on a slightly different trajectory than the British series. Diversity Day was written by B.J. Novak who also played the character of Ryan in the show.²⁹ Michael Schur, the producer of the show, explained that episode was important because it was “a little bit edgy in terms of dealing with race and racial politics in the workplace.”³⁰ To avoid potential controversy, the cable company Comedy Central dropped Diversity Day from its programming and streaming in 2021.³¹ The episode remained available on the other streaming services such as Netflix, Amazon, and Paramount.

The producers realized that Michael Scott’s character - the manager - came across as too mean-spirited in the early episodes of the first season, which aligned his character more closely to the antagonist of the British version of the show. To connect with the American audience, the writers eventually evolved Michael’s character to be “less negative and more of an optimist so that he seemed more like a fumbling idiot than someone who is purposely cruel.”³² The student’s personal relationship to *The Office* and Michael’s later and more likeable persona might influence their reaction to Diversity Day and whether they are inclined to severely discipline him.

a. Mean-Spirited or Bullying Activity Not Related to a Protected Class

Some of the concerning interactions are mean-spirited but are not illegal because they do not relate to a protected class. At the beginning of the episode, Dwight loudly shreds paper and a credit card while Jim is trying to conduct an important sales phone call and refuses to stop when asked. Jim is forced to end the call before making the sale. The audience later learns that the phone

jury); *Hafford v. Seidner*, 183 F.3d 506, 515-16 (6th Cir. 1999) (“It would not be right to require a judgment against Hafford if the sum of all of the harassment he experienced was abusive, but the incidents could be separated into several categories, with no one category containing enough incidents to amount to ‘pervasive’ harassment.”).

²⁹ B.J. Novak was nominated for a Writers Guild of America for the best screenplay in a comedic episode. Writers Guild of America, West, *News Release*, Dec. 12, 2005, https://web.archive.org/web/20131012215422/http://www.wga.org/subpage_newsevents.aspx?id=1493 (last visited May 1, 2024).

³⁰ Ashley Burns and Chloe Schildhause, *The Behind-the-Scenes Story of ‘Diversity Day,’ The Episode that Defined NBC’s ‘The Office,’* UPROXX, Mar. 23, 2015, <https://uproxx.com/feature/feature-the-behind-the-scenes-story-of-diversity-day-the-episode-that-defined-nbcs-the-office/> (last visited Apr. 28, 2024).

³¹ Carly Mayberry, *Comedy Central Caves to Cancel Culture, Removes Episode from ‘The Office’ Line-up,* NEWSWEEK, Aug. 30, 2021.

³² Lily Brown, “*The Office*”: *Why Producers Demanded Steve Carell’s Michael Scott Be Made More Likeable After Season 1,* SHOWBIZ CHEATSHEET, Aug. 10, 2020, https://www.cheatsheet.com/entertainment/the-office-why-producers-demanded-steve-carells-michael-scott-be-made-more-likeable-after-season-1.html/#google_vignette (last visited May 1, 2024); *see also* Jason Hellerman, *Four Changes to Michael Scott That Saved “The Office,”* NOFILMSCHOOL, Jan. 3, 2024, <https://nofilmschool.com/michael-scott> (last visited May 1, 2024).

call involved one of Jim’s most important clients and historically accounted for a sizable portion of his annual commission. Near the end of the episode, we learn that Dwight placed the customer’s order during the day and presumably earned Jim’s commission.³³ While this type of behavior is annoying and negatively affects Jim’s pay, it is not covered by equal opportunity laws because the conduct is not related to a protected class (*i.e.*, his sex, race, age, religion, etc.). Title VII is not a “general civility code” and does not prohibit employees from pranking or bullying each other.³⁴

b. The Chris Rock Routine

The audience eventually learns that the impetus for the diversity training session is to address and respond to complaints arising from Michael’s telling of a profanity-laced routine by Chris Rock called, “Niggas vs. Black People.”³⁵ Chris Rock’s routine was laced with racial epithets and provocative characterizations of Black Americans. Chris Rock stopped performing the routine because “some people that were racists thought they had license to say n----.”³⁶ Michael reiterates this sentiment during the Diversity Day episode,

How come Chris Rock can do a routine, and everybody finds it hilarious and groundbreaking, and then I go and do the exact same routine, same comedic timing, and people file a complaint to corporate? Is it because I'm white and Chris is Black?³⁷

Mr. Brown starts his training by asking the employees to discuss and process the appropriateness of performing the Chris Rock routine. When Kevin describes the routine as a comparison between two types of Black people, Michael jumps in to take over. Michael then lets loose with an excited recreation of the routine in which is bleeped out because it is littered with racial slurs and swear words.³⁸ Michael’s reenactment of the skit clearly involves the protected class of race. It also

³³ Novak, *supra* note 4.

³⁴ Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) (quoting Oncale, *supra* note 14 at 80); *see, cf.* Harvin v. Manhattan & Bronx Surface Transit Operating Auth., 767 F. App’x 123, 128 (2d Cir. 2019) (supervisor being “rude and hostile” to plaintiff on several occasions reflected a “fraught relationship” but not actionable harassment); Browne v. N.Y. State Dep’t of Corr. & Cmty. Supervision, 2024 U.S. Dist. LEXIS 37467, 21-22 (S.D.N.Y. 2024) (granting summary judgment for employer where plaintiffs were subject to “mean-spirited gossip and bullying in the form of prank calls” and hidden timecards).

³⁵ Chris Rock’s “Niggas vs. Black People” appeared in his 1996 HBO special “Bring the Pain” and on his 1997 album “Roll with the New.” *Chris Rock: Bring the Pain*, IMDB, <https://www.imdb.com/title/tt0200529/> (last visited May 1, 2024).

³⁶ Rebecca Long, *Rock: Bring on Oscar ‘Safety Net,’* 60 MINUTES, Feb. 17, 2005, <https://www.cbsnews.com/news/rock-bring-on-oscar-safety-net/> (last visited Apr. 28, 2024).

³⁷ Novak, *supra* note 4.

³⁸ Brian Baumgartner, the actor who played Kevin’s character, explained the reason that he thought that, although inappropriate, he viewed the scene as an important contribution to the larger societal discussion of race, culture, and the workplace:

It was certainly an inappropriate thing for someone to do in the workplace, but the message behind that was the same message that was behind a lot of the episode. His naiveté got him in trouble, but part of what he was doing, in an age where you were so overloaded on the PC side, and nobody was able to say anything, was forcing people to examine from a naive perspective, why isn’t this something we can talk about? Obviously, a work-place setting is what makes everyone uncomfortable, but I think just bringing up the issue of race and not hiding is why I’m proud of it.

Ashley Burns, *supra* note 30.

raises significant questions about appropriateness, context, racism, and power that circulate around the use of the N-word, particularly by a supervisor.³⁹

The author recommends that instructors not use the N-word while teaching this activity and that they consider how they plan to address discussion of racism, sexism, xenophobia, and homophobia before they lead the activity.⁴⁰ Faculty need to prepare their students to address these issues directly and frankly, but engaging in an informed, civil, and empathetic discussion is difficult.

c. Michael's Follow-Up Training and the Notecard Activity

The next significant event happens during Michael's follow-up diversity training. Michel hands out note cards with various races and nationalities written on them and tells everyone to tape their cards to their forehead without looking at them. He then instructs his employees to interact with and treat their peers according to the stereotypes of the groups identified on the cards. He tells them to see if the card wearer can guess their assigned identity. Throughout the exercise, he uncomfortably encourages his employees to lean into and embody the stereotypes.

As he hands out the cards, he says, "You'll notice I didn't have anyone be an Arab" because it would be "too explosive." This reference to invokes anti-Muslim anti-Middle Eastern biases that heightened in the post 9/11 era, which was less than four years before the episode aired, and implicates national origin, religion, and racial biases.⁴¹ It also illustrates how common memes or themes used in the media, social media, news, and political campaigns may, if repeated in a work setting, create the foundation of a hostile environment claim.⁴²

At one point in the exercise, Michael encourages Pam (a White woman with the word "Jew" on her card) and Stanley (a Black man with the word "Black") to play out the stereotypes, eventually saying that it is the, "Olympics of suffering, slavery versus the holocaust." This exchange related to issues of race, ancestry, and possibly religion.

The notecard scene is punctuated when Kelly, an East Indian woman, enters the room after returning from a customer meeting. To illustrate his desire for the employees to play-up and lean-into the stereotypes, Michael approaches an unwitting Kelly and starts to talk loudly at her in a thick Indian accent. Although Kelly is not aware of the exercise, Michael acts as if he is an East

³⁹ See Gene Demby, *Who Can Use the N-Word? That is the Wrong Question*, CODE SWITCH, Sept. 6, 2013, <https://www.npr.org/sections/codeswitch/2013/09/06/219737467/who-can-use-the-n-word-thats-the-wrong-question> (last visited May 1, 2024); Michelle Goodwin, *The Economy of Citizenship*, 76 Temp. L. Rev. 129, 129-131 (2003) (addressing the complex history and interaction of culture and society with the use of the N-word).

⁴⁰ See Randall Kenedy & Eugene Volokh, *The New Taboo: Quoting Epithets in the Classroom and Beyond*, 49 CAP. U.L. REV. 1 (2021) (addressing the complexities of quoting racial epithets in the classroom).

⁴¹ See Sahar F. Aziz, *Sticks and Stones, The Words That Hurt: Entrenched Stereotypes Eight Years After 9/11*, 13 NEW YORK CITY L. REV. 33 (2009). For instance, the Fourth Circuit reversed summary judgment for the employer in *EEOC v. Sunbelt Rentals, Inc.* where the Muslim plaintiff from Middle East decent was called "towel head," "Taliban," and "terrorist." *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 311, 318-19 (4th Cir. 2008). The court held that there was sufficient evidence for a jury to find hostile work environment based on religion and national origin, particularly after the post 9/11 backlash against Muslims. *Id.*

⁴² For instance, President Trump bragging that he could "grab [women] by the pussy," telling Muslim Congressmen "go back" to the "totally broken crime infested places which they came," and leading chants to "build the wall" would be problematic if spoken between co-workers. See Joe Davidson, *Talking in the Workplace as Trump Does Can Get You Fired and Your Employer Fined.* Seattle Times, Aug. 7, 2019, <https://www.seattletimes.com/explore/careers/talking-in-the-workplace-as-trump-does-can-get-you-fired-and-your-employer-fined/> (last visited May 1, 2024).

Indian worker in a convenience store and repeatedly and loudly asks, “Would you some cookie-cookie cookie? I have some very delicious cookie-cookie, only ninety-nine cents plus tax. Try my cookie-cookie. Try my cookie-cookie.” Kelly, who is confused and clearly offended, eventually slaps Michael and angrily walks out of the room. Michael, who is obviously stunned, turns to the group and says, “[s]he gets it. Now she knows what it’s like to be a minority.”⁴³ Michael’s comment is clueless because, as an Indian woman, Kelly experiences discrimination in her life and does not need her White American boss yelling at her in an Indian accent to “get it.” This interaction is based on Kelly’s national origin, ancestry, and possibly religion.

There are two other instances worth noting during the card exercise. First, when Michael asks which races people find sexually attractive, Dwight says that he finds Whites and Indians sexually attractive while sitting next to Kelly, who is of East Indian descent.⁴⁴ This comment is both sexually charged and relates to national origin. It also illustrates the notion of intersectional harassment because Kelly the comments implicate her sex and national origin.

In another exchange, Michael asks his employees to say where “they are from.” When he asks Oscar, it clear that Michael is trying to highlight Oscar’s Mexican heritage. Oscar responds that, although his parents were from Mexico, and he was born and raised in the United States. Michael then asks if he should use another word instead of Mexican because “Mexican is offensive.”⁴⁵ This exchange clearly revolves around Oscar’s national origin and employs a common microaggression – assuming that a Hispanic presenting person is not “from this country.”⁴⁶

B. Is This a Quid Pro Quo Harassment Situation?

1. The Law

The law of harassment in the United States largely evolved around sex and sexual harassment. It is worth noting that the terms “quid pro quo” and “hostile work environment” do not appear in the statutory text of Title VII passed in 1964, those theories were developed long after the passage of Title VII.⁴⁷ Section 703(a) of Title VII forbids an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's . . . sex.”⁴⁸

The U.S. Supreme Court first recognized the quid pro quo theory of harassment in the 1986 case of *Meritor Savings Bank, FSB v. Vinson*.⁴⁹ Quid pro quo applies to situations where a supervisor threatens to discipline or retaliate against an employee for rejecting the supervisor’s

⁴³ Novak, *supra* note 4.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Derald Wing Sue, et. al., *Racial Microaggressions in Everyday Life: Implications for Clinical Practice*, 62(4). AMERICAN PSYCHOLOGIST, 271 (2007); Capodilupo Wing, et al. *Racial Microaggressions in Everyday Life Implications for Clinical Practice*, 62:4 AM. PSYCHOLOGIST, 271-286 (2007).

⁴⁷ *Burlington Indus. v. Ellerth*, 524 U.S. 742, 751 (1998).

⁴⁸ 42 U.S.C. § 2000e-2(a)(1).

⁴⁹ *Meritor*, *supra* note 14 at 64-65 (distinguishing hostile work environment claim from a claim linked to the “grant or denial of an economic quid pro quo”); *see also* *Ellerth*, *supra* note 49 at 752 (explaining that “Title VII is violated by either explicit or constructive alterations in the terms or conditions of employment”); *Venters v. City of Delphi*, 123 F.3d 956, 976-77 (7th Cir. 1997) (applying quid pro quo theory to religious harassment).

sexual advances. It also applies to situations where supervisors condition employment benefits in exchange for engaging in sexual interactions.⁵⁰ If a plaintiff establishes a quid pro quo claim, the employer will be subject to vicarious liability and not be able to raise an affirmative defense.⁵¹

2. Application to the Facts and Analysis

The quid pro quo theory is not applicable to this fact pattern because the supervisor, Michael, did not demand that any employee submit to sexual or other advances in exchange for an employment benefit or risk retaliation. Because none of the other employees are in the position of authority and they do not have the power to affect the terms and conditions of their peers' employment, their actions likewise do not fall under a quid pro quo theory. If Michael had engaged in a quid pro quo demand or retaliation, Dunder Mifflin would be automatically and vicariously liable for unlawful discrimination.

It is also worth noting at this point that the generally only the employer, and not the offending employee, can be held liable for unlawful discrimination under Title VII and most state Equal Opportunity statutes. Courts will dismiss Title VII claims against individuals because these statutes prohibit discrimination by an "employer," and not "employees."⁵² Many state statutes authorize claims against individual employees for aiding and abetting another to engage in unlawful discrimination or retaliation. For instance, an individual employee may be liable for "aiding and abetting" another to violate the Pennsylvania Human Relations Act.⁵³ To succeed in such a case, the plaintiff must first prove that the employer is liable for the underlying unlawful discrimination.⁵⁴

C. Was a Tangible Adverse Employment Action Taken in Relation to the Harassment Situation?

1. The Law

Harassment law was also expanded to situations where a protected class is used as the basis for a supervisor to negatively affect the tangible terms and conditions of an employee's work.⁵⁵ An employer will be vicariously liable "when the employer has empowered that employee to take tangible employment actions against the victim, i.e., to effect a 'significant change in employment

⁵⁰ *Id.* At 65.

⁵¹ Ellerth, *supra* note 47 at 752-53.

⁵² 42 U.S.C. § 200e-2(a) (defining "employer"); *see also* Newsome v. Admin. Off. of the Cts. of the State of New Jersey, 51 F. App'x 76, 79 n.1 (3d Cir. 2002) (affirming dismissal if Title VII against individual employee); Williams v. Banning, 72 F.3d 552, 555 (7th Cir. 1995); Kirkman v. Faurecia Emissions Control Techs., 2020 U.S. Dist. LEXIS 45838 (E.D. Mo. Mar. 17, 2020) (finding no individual liability under Title VII, ADEA, ADA, the Rehabilitation Act of 1973, and the Genetic Information Nondiscrimination Act); Pointer v. Walmart Corp., 2019 U.S. Dist. LEXIS 13004, 2019 WL 339633, *1 (E.D. Mo. Jan. 28, 2019) (compiling cases for Age Discrimination in Employment Act); Franklin v. City of Slidell, 936 F. Supp. 2d 691, 703 (E.D. La. 2013) (dismissing Americans with Disabilities Act claim against individual employee).

⁵³ 43 Pa. Stat. § 955(e).

⁵⁴ Scully v. Allegheny Ludlum Corp., 257 Fed. Appx. 535, 538 (3d Cir. 2007).

⁵⁵ Gregory v. Daly, 243 F.3d 687, 698 (2d Cir. 2001).

status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, a decision causing a significant change in benefits.”⁵⁶

A “tangible employment action” involves “a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”⁵⁷ To rise to the level of a tangible employment action, employees initially had to show that they suffered a “significant” and detrimental effect.⁵⁸ Adverse employment actions include hiring, firing, demoting to a significantly lower position, failing to promote, reducing pay or denying benefits, and reassignment with significantly different responsibilities. The Supreme Court subsequently clarified that an employee need only show that an employment action left the employee “worse off,” and not that the employee was “significantly injured.”⁵⁹ In cases of tangible employment action, the employer is held vicariously liable because “the injury could not have been inflicted absent the agency relation.”⁶⁰

2. Application to the Facts and Analysis

The tangible employment action theory of harassment is not applicable to this case study because no employee was disciplined or suffered an adverse employment action. At most, Michael instructed Toby, the Human Resources employee at the branch office, to leave the follow-up training session because Toby recommended that the group sit “Indian Style.”⁶¹ While this may be demeaning, it does not ultimately affect the terms and conditions of Toby’s work.

Because this case does not involve a quid pro quo or tangible employment action, the facts will be evaluated based on a hostile work environment claim.

D. Are the Elements of a Hostile Work Environment Claim Met?

What qualifies as hostile work environment harassment? Title VII and state human rights act do not impose a “general civility code.”⁶² These laws do not reach “the ordinary tribulations of the workplace,” for example, the “sporadic use of abusive language” or boorish conduct.⁶³ Courts regularly dismiss hostile work environment lawsuits where the offending comments are singular or stray comments.⁶⁴ To be actionable, the behavior does not need to force the victim to quit; instead, it must be severe or pervasiveness enough to pollute the working environment and ultimately “alter the conditions of the victim’s employment.”⁶⁵

To help students distinguish between conduct that is improper, rude, or uncomfortable and conduct that crosses the threshold to create a hostile work environment, it is helpful to help the students linearly work through each of the elements of a hostile work environment claim.

⁵⁶ Meritor, *supra* note 14 at 765 (“An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee.”).

⁵⁷ *Id.* at 761.

⁵⁸ Muldrow v. City of St. Louis, 144 S. Ct. 967, 2024 U.S. Lexis 1816, *14-15 (2024) (citing cases).

⁵⁹ *Id.* at *13.

⁶⁰ Meritor, *supra* note 14 at 765; *see also* Vance, *supra* note 14 at 452 (quoting Oncale, *supra* note 11 at 81).

⁶¹ Novak, *supra* note 4.

⁶² Faragher, *supra* note 31 at 788.

⁶³ *Id.*

⁶⁴ Meritor, *supra* note 14 at 67; Kerri Lynn Stone, *Taking in Strays: A Critique of the Stray Comment Doctrine in Employment Discrimination Law*, 77 MO. L. REV. 149 (2012).

⁶⁵ Harris v. Forklift Sys., 510 U.S. 17, 21-22 (1993).

1. Unwelcome (Subjective and Objective)

a. The Law

To prove a hostile work environment claim, the employee must meet an objective and subjective test. The plaintiff must show that that (1) they subjectively found the conduct unwelcome, offensive, and abusive, and (2) that a reasonable person in the position of the plaintiff would find the work environment objectively hostile to the extent that it alters the terms and conditions of the employee's employment.⁶⁶ Offensive conduct may include, but is not limited to, "offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance."⁶⁷

Initially, an employee must subjectively perceive the work environment to be unwelcome and offensive to assert a hostile work environment claim. The unwelcomeness requirement was initially articulated in the Supreme Court's 1986 opinion in *Meritor Savings Bank, FSB v. Vinson*, where the court explained, "[t]he gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'"⁶⁸ In the 1993 *Harris* decision, the Court refined the hostile work environment analysis to require a showing that the conduct was both subjectively and objectively hostile.⁶⁹ The impetus for the unwelcomeness requirement was to safeguard against claims to safeguard against employees who engage in consensual sexual relationships.⁷⁰

Though there is some variation between circuits as to how closely courts and juries consider whether the plaintiff solicited, invited, incited, or otherwise actively participated in the conduct.⁷¹ The argument is, if the plaintiff engaged in and encouraged the conduct, the conduct, regardless of how improper or lewd, was not unwelcome and cannot therefore be actionable.

There is a significant critique of the unwelcome requirement to the extent that it presumes that victims welcome, or not offended, by conduct if they do not speak up. It invokes the stereotype that people, largely women, welcome sexual advances and "asked for it" while allowing the perpetrator to argue that their conduct was "flattering" and implicitly "consensual."⁷² This interpretation of the standard ignores the many reasons that employees will not speak up and may feel forced to "go along to get along."⁷³

⁶⁶ *Id.*

⁶⁷ *Harassment, supra note 9.*

⁶⁸ *Meritor, supra note 14 at 68.*

⁶⁹ *Harris, supra note 62 at 21-22.*

⁷⁰ Larsa Ramsini, *The Unwelcome Requirement in Sexual Harassment: Choosing a Perspective and Incorporating the Effect of Supervisor-Subordinate Relations*, 55 WM. & MARY L. REV. 1961, 1967-68 (2014); Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 831 (1991); Catherine M. Maraist, *Faragher v. City of Boca Raton: An Analysis of the Subjective Perception Test Required by Harris v. Forklift Systems, Inc.*, 57 LA. L. REV. 1343, 1365 (1997) ("The 'unwelcomeness' requirement was included to protect both men and women who engage in consensual sexual relationships at work. If this protection is eliminated, then the sexual harassment claim could potentially exist in any relationship.").

⁷¹ *Id.*, Ramsini at 1971-72; *Meritor, supra note 14 at 68* (evaluating unwelcomeness by the complainant's "conduct indicated that the alleged sexual advances were unwelcome").

⁷² Ramsini, *supra note 70 at 1975.*

⁷³ *Meritor, supra note 14 at 68* (explaining that the inquiry is whether the conduct was unwelcome, not whether the complainant voluntarily participated in it); *Kramer v. Wasatch Cnty. Sheriff's Off.*, 743 F.3d 726, 754-55 (10th Cir.

Courts will also evaluate other statements made by the complainant and their reaction to the challenged conduct. Statements that plaintiffs did not feel harassed by the conduct or were not affected by the conduct will likely undermine their hostile work environment claim. For instance, the Sixth Circuit affirmed summary judgment dismissing racial hostile work environment claim where the plaintiff testified that he did not consider a racially charged hate letter a “big deal,” that he was not shocked or disturbed by it, and that he did not lose sleep over it.⁷⁴ On the other hand, a person who might welcome conduct at one point may later find the conduct unwelcome, such as after a romantic relationship ends.⁷⁵ And, although an employee may welcome certain conduct, such as sexually charged conduct, from one employee, the same conduct may not be welcomed by all employees.⁷⁶

b. Application to the Facts

Considered in isolation, several employees were uncomfortable and shocked by some of the parts of the Diversity Day training. It appears that many found the conduct unwelcome. This is highlighted by the documentary style filming that captured employees’ responses to Michael and their occasional glance at the camera with a shocked or deadpan facial reaction.⁷⁷

Kelly did not appreciate when Dwight said that he was attracted to Indian women and was further offended when Michael talked at her with an Indian accent. Stanley appeared frustrated when Michael wanted him to act out the “Olympics of suffering” between slavery and the holocaust. Most employees appeared shocked by Michael’s enactment of the Kris Rock routine.

Students will almost uniformly, and rightfully, assume that much of the Diversity Day training was uncomfortable and awkward, and that some of the employees found particular exchanges unwelcome. The discussion should then examine the requirement that the conduct be so severe or pervasive as create a hostile work environment.

2. Severe or Pervasive Enough to Change the Condition of Employment and Create an Abusive, Hostile Work Environment

a. The Law

2014) (holding that whether sexual conduct is unwelcome is a fact question for the jury to decide, regardless of whether the plaintiff voluntarily participated in it).

⁷⁴ Newman v. Fed. Express Corp., 266 F.3d 401, 405-06 (6th Cir. 2001); *cf.* Kratzer v. Rockwell Collins, Inc., 398 F.3d 1040, 1047-48 (8th Cir. 2005) (holding that a prima facie case of sexual harassment was not met where the plaintiff stated that she did not feel harassed by the conduct).

⁷⁵ *See, e.g.*, Gerald v. Univ. of P.R., 707 F.3d 7, 17 (1st Cir. 2013); Williams v. Herron, 687 F.3d 971, 975 (8th Cir. 2012); Pérez-Cordero v. Wal-Mart Puerto Rico, Inc., 656 F.3d 19, 28 (1st Cir. 2011).

⁷⁶ Kramer, *supra* note 73 at 749 n. 16.

⁷⁷ The actor who played Angela explained that the deadpan looks allowed the characters to balance the comedic and critical discussion. She explained,

The character Michael Scott, you as the viewer know he’s inappropriate. So, what we’re saying is this is inappropriate, and this guy is an idiot, and we’re all reacting to him because he’s an idiot. It’s not saying what he’s saying is okay, and that’s how people should think. It’s written that Michael Scott is inappropriate, and you shouldn’t talk that way to people. Our reactions to him validate that. I guess as it went out to the world that people would see that we’re saying, “No, this is wrong and we’re going to laugh at it. And call it out.”

Burns, *supra* note 30.

Even if an employee subjectively views conduct based on a protected class offensive, the conduct does not raise to an actionable claim unless it is also “sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’”⁷⁸ The complained of conduct does not need to be severe *and* pervasive, it simply needs to be severe *or* pervasive. The two factors work on a continuum; the more severe the harassment is, the less pervasive it needs to be to establish a hostile work environment claim. Likewise, more pervasive conduct need not be as severe.⁷⁹

Whether a series of acts is sufficiently severe or pervasive to constitute a hostile work environment depends on the specific facts of the case and viewed in the overall totality of the circumstance. Some of the key factors include:

- the frequency of the discriminatory conduct,
- its severity,
- the degree that it is physically threatening or humiliating,
- whether the complainant suffered psychological harm, and
- whether it unreasonably interferes with an employee's work performance.⁸⁰

Whether the alleged harassment is sufficiently severe or pervasive to create a hostile work environment is “generally a question of fact for the jury.”⁸¹

It is possible for a single individual incident to meet the standard if it is “extraordinarily severe.”⁸² It is very difficult to meet this standard when the harassment is from a co-worker and happened so quickly that the employer was not on notice of it.⁸³ Some examples of single incident harassment include sexual assault,⁸⁴ forced sexual touching,⁸⁵ physical violence or credible threat of violence,⁸⁶ racial slurs aggressively directed at subordinate, and display of symbols of hate such as a swastika or noose.⁸⁷

Most hostile work environment claims involve a series of acts and incidents over a period of time. When considering whether the conduct is sufficiently pervasive, courts may consider factors such as whether:

⁷⁸ Meritor, *supra* note 14 at 67 (emphasis in original) (quoting Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

⁷⁹ Alamo v. Bliss, 864 F.3d 541, 550 (7th Cir. 2017) (explaining that the severe and pervasive requirements are inversely related); Flood v. Bank of Am. Corp., 780 F.3d 1, 11-12 (1st Cir. 2015) (same); EEOC v. Prospect Airport Servs., Inc., 621 F.3d 991, 1000 (9th Cir. 2010) (same).

⁸⁰ Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 103 (2002).

⁸¹ Johnson v. Advocate Health & Hosp. Corp., 892 F.3d 887, 901 (7th Cir. 2018); *see also* Hernandez v. Valley View Hosp. Ass'n, 684 F.3d 950, 958 (10th Cir. 2012); Howard v. Burns Bros., Inc., 149 F.3d 835, 840-41 (8th Cir. 1998).

⁸² Figueroa v. Johnson, 648 F. App'x 130, 135 (2d Cir. 2016) (noting that a single incident sexual harassment incident must be “extraordinarily severe” to be actionable); Paul v. Northrop Grumman Ship Sys., 309 F. App'x 825, 826, 828 (5th Cir. 2009) (requiring single incident of sexual harassment be “egregious,” and affirming summary judgment for employer where a co-worker “chesting up” to plaintiff’s breasts, and when she fled, followed her, forced his way through the door ahead of her, placed his hand on her stomach and around her waist, and rubbed his pelvis against her hips and butt); Brooks v. City of San Mateo, 229 F.3d 917, 921, 922-27 (9th Cir. 2000) (affirming summary judgment for employer where co-worker trapped the victim behind a console and twice grabbed her breasts).

⁸³ Natalie S. Neals, *Flirting with the Law: An Analysis of the Ellerth/Faragher Circuit Split and a Prediction of the Seventh Circuit’s Stance*, 97 MAR1. L. REV. 167, 177-78 (2013).

⁸⁴ Lapka v. Chertoff, 517 F.3d 974, 982-84 (7th Cir. 2008).

⁸⁵ Turner v. The Saloon, Ltd., 595 F.3d 679, 686 (7th Cir. 2010).

⁸⁶ Patterson v. Cnty. of Oneida, 375 F.3d 206, 230 (2d Cir. 2004).

⁸⁷ Tademey v. Union Pac. Corp., 614 F.3d 1132, 1145 (10th Cir. 2008).

- the conduct was by a co-worker, third party, or supervisor;
- the conduct took place in front of the employee's customers or peers;
- the same or different individuals are perpetrating the conduct; and
- the conduct is directed at the complainant.⁸⁸

Generally, "simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment."⁸⁹ Likewise, isolated incidents' of discriminatory conduct and "run-of-the mill boorish, juvenile, or annoying behavior that is not uncommon in American workplaces" are often deemed insufficient to support a claim for hostile work environment.⁹⁰

b. Application to the Facts and Analysis

When considered in isolation, it is unlikely that the specific conduct witnessed by the student investigators would be seen as severe on its face to constitute a hostile work environment. When considered in the larger context, the analysis of the case study generally revolves around the pervasiveness of the conduct. Michael's and the others' conduct should also be considered in context, it took place when his employer was trying to respond to and address complaints of Michael's prior conduct.

Most students will identify Michael's enactment of the Chris Rock comedy routine as the most troublesome event because it is laced with racial epithets and swear words. His conduct is problematic on several levels. First, his prior performance of the routine is the reason that the company sent a Human Resource specialist to the Scranton office to make it clear that the conduct was unacceptable. Second, Michael acted contrary to Mr. Brown's directions. Third, he refused to acknowledge that his conduct was improper and made it clear that he would not change his ways. His disobedience and aloofness were laid bare when he signed the diversity pledge with "Daffy Duck." While these facts clearly support the conclusion that Michael was insubordinate and did not agree to comply with the company's instructions, it is uncertain whether his conduct created a viable hostile work environment claim. His insubordination certainly justifies and requires a stern response from the company and Dunder Mifflin, including possible termination. But it might not, by itself, rise to the level of an actionable hostile work environment.

Some factors cut against a severe or pervasive finding. First, Michael does not direct the routine (or his racial slurs) at any specific the employees. He is playing to the entire crowd. Second, the statements do not seem designed to threaten or humiliate a particular employee. Third, it is unknown whether Michael or other employees otherwise engage in other racially tinged speech or conduct. Without a doubt, Michael's activity establishes a setting where others may see such speech as appropriate and even encouraged.⁹¹ Finally, the students need to consider which

⁸⁸ *Enforcement Guidance on Harassment in the Workplace*, *supra* note 9, *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 803, 811-12 (11th Cir. 2010) (en banc) (holding that sexual comments and pornography between male employees created a hostile work environment for female employee even though they were not directed at her); *Delozier v. Bradley Cnty. Bd. of Educ.*, 44 F. Supp. 3d 748, 759 (E.D. Tenn. 2014) (highlighting statements made in front of plaintiff's students that undermined her authority); *Hanna v. Boys & Girls Home & Family Servs., Inc.*, 212 F. Supp. 2d 1049, 1061 (N.D. Iowa 2002) (focusing on harassing statements made in front of plaintiff's customers).

⁸⁹ Faragher, *supra* note 31 at 788.

⁹⁰ *Throupe v. Univ. of Denver*, 988 F.3d 1243, 1252 (10th Cir. 2021).

⁹¹ Kristin Berger Parker, *Ambient Harassment Under Title VII: Reconsidering the Workplace Environment*, 102 NW. UNIV. L. REV. 945 (2008) (advocating for broader application of hostile work environment claims stemming from

employee might raise a hostile work environment claim. How might the routine impact the work environment of a White employee differently than a Black employee? Does it make a difference that it takes place in a somewhat mandatory training context?

It is worth noting that the N-word is one of the most historically charged and hateful words in the United States, it carries significant weight.⁹² Some commentators argue that the single use of the N-word by a supervisor can and should meet the threshold for hostile work environment liability.⁹³ Many courts recognize that, "perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as 'n****r.'"⁹⁴ Therefore, Michael's statements would support the complaint of a hostile environment, particularly for a Black employee, but it the employee would likely need to point to additional evidence supporting their claim to survive summary judgment.⁹⁵

Many courts have dismissed hostile work environment claims at the summary judgment stage when racial slurs were more widely used and aggressively deployed. For instance, in *Jackson v. Flint Ink N. Am. Corp.*, the 8th Circuit affirmed summary judgment where the plaintiff identified six instances where managers and coworkers made racially derogatory remarks, often with other expletives, around him.⁹⁶ Some of the remarks were not made to the plaintiff, two did not directly refer to him, and the final one was made during an altercation between the plaintiff and another employee.⁹⁷ The plaintiff also pointed to a crude drawing of a burning cross with "KKK" scrawled on a wall to support his claim.⁹⁸ While the court recognized that a work environment "dominated by racial slurs constitutes a violation of Title VII," it granted summary judgment for the employer because the racial slurs were infrequent and offhand.⁹⁹

Similarly, in *McLemore v. Holiday Stationstores, Inc.*, the district court granted summary judgment to the employer where the manager repeatedly said, "what's up, my niggah," a line from the comedy movie "Rush Hour."¹⁰⁰ The manager also asked the plaintiff whether the rumors that black men have larger penises was accurate. In the end, the Court dismissed the claim at summary judgment because the conduct was not sufficiently severe enough to affect a term of condition of

conduct that is not clearly targeted at a particular group, such a pornography displayed in communal area or generalized use of sexist language).

⁹² See Leora Einstadt, *The N-Word at Work: Contextualizing Language in the Workplace*, 33 BERKELY J. EMPL. L. 299 (2012) (advocating for a contextual framework to evaluate the use and meanings of racial slurs).

⁹³ Darryll Halcomb Lewis, *The Creation of a Hostile Work Environment by a Workplace Supervisor's Single Use of the Epithet "Nigger,"* 53 AM. BUS. L.J. 383, 400-405 (2016) (compiling cases).

⁹⁴ *Banks v. GM, LLC*, 81 F.4th 242, 266 (2nd Cir. 2023) (quoting *Rivera v. Rochester Genesee Reg'l Transp. Auth.*, 743 F.3d 11, 24 (2d Cir. 2014)).

⁹⁵ *Id.*

⁹⁶ *Jackson v. Flint Ink N. Am. Corp.*, 370 F.3d at 792-94 (8th Cir. 2004).

⁹⁷ *Id.* at 795.

⁹⁸ *Id.* at 796; *but see Banks*, 81 F.4th 242, 265 ("A reasonable jury could find that even a single placement of this object -- imbued as it is with historical gravity as a symbol and tool of actual violence -- directly at the workstation of a Black employee could amount to severe conduct sufficient to support an inference that the workplace is hostile to Black employees.").

⁹⁹ *Id.* at 795.

¹⁰⁰ *McLemore v. Holiday Stationstores, Inc.*, No. 02-4335, 2004 U.S. Dist. LEXIS 18668, *11 (D. Minn. 2004).

the plaintiff's employment.¹⁰¹ While the *Jackson* and *McLemore* cases may seem like outliers, they are not alone in holding plaintiffs to a high standard.¹⁰²

A similar analysis can apply to the other instances of awkward and uncomfortable conduct in the case study. Does Michael's encouragement of employees to act out stereotypes contribute to a hostile work environment? Yes. Was it improper for Michael to tell Pam and Stanley to lean into the "Olympics of suffering" of the Jewish people and Black Americans? Yes. However, the ultimate answer as to whether the conduct reached the severe or pervasive threshold will depend on more evidence and context. Michael is clearly naïve and not prepared to lead a thoughtful training on the topic of racism, sexism, and harassment. Open conversations about racism, sexism, homophobia, and religion are notoriously difficult to navigate, even among Human Resource professionals.¹⁰³ Diversity-related trainings are often criticized and because they are unsuccessful and may do more damage than good.¹⁰⁴ As one commentator noted, "On one end of the spectrum, diversity training has become a bastion of political correctness and a feel-good activity. At the other end, it is criticized as overly confrontational and oppressive."¹⁰⁵ Here, Michael manages to run into both problems.

In addition, the standards for what is acceptable, severe, pervasive, and reasonable evolve as cultural and legal norms change. Reasonableness is socially defined and reflects the changing culture and norms.¹⁰⁶ Because the reasonableness standard is considered at "a reasonable person in the plaintiff's position," the standard for harassment evolves with the social demands of the moment.¹⁰⁷ The notion of what is reasonable with regards to sex and sexual harassment has expanded and evolved in the wake of the #metoo movement.¹⁰⁸ This is a ripe area for class discussions. Instructors might want to ask students whether they believe cultural norms are

¹⁰¹ *Id.* at * 12 (citing *Gilbert v. City of Little Rock, Ark.*, 722 F.2d 1390, 1394 (8th Cir. 1983) ("More than a few isolated incidents of harassment must have occurred to establish a violation of Title VII")).

¹⁰² *See, e.g.*, *Bainbridge v. Loffredo Gardens, Inc.*, 378 F.3d 756, 760 (8th Cir. 2004) (dismissing claim where the use of racial slurs were sporadic, used in reference to customers, competitors, and other employees, or overheard); *Brown v. E. Mississippi Elec. Power Ass'n*, 989 F.2d 858 (5th Cir. 1993) (affirming summary judgment where plaintiff was subjected to racial slurs); *Bozeman v. Ark. Found.*, 2020 U.S. Dist. LEXIS 113473, *19-20 (E.D. Ark. 2020) (granting summary judgment for employer where ten racists statements and interactions over the course of the plaintiff's employment); *Hampton v. J.W. Squire Co.*, No. 4:10CV00013, 2010 U.S. Dist. LEXIS 106176, *12-13 (W.D. Va. Oct. 5, 2010) (holding that a hostile work environment did not exist where a supervisor used N-word three times in one conversation); *Miles v. Bellefontaine Habilitation Ctr.*, 2006 U.S. Dist. LEXIS 37117 (D. Mo. 2006) (granting summary judgment where the plaintiff's manager used a racial slur toward the plaintiff); *Smith v. Beverly Health & Rehab. Servs., Inc.*, 978 F. Supp. 1116, 1126 (N.D. Ga. 1997) (holding that several utterances of racial epithets by a supervisor were insufficient to support hostile work environment claim); *Grant v. UOP, Inc.*, 972 F. Supp. 1042, 1052-53 (W.D. La 1996), *aff'd*, 122 F.3d 1066 (5th Cir. 1997) (affirming summary judgment where the N-word was directed towards the plaintiff on five separate instances).

¹⁰³ Merideth Somers, *How to Have Productive Conversations About Race at Work*, MIT MANAGEMENT, Dec. 16, 2020, <https://mitsloan.mit.edu/ideas-made-to-matter/how-to-have-productive-conversations-about-race-work>.

¹⁰⁴ *See* Frank Dobbin & Alexandra Kalev, *Why Sexual Harassment Programs Backfire*, HARVARD BUSINESS REVIEW MAGAZINE, May-June 2020, <https://hbr.org/2020/05/why-sexual-harassment-programs-backfire> (arguing that training often puts men on the defensive and makes them more likely to blame the victims).

¹⁰⁵ Rebecca Hastings, *Diversity Training Pitfalls to Avoid*, SOCIETY OF HUMAN RESOURCE MANAGEMENT, Feb. 24, 2011, <https://www.shrm.org/topics-tools/news/inclusion-equity/diversity/diversity-training-pitfalls-to-avoid> (quoting Christopher Metzler, THE DIVERSITY FACTOR (Sp. 2003)).

¹⁰⁶ Danielle Bernstein, *Reasonableness in Hostile Work Environment Claims After #metoo*, 28 MICH. J. GENDER & L 119, 130 (2021).

¹⁰⁷ Oncale, *supra* note 11 at 81-82 (1998); *see also* *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991) (describing the standard as a "reasonable victim of the same sex as the plaintiff").

¹⁰⁸ *Id.* at 186-87.

changing, whether particular protected classes are gaining or losing ground, and whether additional classes of people should be protected.

Another troublesome moment in the card game is when Michael confronts Kelly as she walks into the room midway through the exercise. When Michael starts into her with a strong Indian accent and repeatedly asking if she “wants a cookie” is disorienting, aggressive, and clearly offensive to Kelly. Her response, slapping him in the face and walking out, is both shocking and seemingly appropriate. This exchange will be considered as part of the overarching context and a pervasiveness analysis. “Petty slights, annoyances, and isolated incidents (unless extremely serious) will not rise to the level of illegality. To be unlawful, the conduct must create a work environment that would be intimidating, hostile, or offensive to reasonable people.”¹⁰⁹

While Mr. Brown’s efforts were unsuccessful, they do illustrate that Dunder Mifflin is taking proactive steps to create an inclusive and safe work environment? Mr. Brown’s efforts clearly did not remedy the underlying problem. Michael is still a problem. He is clearly offending some of his employees and his conduct may be encouraging an environment that accepts, and possibly embraces, sexist or racist undertones.

Instructors should also emphasize that a hostile work environment often arises from different sources including the victim’s supervisor, co-worker, or non-employee. This might include statements and actions by Dwight, who says that he is sexually attracted to White and Indian women and later claims that sexual orientation is a choice, or Kevin, who asks Angela if she wants to “get high.”

One final example worth noting is when Michael asks Oscar where he “is from” and whether there is a more appropriate word than “Mexican,” because the term “Mexican” has negative connotations. While this interaction is uncomfortable and demeaning to Oscar, it is more akin to a microaggression that may not arise to the level of a hostile work environment.¹¹⁰ For instance, in *Aman v Cort Furniture Rental Corp.*, co-workers referred to Black employees as “one of them,” “another one,” “poor people,” and told Black employees to not “touch anything in the customers’ homes” and not to steal.¹¹¹ The Third Circuit Court of Appeals reversed the trial court’s grant of summary judgment to the employer, holding that the use of code words carried an undertone of racial motives and implications and could be considered by a jury.¹¹² With that said, microaggressions do have a cumulative affect and may constitute evidence of pervasive harassment.¹¹³

While the events of the Diversity Day episode may not reach the required level of severity or pervasiveness necessary to create an unlawful hostile work environment, students need to consider the larger context. If this conduct happened on one day, the day that the office was addressing race and a diversity, students should consider what happens on a week-to-week and month-to-month basis. It becomes increasingly problematic the more often a manager injects the

¹⁰⁹ *Harassment, supra note 9.*

¹¹⁰ Frances Baillon & Michelle Gibbons, *Kenneth v. Homeward Bound, Inc.: Potential Impacts of the Minnesota Supreme Court’s Not-So-Severe “Severe or Pervasive” Standard to Race Harassment Claims Under the Minnesota Human Rights Act*, 49 MITCHELL HAMLINE L. REV. 570, 616 (2023). Microaggressions are seemingly minor but damaging put-downs and indignities based on a protected class and may include microassaults, microinsults, and microinvalidations. *Id.* at 616.

¹¹¹ *Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1078-79 (3d Cir. 1996).

¹¹² *Id.* at 1080.

¹¹³ See Olivia Mendes, *Gender-Neutral Pronouns: They Are Here to Stay*, 52 SETON HALL L. REV. 317 (2021) (discussing how misgendering another employee is evidence of harassment and increasingly seen as the basis for raising hostile work environment claims).

phrase “that’s what she said,” into an innocuous conversation to sexualize it.¹¹⁴ In short, while the incidents of this particular day may not rise to the level of an actionable hostile work environment claim, they are genuinely concerning and suggest that Dunder Mifflin has a longer-term problem that might subject it to significant legal exposure. It appears that Michael has glamorized and fostered a work environment where sexualized and racial joking is welcomed and encouraged. Dunder Mifflin needs to take further, prompt, and firm action to bring Michael under control.

F. Can the Employer Assert an Affirmative Defense?

1. The Law

An employer may be able to assert an affirmative defense to harassment depending on the nature of the harassment and the perpetrator of harassment. The employer is automatically vicariously liable if the harassment by a supervisor involves a quid pro quo or when the victim suffers a tangible adverse employment action. Likewise, if the harassment is perpetrated by senior leaders of a company such as an owner, president, or corporate officer, the employer will be vicariously liable because the “agent’s high rank makes him or her the employer’s alter ego.”¹¹⁵ No affirmative defense is available in any of these three situations. In other harassment situations, however, the employer may be able to raise an affirmative defense by proving that it took reasonable measures to prevent harassment and acted appropriately when it learned of the harassment.

The Supreme Court has established different affirmative defenses requirements depending on whether the perpetrator is a supervisor (and no quid pro quo or adverse action has been taken) or whether the perpetrator is a non-supervising co-employee or third party.¹¹⁶ The Supreme Court allows a defense to “to accommodate the agency principles of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII’s equally basic policies of encouraging forethought by employers and saving action by objecting employees.”¹¹⁷

For the purposes of assigning liability to employers, a supervisor is someone who exercises immediate or higher authority over the victim of harassment. A supervisor must have the power to “make significant change[s] in employment status, such as hiring, firing, failing to promote, reassignment with significant different responsibilities, or a decisions causing significant change in benefits.”¹¹⁸

If the harassment is perpetrated by a supervisor and *no* tangible employment action was taken, the defending employer may raise the *Faragher-Ellerth* defense.¹¹⁹ This defense includes two elements:

1. that the employer exercised reasonable care to prevent and correct promptly any harassing behavior, and
2. that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.¹²⁰

¹¹⁴ Levitt, *supra* note 1.

¹¹⁵ Meritor, *supra* note 14 at 768.

¹¹⁶ Faragher, *supra* note 31 801-803; Ellerth, *supra* note 49; Meritor, *supra* note 14 at 763-765.

¹¹⁷ Meritor, *supra* note 14 at 764.

¹¹⁸ Vance, *supra* note 14 at 454.

¹¹⁹ Meritor, *supra* note 14 at 765.

¹²⁰ *Id.*

The employer has the burden to prove both requirements with a preponderance of evidence.¹²¹

The *Faragher-Ellerth* defense requires the employer to take proactive steps to educate its workforce and prevent possible harassment and discrimination. Usually, employers are required to have a clear anti-discrimination and harassment policy and educate its workforce.¹²² To be effective, the policies should identify and define unlawful harassment and discrimination, provide clear examples of improper conduct, require managers to report incidents of harassment, and establish a specific complaint procedure or policy for employees to report concerning conduct, and include an anti-retaliation protections.¹²³ The complaint procedure should also include a mechanism for an employee to report harassment to another person when the supervisor is the harasser.¹²⁴ The employer must also generally implement effective training. If the employer knows of previous harassment by the same offending supervisor and turns a blind eye to the harasser's conduct, the affirmative defense would be lost.¹²⁵

To fulfill the second prong of the *Faragher-Ellerth* defense, the employer must take prompt and effective remedial action when it learns of possible harassment. The second prong also applies in situations where a complainant fails to follow the reporting guidelines and waits an unreasonable amount of time to inform the employer of the harassment.¹²⁶

If the harassing employee is a co-worker, a negligence standard governs the employer's affirmative defense. To meet this standard, the complainant must show that the employer (1) unreasonably failed to prevent the harassment, or (2) failed to take reasonable corrective action of harassment that it knew or should have known.¹²⁷ This defense often considers the employer's policies, complaint procedures, and training to create a harassment free workplace; the relative relationship of the complainant alleged harasser; and the employer's efforts to monitor the workplace and minimize possible risks.¹²⁸

The employer must also show that it promptly investigated the harassment and took reasonable action to stop the harassment and prevent future harassment.¹²⁹ The reasonableness of the corrective action will depend on the circumstance underlying the complaint, but often involves similar considerations at the *Farragher-Ellerth* defense. Courts will consider the proportionality of the corrective action to the harassment, whether the harassment stops or is minimized, the impact on the complainant, and other factors related to the investigation.¹³⁰

¹²¹ *Id.*

¹²² *Enforcement Guidance on Harassment in the Workplace*, *supra* note 9; EEOC v. Boh Bros. Constr. Co., L.L.C., 731 F.3d 444, 462-63 (5th Cir. 2013); *see also* EEOC v. Mgmt. Hospitality of Racine, Inc., 666 F.3d 422, 436 (7th Cir. 2012) (“[A]n employer’s complaint mechanism must provide a clear path for reporting harassment.”); *Agusty-Reyes v. Dep’t of Educ.*, 601 F.3d 45, 55 (1st Cir. 2010) (holding that a jury could reasonably conclude that employer could not prove the first prong if it did not disseminate a harassment policy).

¹²³ *Brenneman v. Famous Dave’s of Am., Inc.*, 507 F.3d 1139, 1145 (8th 2007); *Ferraro v. Kellwood Co.*, 440 F.3d 96, 102-03 (2^d Cir. 2006).

¹²⁴ *Meritor*, *supra* note 14 at 73; *Sanford v. Main St. Baptist Church Manor, Inc.*, 327 F. App’x 587, 596 (6th Cir. 2009).

¹²⁵ *Minarsky v. Susquehanna Cnty.*, 895 F.3d 303, 312-13 (3^d Cir. 2018).

¹²⁶ *Faragher*, *supra* note 31 at 807-08; *Meritor*, *supra* note 14 at 765; *see also* *Roby v. CWI, Inc.*, 579 F.3d 779, 786 (7th Cir. 2009).

¹²⁷ *Faragher*, *supra* note 31 at 799; *Meritor*, *supra* note 14 at 758-759; *see also* 29 CFR §1604.11(d) (2012).

¹²⁸ *Vance*, *supra* note 14 at 445-46, 449; *Enforcement Guidance on Harassment in the Workplace*, *supra* note 9.

¹²⁹ *Dawson v. Entek Int’l*, 630 F.3d 928, 940 (9th Cir. 2011).

¹³⁰ *See, e.g.*, *May v. Chrysler Grp., LLC*, 716 F.3d 963, 971 (7th Cir. 2012).

2. Application to the Facts and Analysis

The students should initially identify the person who is engaging in the troubling behavior because the affirmative defense requirements are different if the perpetrator is the supervisor, Michael, or a co-employee. The most concerning conduct is by Michael. As the regional manager and supervisor of the office, Michael is not a top-level owner, officer, or executive who, by his position, constitutes an alter-ego of the company. Likewise, the harassing behavior was not tied to an adverse employment action. Dundler Mifflin may therefore be able to raise an affirmative defense.

Dundler Mifflin will need to prove that it took reasonable efforts to prevent harassment. The fact pattern says that the company has a handbook and policy stating that “will not tolerate any unlawful discrimination or harassment,” that “employees are expected to treat each other with respect,” and that the company will “discipline employees who engage in unlawful activity and punish violators to the fullest extent available at law.” While this is a start, the ambiguity in the fact pattern provides the opportunity for the class to discuss what makes up an effective anti-discrimination policies and training.¹³¹ This might include a widely disseminated policy with the following features:

- Clear definition of harassment
- Clear prohibition of harassment
- Comprehensive to all workers
- Examples of types of harassment
- Clear complaint and reporting procedure
- A commitment to maintain confidentiality or discreteness, to the extent possible
- No retaliation¹³²

It is also worth noting that an employer cannot promise complete confidentiality during an investigation because it may need to communicate with the alleged harasser and potential witnesses during the investigation. However, the employer should be discrete in its investigation and only share information with those who need to know about it.¹³³

The employer must also communicate the anti-discrimination policies and train the workforce, with a particular emphasis on training supervisors. The training should be tailored to the workforce and clearly communicate the employer’s anti-discrimination policies, the complaint procedures, and be presented in an easy-to-understand format.¹³⁴ Even with the best anti-harassment policies, complaint procedure, and training, the employer still needs to implement the policies effectively.¹³⁵ Dundler Mifflin has a limited policy, and Mr. Brown’s efforts illustrate that it taking some efforts to train its employees and respond to complaints.

Both affirmative defenses also require the employee to take prompt and effective measures to correct the problematic conduct. Here, Dundler Mifflin sent Mr. Brown to Scranton to conduct

¹³¹ Ferraro v. Kellwood Co., 440 F.3d 96, 102 (2d Cir. 2006) (“An employer may demonstrate the exercise of reasonable care, required by the first element, by showing the existence of an antiharassment policy during the period of the plaintiff’s employment, although that fact alone is not always dispositive.”).

¹³² *Enforcement Guidance on Harassment in the Workplace*, supra note 9.

¹³³ *Id.*; Georgia Stanton & Rebecca Herbst, *Mum’s Not the Word: Employee Conversations and Confidentiality Rules*, 42 AZ. ATTORNEY, 16, 19-20 (2005).

¹³⁴ *Id.* For a more comprehensive discussion of best practices, see EEOC, *Promising Practices for Preventing Harassment*, OLC EEOC-NVTA, No. 2017-2 (2017).

¹³⁵ *Id.*

an office training and obtain signed statements from the employees apologizing for their missteps and affirming their commitment to anti-discrimination in the workplace. Setting aside Michael's obstinance, these facts raise the question of whether the employer's response was reasonable.

In most situations, the employer will need to initiate a prompt and adequate investigation. The longer the employer waits to investigate, the less likely that it will be seen as reasonable.¹³⁶ The investigation must also be thorough enough to arrive at a "reasonable estimation of the truth."¹³⁷ An investigation should be performed by someone with interviewing and critical analysis skills.¹³⁸ It usually includes talking with the complainant and the accused person and should be documented by the employer. When there is conflicting evidence, the investigator will need to assess the witnesses' credibility. The investigator should generally create a report of their findings.¹³⁹ The case study does not focus on whether an investigation occurred. It appears that Mr. Brown was focused on the Chris Rock incident and did not ask employees to share their experiences. Likewise, the students themselves are part of a more comprehensive investigation into the Scranton office. They have been charged to assess the situation and recommend further action.

Finally, the employer needs to take appropriate corrective action that stops the harassment and is reasonably calculated to prevent and deter future harassment by the perpetrator or others.¹⁴⁰ When issuing discipline, the employer also needs to consider issues of consistency.

There is room for a robust classroom discussion on whether the Mr. Brown's training was an effective way to respond to the complaint about the Chris Rock routine. Most students will agree that it was appropriate for Mr. Brown to conduct the training and that he seemed competent. Some questions to ask and address might include:

- Did Mr. Brown's training appropriately address the specific problem that was complained of? Was the message clear that such jokes were unacceptable?
- Did the HERO appropriately frame the employer's expectations for its employees?
- Should have Mr. Brown started with a one-on-one conversation with Michael instead of a group discussion?
- Should Mr. Brown or someone else in the company have further investigated the issue before the training? If so, what would the investigation look like?
- Was it an appropriate remedial measure to have all employees, including Michael, sign the commitment to diversity?
- Was Mr. Brown's efforts effective at stopping Michael and other employees from continuing to engage in improper behavior and deterring such behavior in the future?
- Does the company need to take more drastic action to follow up with Mr. Brown's training?

¹³⁶ *Id.*

¹³⁷ *Id.* (quoting *Baldwin v. Blue Cross/Blue Shield of Ala.*, 480 F.3d 1287, 1304 (11th Cir. 2007)).

¹³⁸ John Pearce & Ilya Lipin, *Mitigating the Employer's Exposure to Third Party Claims of a Hostile Work Environment*, 26 HASTINGS WOMEN'S L.J. 319, 352-53, (2015).

¹³⁹ See Dori Meinert, *How to Conduct a Workplace Investigation*, SHRM, Dec. 1, 2014, <https://www.shrm.org/topics-tools/news/hr-magazine/how-to-conduct-workplace-investigation> (last visited Apr. 30, 2024).

¹⁴⁰ *Enforcement Guidance on Harassment in the Workplace*, *supra* note 9; see *cf.*, *Vance v. Ball State Univ.*, 646 F.3d 461, 473 (7th Cir. 2011), *affd.* by Vance, *supra* note 14 (affirming that the employer was not liable where it took reasonable steps to prevent continuing harassment).

Students will recognize that Michael was not receptive to Mr. Brown’s training and did not take him or his message seriously. While this is accurate, it is worth slowing down to ask if the company has acted reasonably to date, at least initially.

Michael refused to accept that his telling of the Chris Rock routine and use of the N-word was improper, and he refused to commit himself to future change. His belligerence and defiance by signing the diversity statement with “Daffy Duck” amounted to insubordination, and the company can clearly take more drastic action against him. Unlike *Bazemore v. Best Buy*, where the Fourth Circuit affirmed the dismissal the plaintiff’s claim because the employer disciplined the employee who told a racist and sexually charged joke and effectively stopped the harassment, Michael is still a problem.¹⁴¹ Dunder Mifflin’s ability to effectively assert the affirmative defense will likely depend on what it does next – which is shaped by the student’s recommendations to the company’s Chief Executive Officer.

G. What Should the Employer Do Next?

Because Dunder Mifflin and Mr. Brown’s initial approach did not change Michael’s approach to management or penchant to engage in sexual and racial joking and other boorish conduct, the company will need to ratchet-up its response to be able to assert the affirmative defense. Although complaining employees often argue that the employer could have done more, which is true here, the employer is only obligated to act *reasonably* to stop the harassment. This means that Dunder Mifflin must take increasingly aggressive measures to ensure that Michael is on board and stops engaging in racial and sexualized conduct.¹⁴² These steps may include additional individualized meetings with Michael and disciplining Michael more aggressively such as through a formal written findings, suspension, a performance improvement plan, or possibly termination.¹⁴³ But, the effectiveness of the company’s legal defense will depend on the student’s recommendations to their boss and the company’s follow through. Courts will often grant summary judgment in favor of employers where the employer takes continued and, when necessary, increasingly strong actions to respond to and remedy harassing behavior.¹⁴⁴ Students will also need to ensure that Dunder Mifflin reassesses its company-wide anti-harassment policies and training.

¹⁴¹ *Bazemore v. Best Buy*, 957 F.3d 195, 202-203 (4th Cir. 2020); *Carter v. Chrysler Corp.*, 173 F.3d 693, 702 (8th Cir. 1999) (affirming dismissal as a matter of law where the employer took reasonable corrective measures that stopped the harassment, despite plaintiff’s argument that the employer could have done more).

¹⁴² *EEOC v. Xerxes Corp.*, 639 F.3d 658, 677 (4th Cir. 2011) (“So long as the employer’s response to each known incident of coworker harassment is reasonably prompt, and the employer takes remedial measures that are reasonably calculated to end the harassment, liability may not be imputed to the employer as a matter of law.”).

¹⁴³ *Enforcement Guidance on Harassment in the Workplace*, *supra* note 9.

¹⁴⁴ *See Pimentel v. Atrium Hosp. LP*, No. 3:19-CV-1284, 2022 U.S. Dist. LEXIS 161024, *17 (D. Conn. Sept. 7 2022) (granting summary judgment where conducted an investigation, required mandatory training for all supervisors, and ultimately terminated the offending employee); *see also Van Alstyne v. Ackerley Grp.*, 8 F. App’x 147, 153 (2d Cir. 2001) (affirming summary judgment where employer investigated complaint and asked supervisor to resign); *Perry v. Ethan Allen, Inc.*, 115 F.3d 143, 154 (2d Cir. 1997) (finding appropriate corrective action where employer conducted prompt investigation, confronted offending employees, and warning that future harassment would not be tolerated); *Rouse v. City of Milwaukee*, 921 F. Supp. 583, 589-90 (E.D. Wi. 1996) (granting summary judgment where employer took increasing severe actions against harassing but did not terminate that employee).

H. Other Potential Discussion Issues.

1. What is the Employer's Potential Legal Exposure?

This activity also presents an opportunity to educate students of the potential legal exposure to employer and the types of remedies available to injured employees. Title VII allows for a wide array of remedies to an injured employee which include compensatory and punitive damages, as well as costs and attorney fees.¹⁴⁵ When applicable, Title VII also allows for equitable remedies including injunctive relief, reinstatement, and updating development of policies.¹⁴⁶ Compensatory damages include out of pocket losses including lost wages and emotional harm.

Title VII treats backpay and front pay as forms of equitable relief and, as such, are not considered compensatory damages.¹⁴⁷ Back pay includes the lost wages, fringe benefits, and economic losses that a plaintiff suffers from the time of the alleged discrimination through trial. Back pay is available under Title VII for up to two years prior to the filing of a charge of discrimination.¹⁴⁸ Front pay is also designated as equitable relief under Title VII and is designed compensate the plaintiff for future lost wages. State statutes and courts generally treat lost wages as a legal remedy for the jury to decide.

Often, plaintiffs in a hostile work environment claim will not suffer lost wages because the legal claim is premised on the assumption that the employee did not suffer an adverse employment action. Their primary compensatory damages will therefore include emotional distress damages. If, however, complainants show “the abusive working environment became so intolerable that her resignation qualified as a fitting response,” they may be able to assert a hostile-environment constructive discharge claim.¹⁴⁹ In those cases, the court would treat the resignation as an employer-caused termination and would allow for lost wages.

Punitive damages are issued to punish the wrongdoer and deter future misconduct. Punitive damages are available under Title VII if the employer intentionally discriminates against an employee "with malice or reckless indifference to the federally protected rights of an aggrieved individual."¹⁵⁰

Under Title VII, the ADA, and the ADEA, the plaintiff's damages are capped based on the size of the employer. Compensatory and punitive damages are capped at \$50,000 for employers with 15 – 100 employees, at \$100,000 for employers with 101 – 200 employees, at \$200,000 for employers with 201 – 500 employees, and \$300,000 for employers with more than 500

¹⁴⁵ 42 U.S.C. § 1918a(b).

¹⁴⁶ 42 U.S.C. § 2000e-5(g) (successful complainant may “enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay. . . , or any other equitable relief as the court deems appropriate.”); *EEOC v. Prospect Airport Servs.*, No. 2:05-CV-01125, 2012 U.S. Dist. LEXIS 103256, * (D. Nev. Ju. 25, 2012) (ordering employer to develop, distribute, and implement anti-harassment policy).

¹⁴⁷ 42 U.S.C. § 2000e-5(g); *see also* *Traxler v. Multnomah Cnty.*, 596 F.3d 1007, 1013 (9th Cir. 2010) (citing cases holding that front pay under the ADEA is an equitable form of relief for the court to decide).

¹⁴⁸ Backpay is considered an equitable remedy under Title VII.

¹⁴⁹ *State Police v. Suders*, 542 U.S. 129, 133-34 (2004) (analyzing constructive discharge theory in conjunction with hostile work environment claim). In *Sunders*, the Court held that employer can still assert a *Faragher-Ellerth* affirmative defense when the employee argues that the severity of the harassment rose to the level of a constructive discharge. *Id.*

¹⁵⁰ 42 U.S.C. § 1981a(b)(1).

employees.¹⁵¹ This cap does not apply to backpay or interest on back pay.¹⁵² By way of example, in *Glowacki v. O'Reilly Auto Enterprises*, the jury awarded the plaintiff \$979,000 in past economic damages, \$800,000 in future economic damages, \$160,000 for emotional distress, \$1 million in punitive damages. The district court awarded \$140,075 in attorney fees and \$8,301 in costs, allowed the economic damages and emotional distress damages, and reduced the punitive damages and emotional distress damages to \$300,000 because of the company had more than 500 employees.¹⁵³

The damages available under state laws may be more or less generous than Title VII. For instance, Minnesota law caps punitive damages for discrimination claims at \$25,000 but does not cap compensatory damages.¹⁵⁴ Minnesota law also allows the court to award civil penalties and triple financial compensatory damages.¹⁵⁵ Pennsylvania, where the Scranton office of Dunder Mifflin is located, likewise does not cap punitive or compensatory damages.¹⁵⁶

Finally, federal and state laws allow prevailing plaintiffs to recover legal costs and attorney fees.¹⁵⁷ Students are often surprised by the expense of hiring an attorney. As of August 2023, Clio reports that the average hourly rate for an attorney in the U.S. is \$327 an hour.¹⁵⁸ The cost of litigation expenses can be buffeted by employers who purchase employment practices liability insurance which covers claims such as discrimination, hostile work environment, and wrongful termination.¹⁵⁹ On the employee side, most attorneys who represent plaintiff employees in discrimination claims use contingency fees or mixed fee approaches where they are not paid by the hours worked; instead, they receive a portion of the ultimate settlement or verdict, often in the 33 – 40% range. This area is also ripe for discussion about the legal process, the cost and risks associated with a lawsuit from the employee's perspective, the employer's perspective, and the attorney's perspective.

2. What Other Business Ethics and Considerations are Involved?

The case study offers a host of additional practical and ethical questions. For instance, the President of Dunder Mifflin made it clear that he supported Michael Scott and is looking for ways to export the fun culture of the Scranton, Pennsylvania office across the business. He sees Michael as a “hysterical guy with a lot of heart” and does “not want to shake thing up” in the branch. This puts the students in a tricky situation. How should the student approach their project if they view Michael as the problem and believe that the company needs to severely discipline or terminate

¹⁵¹ 42 U.S.C. § 1981a(b)(3).

¹⁵² 42 U.S.C. § 1981a(b)(2).

¹⁵³ *Glowacki v. O'Reilly Auto Enters., LLC*, No. 1:21-cv-868, 2023 U.S. Dist. LEXIS 222529, *37 (W.D. Mi. Dec. 14, 2023).

¹⁵⁴ Minn. Stat. § 363A.29, subd. 4.

¹⁵⁵ *Id.* The treble damage award only applies to lost wages, it does not include emotional distress damages.

¹⁵⁶ 43 Pa. Stat. § 962(c2).

¹⁵⁷ Minn. Stat. § 363A.20, subd. 4. Fee shifting statutes play a critical role to allow individuals access to the courts and legal remedies.

¹⁵⁸ Ashley Merryman, *What Does Hiring a Lawyer Cost*, U.S. NEWS AND WORLD REPORT, Mar. 1, 2024, <https://law.usnews.com/law-firms/advice/articles/what-does-hiring-a-lawyer-cost#:~:text=Attorneys%20charged%20a%20national%20average,years%20they've%20practiced%20law> (last visited May 1, 2024).

¹⁵⁹ See Erin Meyers & Joni Hersch, *Employment Practices Liability Insurance and Ex Post Moral Hazard*, 106 CORNELL L. Rev. 947 (2021) (discussing the relationship between employment liability practices insurance, deterrence of discrimination, compensation of victims, and dissemination of best practices).

him? How should students go about educating the Chief Operating Officer about the risk created by the “fun culture” at the Scranton office? How does the employee’s status as a relatively new employee affect their ability to carry out their duties to the company?

Students also need to grapple with the difference between their and the company’s ethical duties their employees, regardless of whether the employees can assert a legal claim. While often parallel and consistent, ethical obligations often exceed and transcend legal liability.

Finally, this activity highlights the role and obligation of bystanders.¹⁶⁰ Consider asking students how co-workers should act when they see or experience inappropriate behavior, even if that behavior is not directed towards them. Should they adopt an active, interventionist approach to stop harassment when they see it? Intervention among peers and bystanders may be an effective way to disrupt and reign-in fellow employees while establishing a supportive environment.¹⁶¹ It might also open the employee up to retaliation.

IV. EVALUATION TECHNIQUES

This case study can be assessed in several ways. First, it can simply provide the framework for a thoughtful discussion of the legal and practical aspects of harassment without further evaluation. Second, students can be evaluated on the quality of their written memorandum to their boss or their disciplinary memorandum to Michael Scott. Third, this case can be assigned as an individual paper assignment. Appendix 2 includes a written paper option and Appendix 3 is a proposed a grading rubric. Finally, the case can serve as the basis for an examination question. Each of these methods can use a similar grading criterion that examines the quality of the writing or presentation as well as (1) the summary of the relevant facts, (2) identification of the legal rules, (3) application of the rules to the fact, and (4) conclusions and recommendations for future action.

V. CONCLUSION

The overwhelming popularity of *The Office* is, in part, due to its ability to depict and poke fun of the modern workplace, a place where boring work gets done, conflicts happen, and relationships develop and grow. While the show walks the line between offense and caring, it generally lands on the side of caring and connection. Diversity Day provides an accessible and inventive way for students to assume the role of an investigator to observe and evaluate whether a particular office is at risk of a hostile work environment claim. This activity is designed to help students learn the nuances of hostile work environment law while considering practical and strategic approaches to improving a concerning workplace culture. Hopefully, it will help them make deeper connections between legal obligations, human connection, and inclusiveness in a business setting.

¹⁶⁰ Stephanie Johnson et al. *Why We Fail to Report Sexual Harassment*, HARVARD BUSINESS REVIEW, Oct. 4, 2016, <https://hbr.org/2016/10/why-we-fail-to-report-sexual-harassment> (explaining need to train bystanders to intervene when they see sexual harassment).

¹⁶¹ Justin Keepler et al., *Rethinking How to Manage Harassment and Discrimination in the Workplace*, 13 INDUS. AND ORG. PSYCH. 219, 219-21 (2020).

APPENDIX 1

MEMORANDUM TO NEW DIRECTOR OF HUMAN RESOURCES

RE: Your Assignment – Investigate and Report on the Scranton Office Work Environment

You recently started as the Director of Human Resources for Dunder Mifflin, Inc., a middle-market paper company. Up to this point, Dunder Mifflin has used an outside vendor to provide most of its human resources needs.

While you are new to Dunder Mifflin, you have already begun to hear rumblings about the fast-and-loose culture of the Scranton, Pennsylvania branch.

Although Kris Dickinson, your boss and the Chief Operating Officer, knows the paper industry, he is not well schooled in employment laws. The employee handbook is five pages long and includes a statement that “the Company will not tolerate any unlawful discrimination or harassment,” “employees are expected to treat each other with respect,” and the company will “discipline employees who engage in unlawful activity and punish violators to the fullest extent available at law.”

Kris explains that the Scranton branch has the highest sales volume and profitability of the company’s regional offices. While the other offices are struggling, Scranton is gaining market share. Kris praises the Scranton branch for its “fun culture,” and said that he wants to find a way to reproduce the culture across the other branches. He attributes much of the office’s success to the regional manager, Michael Scott, who he has characterized as a “hysterical guy with a lot of heart.” Kris “does *not* want to shake things up” at Scranton or undermine its success.

Although you have heard various complaints of personality conflicts at the Scranton branch, there are no written documents in the personnel or Human Resources files. Nothing of note that stands out in the personnel records or the annual reviews, they are mostly generic and positive. You have also heard rumors of romantic relationships and pranks that may have “gone a bit overboard” in the Scranton office, but you are unsure if the rumors are true or if they have caused any problem.

Dunder Mifflin has historically contracted with an outside company, Diversity, Inc., to offer trainings and seminars designed to improve workplace culture. In response to a recent report that Michael Scott told an inappropriate joke a few weeks ago, the company is sending Mr. Brown, a consultant at Diversity, Inc., to conduct a diversity training for the office. The training is designed around the acronym HERO, which stands for Honesty, Empathy, Respect and Open-mindedness.

Kris has instructed you to accompany Mr. Brown and to conduct your own investigation into the Scranton branch to independently determine whether there are any potential legal concerns and, if so, to recommend the next steps.

YOUR SPECIFIC TASK – CONSIDER AND REPORT BACK

1. *Issue - Primary Questions.*
Is there any problem of *hostile work environment harassment* at the Scranton office? If so, what actions should the company take?
2. *Rule - Identify the Relevant Law and Legal Standard.*

State the applicable legal standard to determine whether unlawful harassment has occurred or whether the company faces a legal risk. Make sure to specifically consider the legal standard for a hostile work environment claim as well as the criteria to assert an affirmative defense to such a claim.

3. *Key Facts.*
Identify the essential relevant facts you discovered in your investigation. Make sure to identify the people involved and identify specific troubling actions or statements.
4. *Application - Analysis.*
Analyze the facts according to the legal standard to determine whether the company faces any legal risks of unlawful harassment. Be prepared to report your findings and to identify the primary risks and possible exposure to the company.
5. *Conclusion - Recommendations.*
State your recommendations for the company. Be specific. Make sure to discuss steps that need to be taken at an individual, office, or corporate level. Also feel free to discuss the business implications of your recommendations.

THE EMPLOYEES

To help orient and prepare yourself for your visit, here is a list and photo of the employees in the Scranton branch:





APPENDIX 2 - WRITTEN PAPER OPTION

Memorandum Assignment

After you conduct your investigation, write a memorandum between 1,200 – 2,000 words that address the following:

1. *Relevant Law and Legal Standard.* First, identify the applicable legal standard and test to determine whether a company faces legal liability under an unlawful hostile work environment theory. Cite the relevant statutes and case law. If relevant, identify the relevant affirmative defenses available to a hostile work environment claim.
2. *Key Facts.* State the essential relevant facts you discovered in your investigation. Focus on the facts that are key to your analysis.
3. *Analysis.* Analyze the facts with the legal standard to explain whether the company faces any legal risks. Identify the primary risks and explain the possible exposure to the company.
4. *Recommendations.* State your recommendations for the company. Be specific. Feel free to discuss steps that need to be taken at an employee, office, or corporate level. Make sure to address the business needs and the relative strengths and weaknesses (pros and cons) of your recommendations.

Citation Requirements:

Cite the relevant authority in your memorandum. At minimum include:

- at least one statute, regulation, or formal agency guidance
- at least one court opinion; and
- at least one law review article.

Grading Criteria

The paper will be graded on the following criteria:

- *Analysis and Completeness – 70%*. Does the memorandum accurately and completely identify the legal standard accurate? Does the paper identify the essential facts without including extraneous facts? How well does the writer apply the facts to the law? Is the analysis thoughtful and helpful? Do the recommendations follow from the legal analysis? Are the recommendations helpful, do they into account the business needs? Does the writer meaningfully address the concerns of the CEO?
- *Writing Quality – 20%*. Is the paper well written? Is the tone and presentation professional and credible? Does the writer use proper sentence structure, grammar, spelling, and mechanics? Does the writer have a strong, credible voice?
- *Citations and Sources – 10%*. Does the paper use proper citations and source attribution? Does the paper cite relevant and quality sources? Do the sources support the argument? The driving question is whether the reader has confidence that information is accurate and can be trusted. Papers will be checked against Turnitin.com to review for plagiarism and improper citation.
- *Length*. Is the paper the proper length? Papers that are not the proper length will lose one full grade.

APPENDIX 3 - GRADING RUBRIC FOR WRITTEN MEMORANDUM

Student: _____

Overall Score: _____

Analysis and Completeness – 70%.

Score: _____ / _____

Does the memorandum accurately and completely identify the legal standard accurate? Does the paper identify the essential facts without including extraneous facts? How well does the writer apply the facts to the law? Is the analysis thoughtful and helpful? Do the recommendations follow from the legal analysis? Are the recommendations helpful, do they into account the business needs? Does the writer meaningfully address the concerns of the CEO?

Analysis and Completeness	Outstanding	Very Good	Satisfactory	Needs Improvement
Legal Standard - Protected Class - Unwelcome - Offensive - Severe or Pervasive - Hostile Environment				
Essential Facts				
Application of Law to Facts				

Recommendations				
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Writing Quality – 20%

Score: _____ / _____

Is the paper well written? Is the tone and presentation professional and credible? Does the writer use proper sentence structure, grammar, spelling, and mechanics? Does the writer have a strong, credible voice?

Writing Quality	Outstanding	Very Good	Satisfactory	Needs Improvement
Overall Writing				
Tone and Presentation				
Proper Mechanics				

Citations and Sources – 10%

Score: _____ / _____

Does the paper use proper citations and source attribution? Does the paper cite relevant and quality sources? Do the sources support the argument? The driving question is whether the reader has confidence that information is accurate and can be trusted.

Writing Quality	Outstanding	Very Good	Satisfactory	Needs Improvement
3+ Relevant and Credible Sources				
Proper Citations				
Length				