

“WHAT’S IN A [DEAD] NAME?”: TITLE VII PROTECTIONS  
AGAINST MISGENDERING AND DEADNAMING OF GENDER  
DIVERSE INDIVIDUALS\* \*\*

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Abstract

The Supreme Court’s 2020 holding in *Bostock v. Clayton County* monumentally altered the availability of employment discrimination claims under Title VII to individuals identifying as members of the LGBTQ+ community. The Court did so by finding that the meaning of Title VII’s prohibition of workplace discrimination “because of sex” includes discrimination against individuals on the basis of their homosexual or transgender statuses. The effects of this decision on other aspects of employment litigation are still uncertain.

Pre-*Bostock*, transgender and non-binary individuals were largely left without a legal remedy under Title VII for hostile work environment sexual harassment claims. One novel claim developing post-*Bostock* is a hostile work environment sexual harassment claim brought by transgender or non-binary employees on the basis of intentional misgendering and deadnaming. Although various federal courts have heard sexual harassment claims involving misgendering and deadnaming of gender diverse individuals post-*Bostock*, due to the contemporary nature of the holding, there is a paltry amount of relevant federal case law and little uniformity amongst these courts’ handling of such claims.

To better address the proven detrimental effects of intentional misgendering and deadnaming in the workplace, and to satisfy Title VII’s purpose, Courts should:

- (1) use a reasonable gender diverse person standard (rather than applying a reasonable person standard) when determining

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\* Content Warning: This Note discusses potentially triggering topics, such as discrimination, verbal and physical abuse/violence, and mental health crises, such as self-harm and suicide. Additionally, the language used in this Note attempts to succinctly discuss the usage of identity terms used throughout the LGBTQ+ community, and in no way implies limits on ways individuals can identify themselves. It is important to recognize that individuals can self-identify in numerous ways, varying based on cultural, communal, and individual preferences in terminology.

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whether conduct toward gender diverse individuals is sufficiently severe or pervasive under Title VII;  
 (2) defer to Equal Employment Opportunity Commission (EEOC) guidance and adjudicative decisions regarding intentional misgendering and deadnaming in the workplace; and  
 (3) reduce the burden of proof for plaintiffs in hostile work environment sexual harassment claims at both the federal and state levels.

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## INTRODUCTION

*"What's in a name? that which we call a rose*

*By any other name would smell as sweet . . . ."*<sup>1</sup>

–Juliet Capulet

A soliloquy delivered by William Shakespeare's star-crossed lover, Juliet Capulet, implies that a name is just that—a name—with little value and no greater meaning. In other words, an individual's internal character matters most, not what they are called. But studies, philosophical accounts, and linguistic research show that Juliet, or Shakespeare rather, might have missed the mark with this sentiment.<sup>2</sup> While internal character does matter, the ways in which individuals are addressed have the potential to both negatively and positively impact views of self-worth, the deepest concept of self, and the ability to authentically express identity. The power of naming extends to the workplace and can contribute to a productive or disadvantageous work environment for employees and employers alike. This power rings true in the context of workplace sexual harassment, specifically when naming takes the form of intentional misgendering and deadnaming of transgender and non-binary individuals. The proven devastating effects of such conduct should not go unregulated in the workplace, and gender diverse individuals most vulnerable to naming abuses deserve protections under Title VII of the Civil Rights Act of 1994 (Title VII).

The Supreme Court's recent holding in *Bostock v. Clayton County*<sup>3</sup> monumentally altered the availability of employment discrimination claims under Title VII to individuals identifying as members of the LGBTQ+<sup>4</sup> community. The Court did so by clarifying the meaning of Title VII's prohibition of workplace discrimination "because of sex" to include discrimination against an individual on the basis of their homosexual or transgender status.<sup>5</sup> As *Bostock* was decided in 2020, the effects of this decision on other aspects of employment litigation are still uncertain. Pre-*Bostock*, transgender and non-binary individuals were largely left without a legal remedy under Title VII for hostile work

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1. WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act 2, sc. 2.

2. See Robin Jeshion, *The Significance of Names*, 24 *MIND & LANGUAGE* 370, 373–74 (2009) (emphasizing the feelings and conveyance of significance and individuality through proper naming).

3. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1737 (2020).

4. LGBTQ+ is the "[a]cronym for lesbian, gay, bisexual, transgender, and queer," and "+" is "added in recognition of all non-straight, non-cisgender identities." *Glossary of Terms: LGBTQ*, GLAAD, <https://www.glaad.org/reference/terms> [<https://perma.cc/US2U-739Z>] (last visited Mar. 18, 2022).

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

environment sexual harassment claims. One novel claim developing post-*Bostock* is a hostile work environment sexual harassment claim brought by transgender or non-binary employees on the basis of intentional misgendering and deadnaming. Although various federal courts have heard sexual harassment claims involving misgendering and deadnaming of gender diverse individuals post-*Bostock*, due to the contemporary nature of the holding, there is a paltry amount of relevant federal case law and little uniformity amongst these courts' handling of such claims.

Part I of this Note will first discuss relevant definitions pertaining to sex and gender identity, followed by an examination of the historical and legal background of harmful discrimination against transgender and non-binary individuals within the employment sphere. Part II will dive into the purpose and operation of Title VII hostile work environment claims, as well as identify binding federal case law and non-binding federal agency guidance regarding protections for transgender and non-binary employees. Part III identifies specific problems with Title VII's current severe or pervasive standard and the courts' application of this standard in cases of intentional misgendering and deadnaming of gender diverse employees. Lastly, Part IV of this Note offers solutions to enhance workplace protections of gender diverse individuals without opening employers up to unnecessary liability and ultimately better serving anti-discrimination employment legislation goals.

More narrowly, this Note offers solutions to better address the detrimental effects of intentional misgendering and deadnaming in the workplace, and to better satisfy Title VII's purpose. First, courts should use a reasonable gender diverse person standard, rather than applying a reasonable person standard, when determining whether conduct toward gender diverse individuals is sufficiently severe or pervasive. Additionally, courts should defer to Equal Employment Opportunity Commission (EEOC) guidance and adjudicative decisions regarding intentional misgendering and deadnaming in the workplace. They're the experts. Lastly, regardless of whether intentional misgendering and deadnaming meet the severe or pervasive standard under Title VII, the burden of proof for plaintiffs should be lowered. This is necessary on both the federal and state levels to ensure uniform protection of gender diverse persons.

A call for less stringent hurdles for plaintiffs filing suit in both federal and state courts with regard to proving sexual harassment claims is not a novel concept.<sup>6</sup> Nor is the argument for greater employment

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6. See generally Christina Sabato, Note, *Hearing the Calls for Change: Examining the Pervasive or Severe Standard in a Hostile Work Environment*, 42 WOMEN'S RTS. L. REP. 134, 135 (2020) (arguing that the severe or pervasive standard under Title VII should be less burdensome); Erik A. Christiansen, *How Are the Laws Sparked by #MeToo Affecting Workplace Harassment?*,

discrimination protections for gender diverse individuals.<sup>7</sup> Building off of these ideas, this Note emphasizes the need for uniform legislation and legal precedent that limits intentional misgendering and deadnaming of gender diverse individuals in the employment context. This legislation would also put employers on clear notice of what constitutes severe or pervasive sexual harassment in a post-*Bostock* world.

## I. BACKGROUND

### A. *Important Definitions*

Throughout this Note, familiar-looking terms will be used in narrow, technical ways to describe relevant individuals and actions. It is important to grasp the narrow meaning of these terms before delving into the present issues harming transgender and non-binary individuals. Additionally, this Note uses the terms “transgender and non-binary individuals” and “gender diverse individuals” to efficiently discuss issues affecting both gender identities, but not to insinuate that these two identities are the same or interchangeable in use.

#### 1. Sex, Gender, Gender Identity, and Gender Expression

“Sex” “refers to one’s biological status as male, female, or intersex.”<sup>8</sup> One commonly receives sex assignment at birth via inspection of the genitals and corresponding sex determination of male or female sex based on this inspection.<sup>9</sup> Although frequently erroneously used interchangeably with the term sex, “gender” is the behavioral, cultural, or

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AM. BAR ASS’N (May 8, 2020), <https://www.americanbar.org/groups/litigation/publications/litigation-news/featured-articles/2020/new-state-laws-expand-workplace-protections-sexual-harassment-victims/> [<https://perma.cc/5YHP-4YR2>] (discussing the arguments for and against softening the federal severe or pervasive standard).

7. See generally Erin E. Clawson, Note, *I Now Pronoun-ce You: A Proposal for Pronoun Protections for Transgender People*, 124 PENN ST. L. REV. 247, 248, 274–75 (2019) (discussing remedies for misgendering in the workplace and suggesting transgender status be included under Title VII’s definition of sex pre-*Bostock*); Chan Tov McNamarah, *Misgendering as Misconduct*, 68 UCLA L. REV. DISCOURSE 40, 44 (2020) (suggesting that “bar associations can [best] address the practice of misgendering as attorney misconduct”); Noelle N. Wyman, Note, *Because of Bostock*, 119 MICH. L. REV. 61, 62–64 (2020–2021) (arguing for a softer *prima facie* burden-shifting framework than *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) currently requires for single motive disparate treatment claims brought by gender diverse individuals).

8. AARON DEVOR & ARDEL HAEFELE-THOMAS, *TRANSGENDER: A REFERENCE HANDBOOK* 5 (2019); see also *Sex*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/sex> [<https://perma.cc/37YG-G3K4>] (last visited Jan. 22, 2022) (defining sex as “either of the two major forms of individuals that occur in many species and that are distinguished respectively as female or male especially on the basis of their reproductive organs and structures”).

9. DEVOR & HAEFELE-THOMAS, *supra* note 8, at 5.

psychological traits typically associated with one's sex,<sup>10</sup> commonly composed of "assigned gender, legal gender, gender identity, gender expression, and gender attributions."<sup>11</sup>

"Gender identity" is one's "innermost concept of self" as female, male, neither, or a blend of numerous identities.<sup>12</sup> Importantly, gender identity is not always static but can be fluid or change over time.<sup>13</sup> Additionally, gender identity encompasses many more identities than the two most commonly used genders, male and female, and individuals can hold more than one gender identity at a time.<sup>14</sup> For example, a 2015 U.S. Transgender Survey of over 27,000 people found that participants used more than five hundred unique gender identities when reporting how they identified.<sup>15</sup> Popular social media sites, like Facebook, offer users a choice of nearly sixty gender identity options when setting up a profile, including the ability to identify as a non-listed gender identity.<sup>16</sup>

"Gender expression" refers to an individual's external display of their gender identity.<sup>17</sup> Gender identity tends to be "expressed through behavior, clothing, body characteristics or voice, and . . . may or may not conform to socially defined behaviors and characteristics typically associated with being either masculine or feminine."<sup>18</sup> Expressions of gender identity can be affected by whether an individual feels safe and

10. *Gender*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/gender> [<https://perma.cc/H527-ZJWQ>] (last visited Jan. 22, 2022).

11. DEVOR & HAEFELE-THOMAS, *supra* note 8, at 6.

12. *Sexual Orientation and Gender Identity Definitions*, HUM. RTS. CAMPAIGN FOUND., <https://www.hrc.org/resources/sexual-orientation-and-gender-identity-terminology-and-definitions> [<https://perma.cc/SJX4-X37C>] (last visited Jan. 23, 2022).

13. Sabra L. Katz-Wise, *Gender Fluidity: What It Means and Why Support Matters*, HARV. HEALTH PUBL'G (Dec. 3, 2020), <https://www.health.harvard.edu/blog/gender-fluidity-what-it-means-and-why-support-matters-2020120321544> [<https://perma.cc/6WCL-4NZF>].

14. See DEVOR & HAEFELE-THOMAS, *supra* note 8, at 7–8; see also Katy Steinmetz, *Beyond 'He' or 'She': The Changing Meaning of Gender and Sexuality*, TIME MAG. (Mar. 16, 2017), <https://time.com/magazine/us/4703292/march-27th-2017-vol-189-no-11-u-s/> [<https://perma.cc/62D3-V54P>] (finding that "[a] growing number of young people are moving beyond the idea that we live in a world where sexuality and gender come in only two forms").

15. DEVOR & HAEFELE-THOMAS, *supra* note 8, at 7.

16. Russell Goldman, *Here's a List of 58 Gender Options for Facebook Users*, ABC NEWS (Feb. 13, 2014), <https://abcnews.go.com/blogs/headlines/2014/02/heres-a-list-of-58-gender-options-for-facebook-users> [<https://perma.cc/JX5X-NJ2C>].

17. *Sexual Orientation and Gender Identity Definitions*, *supra* note 12.

18. *Transgender and Non-Binary People FAQ*, HUM. RTS. CAMPAIGN FOUND., <https://www.hrc.org/resources/transgender-and-non-binary-faq> [<https://perma.cc/NS2X-KSV5>] (last visited Jan. 23, 2022); see also Laurel Wamsley, *A Guide to Gender Identity Terms*, NPR (June 2, 2021, 6:01 AM), <https://www.npr.org/2021/06/02/996319297/gender-identity-pronouns-expression-guide-lgbtq> [<https://perma.cc/Z8E5-CV8C>] ("Gender expression is how a person presents gender outwardly, through behavior, clothing, voice or other perceived characteristics. Society identifies these cues as masculine or feminine, although what is considered masculine or feminine changes over time and varies by culture.").

supported in their expression.<sup>19</sup> Additionally, gender expression includes preferred pronouns an individual would like to be addressed by.<sup>20</sup> Traditionally, the pronouns she/her/hers are used for feminine identities, he/him/his for masculine identities, and they/them/their, or many other variations like ze/zim and xe/xim, for gender neutral identities.<sup>21</sup> This Note refers to transgender and non-binary individuals by the pronouns they/them/their to be succinct but recognizes that some gender diverse individuals prefer other pronouns. It is important to note that sex, gender, gender identity, and gender expression differ from sexual orientation, which is one's "inherent or immutable enduring emotional, romantic or sexual attraction to other people."<sup>22</sup> Examples of sexual orientation are homosexuality, bisexuality, or asexuality.<sup>23</sup>

## 2. Transgender, Non-Binary, and Cisgender

Prevalent since the 1990s, "transgender" is an umbrella term for people whose "gender identity and/or expression is different from cultural expectations based on the sex they were assigned at birth."<sup>24</sup> Through a compilation of population surveys and CDC data, a 2016 report estimated that around 1.4 million, or 0.6%, of United States adults identify as transgender.<sup>25</sup> According to Pew Research Center, thirty percent of adults in the United States know someone transgender.<sup>26</sup> Being transgender in no way implies an individual's sexual orientation.<sup>27</sup>

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19. Natalee Seely, *Reporting on Transgender Victims of Homicide: Practices of Misgendering, Sourcing and Transparency*, 42 NEWSPAPER RSCH. J. 74, 76 (2021).

20. *E.g.*, Clawson, *supra* note 7, at 255.

21. *Id.*; Devin Norelle, *Gender-Neutral Pronouns 101: Everything You've Always Wanted to Know*, THEM (May 22, 2022), <https://www.them.us/story/gender-neutral-pronouns-101-they-them-xe-xem> [<https://perma.cc/6DSX-ZW75>] ("Third-person pronouns like "xe/xem" or "ze/zim" are growing increasingly popular. Likewise, it is becoming more common for people to avoid using pronouns altogether, and instead just use their name in all circumstances.").

22. *Sexual Orientation and Gender Identity Definitions*, *supra* note 12.

23. *Frequently Asked Questions Sexual Orientation and Gender Identity*, U.S. DEP'T OF LAB., <https://www.dol.gov/agencies/ofccp/faqs/lgbt#Q19> [<https://perma.cc/LQ4J-NZQC>] (last visited Oct. 29, 2023).

24. *Sexual Orientation and Gender Identity Definitions*, *supra* note 12 (defining transgender); *see also* DEVOR & HAEFELE-THOMAS, *supra* note 8, at 8 ("Transgender or trans are both umbrella terms used to describe a range of people who share the feature of not feeling that the sex and gender assignments made for them at birth were correct.").

25. ANDREW R. FLORES ET AL., HOW MANY ADULTS IDENTIFY AS TRANSGENDER IN THE UNITED STATES? 2 (2016).

26. *Where the Public Stands on Religious Liberty vs. Nondiscrimination*, PEW RSCH. CTR. (Sept. 28, 2016), <https://www.pewforum.org/2016/09/28/where-the-public-stands-on-religious-liberty-vs-nondiscrimination/> [<https://perma.cc/6ABM-Z4KG>] ("A large majority of Americans (eighty-seven percent) say they personally know someone who is gay or lesbian. A much smaller share—only three-in-ten—personally know someone who is transgender.").

27. *Sexual Orientation and Gender Identity Definitions*, *supra* note 12.

“Non-binary” individuals do not identify with any singular gender identity and reject a male/female binary but can fall under the category of transgender.<sup>28</sup> Non-binary individuals can identify as “being both a man and a woman, somewhere in between, or as falling completely outside of these categories.”<sup>29</sup> 1.2 million LGBTQ+ people in the United States identify as non-binary, making up eleven percent of the LGBTQ+ community.<sup>30</sup> Most transgender individuals identify as male or female, but forty-three percent of the transgender community identifies as non-binary.<sup>31</sup> In contrast, individuals whose gender identity aligns with their assigned sex at birth are considered “cisgender.”<sup>32</sup> This Note focuses on transgender and non-binary individuals only but recognizes that these two identities make up only a portion of the gender diverse population.

### 3. Discrimination: Misgendering and Deadnaming

Generally, discrimination is negative and unfair behavior directed at individuals or groups of individuals because of their voluntary or involuntary membership in a social group.<sup>33</sup> Negative stereotypes and

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28. DEVOR & HAEFELE-THOMAS, *supra* note 8, at 8; *see also Understanding Non-Binary People: How to Be Respectful and Supportive*, NAT’L CTR. FOR TRANSGENDER EQUAL. (Jan. 12, 2023), <https://transequality.org/issues/resources/understanding-non-binary-people-how-to-be-respectful-and-supportive> [<https://perma.cc/2NCA-J5TX>] (“[S]ome people have a gender that blends elements of being a man or a woman, or a gender that is different than either male or female. Some people don’t identify with any gender. Some people’s gender changes over time.”).

29. *Transgender and Non-Binary People FAQ*, *supra* note 18.

30. BIANCA D.M. WILSON & ILAN H. MEYER, NONBINARY LGBTQ ADULTS IN THE UNITED STATES 2 (2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Nonbinary-LGBTQ-Adults-Jun-2021.pdf> [<https://perma.cc/YWU4-HKVP>].

31. *Id.* at 6.

32. DEVOR & HAEFELE-THOMAS, *supra* note 8, at 5–6; *see also Cisgender*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/cisgender> [<https://perma.cc/2JK5-ZTMM>] (last visited Jan. 23, 2022) (“[B]eing a person whose gender identity corresponds with the sex the person had or was identified as having at birth.”).

33. CHARLES STANGOR & GRETCHEN B. SECHRIST, *THE CONCISE CORSINI ENCYCLOPEDIA OF PSYCHOLOGY AND BEHAVIORAL SCIENCE* 291–93 (W. Edward Craighead & Charles B. Nemeroff eds., 3rd ed. 2004). These social groups include both visible and invisible groups, but are not limited to age, race, religion, national origin, disability, sexual orientation, gender, and gender identity. *See id.* While the forms of discrimination can vary, two main forms are explicit and subtle discrimination. *See id.* Explicit discrimination can range from direct negative comments about someone or the social group they belong to, to “verbal and sexual abuse or physical harm.” *Id.* Subtle discrimination is more challenging to detect than explicit discrimination due to its tendency to take a nonverbal form and includes staring at or ignoring someone, or sitting far away from a person due to the social group they belong to or appear to belong to. *Id.* Within the employment sphere, studies on workplace discrimination on the basis of sex have focused on two categories of discrimination: formal and informal sex discrimination. *See* MADELINE E. HEILMAN & BRIAN WELLE, *FORMAL AND INFORMAL DISCRIMINATION AGAINST WOMEN AT WORK* 28–29 (2005), [https://dspace.mit.edu/bitstream/handle/1721.1/55933/CPL\\_WP\\_05\\_02\\_HeilmanWelle.pdf](https://dspace.mit.edu/bitstream/handle/1721.1/55933/CPL_WP_05_02_HeilmanWelle.pdf)



implicit biases towards specific groups can both contribute to discriminatory thoughts and actions against such groups.<sup>34</sup> Misgendering and deadnaming are forms of demoralizing and detrimental discrimination against gender diverse populations.<sup>35</sup> Being misgendered and deadnamed are recurrent traumatic experiences for many transgender and non-binary individuals.

There are three relevant types of misgendering: negligent misgendering, accidental misgendering, and intentional misgendering.<sup>36</sup> Negligent misgendering “applies to misattributions of gender that occur due to a failure to take the proper care” by assuming an individual’s gender identity rather than asking them how they would prefer to be addressed.<sup>37</sup> Picture this: a transgender woman who identifies as she/her/hers, but has a gender-neutral name, arrives for a job interview where the secretary calls her “sir” and the interviewer uses the pronouns he/him/his. Here, the secretary and interviewer have assumed the woman’s gender identity and preferred pronouns based on their perceptions of her appearance. Although unintentional, negligent misgendering can still have extremely negative consequences on the misgendered individual, regardless of their gender identity.<sup>38</sup>

Accidental misgendering refers to a situation where “by force of habit, a speaker uses the wrong pronoun, label, title, or name.”<sup>39</sup> Unlike negligent misgendering, accidental misgendering is automatic and “largely uncontrollable.”<sup>40</sup> For example, imagine a coworker of fifteen years comes out as transgender and explains that the appropriate pronouns to address them by are he/him/his. Due to the habit of addressing the coworker by the pronouns she/her/hers, it’s highly likely

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[<https://perma.cc/88FC-UZZW>]. Formal sex discrimination refers to “the biased allocation of organizational resources such as promotions, pay, and job responsibilities” in the workplace. *Id.* at 28. Informal sex discrimination is focused on “interactions that occur between employees and the quality of relationships that they form” and the “verbal and nonverbal behaviours [sic] limiting the respect, credibility and psychological well-being of sexual minorities” in the workplace. *Id.*; Priola et al., *The Sound of Silence. Lesbian, Gay, Bisexual and Transgender Discrimination in 'Inclusive Organizations'*, 25 BRITISH J. OF MGMT. 488, 490–91 (2014).

34. GABBRIELLE M. JOHNSON, AN INTRODUCTION TO IMPLICIT BIAS: KNOWLEDGE, JUSTICE, AND THE SOCIAL MIND 20–22 (Erin Beeghly & Alex Madva eds., 2020).

35. See generally Sabra L. Katz-Wise, *Misgendering: What It Is and Why It Matters*, HARV. HEALTH PUBL'G (July 23, 2021), <https://www.health.harvard.edu/blog/misgendering-what-it-is-and-why-it-matters-202107232553> [<https://perma.cc/XKZ2-5WT8>] (“When people are misgendered, they feel invalidated and unseen. When this happens daily, it becomes a burden that can negatively impact their mental health and their ability to function in the world.”).

36. Chan Tov McNamara, *Misgendering*, 109 CAL. L. REV. 2227, 2261–63 (2020).

37. *Id.* at 2261–62.

38. See *id.* (“[A]ssumptions based on another’s appearance can have devastating consequences.”).

39. *Id.* at 2262.

40. *Id.*

that one will accidentally call their coworker by these old pronouns “particularly early in the transition or shortly after the acknowledgment.”<sup>41</sup> Like negligent misgendering, accidental misgendering remains harmful regardless of its lack of intent.

In contrast, intentional misgendering “involves the conscious refusal to use the correct gendered language or designations.”<sup>42</sup> In this situation, the individual misgendering another person is informed of the person’s preferred pronouns and “deliberately chooses not to use it or chooses to use language at odds with it.”<sup>43</sup> Due to its deliberate nature, intentional misgendering is “more morally culpable than accidental or negligent misgendering,”<sup>44</sup> although any form of misgendering can be injurious to the misgendered individual, as discussed in further detail below.

Deadnaming is a form of misgendering.<sup>45</sup> Deadnaming is the action of calling an individual by their assigned name at birth, or a past chosen name, that the individual no longer wishes to be addressed by.<sup>46</sup> Intentional deadnaming, much like misgendering, is a common form of discrimination transgender and non-binary individuals face on a daily basis and can be negligent, accidental, or intentional.<sup>47</sup> Examples of deadnaming are prevalent in media coverage of violence against transgender individuals.<sup>48</sup> In these cases, the media refers to transgender individuals by their birth-assigned name rather than their actual name corresponding to their identity.<sup>49</sup>

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41. *Id.*

42. McNamara, *supra* note 36, at 2263–64.

43. For example, imagine a case where an employee who was previously addressed by he/him/his has told management ze identify as non-binary and would like to be addressed by ze/zir/zeir. If management refuses to call the employee by their identifying pronouns, because management honored the employee’s previous pronouns of he/him/his, management is most likely intentionally misgendering the employee. *See id.* at 2263.

44. *Id.* at 2264.

45. *Id.* at 2255.

46. *Id.*

47. *See id.* at 2261–64.

48. *See* Chase Strangio, *A Transgender Person’s Deadname Is Nobody’s Business. Not Even a Reporter’s.*, NBC NEWS (May 14, 2020), <https://www.nbcnews.com/think/opinion/trans-gender-person-s-deadname-nobody-s-business-not-even-reporter-nca1206721> [<https://perma.cc/6S84-94NX>] (discussing how media use of transgender individuals’ deadnames “perpetuates the false notion that women who are trans are not ‘real’ women, that men who are trans are not ‘real’ men and that no one could have a gender that is nonbinary[,]” and emphasizing that writing about the deadname of a transgender woman “actually evokes the image of a man for readers and contributes to the insidious social understanding that ‘this person claimed to be a woman but was really a man.’”).

49. *Id.*; *see also* Morgan Sherm, *Deadnaming and Misgendering of Trans People Puts Trans Lives at Risk*, CHI. SUN TIMES (Nov. 29, 2021), <https://chicago.suntimes.com/2021/11/29/22807775/what-i-learned-about-news-media-law-enforcement-transgender-murders-morgan-sherm-op-ed> [<https://perma.cc/ABA7-ZNWV>] (offering solutions to the problem of deadnaming in the media).

## B. Discrimination Against Gender Diverse Individuals in the Workplace

Discrimination against transgender and non-binary individuals, characterized as a “crisis of hate”<sup>50</sup> and an “epidemic,”<sup>51</sup> runs rampant through society and has for quite some time.<sup>52</sup> Discriminatory actions taken against gender diverse individuals range in form from non-verbal micro-aggressions to anti-gender diverse legislation,<sup>53</sup> even to deadly

50. EMILY WATERS ET AL., A CRISIS OF HATE: A REPORT ON LESBIAN, GAY, BISEXUAL, TRANSGENDER AND QUEER HATE VIOLENCE HOMICIDES IN 2017 5 (Nat’l Coal. of Anti-Violence Programs ed., 2018), <http://avp.org/wp-content/uploads/2018/01/a-crisis-of-hate-january-release.pdf> [<https://perma.cc/C79S-657Y>] (reporting on the “crisis of hate” facing the LGBTQ+ community).

51. *An Epidemic of Violence: Fatal Violence Against Transgender and Gender Non-Conforming People in the United States in 2021*, HUM. RTS. CAMPAIGN FOUND., <https://reports.hrc.org/an-epidemic-of-violence-fatal-violence-against-transgender-and-gender-non-conforming-people-in-the-united-states-in-2021> [<https://perma.cc/5HBA-QQFX>] (last visited Mar. 18, 2022) (shedding light on the “epidemic of violence taking the lives of transgender and gender non-conforming people.”).

52. In the 1950’s, anti-masquerading laws made dressing in clothing that did not correspond with one’s sex assigned at birth illegal. DEVOR & HAEFELE-THOMAS, *supra* note 8, at 27. These laws gave police immense unchecked power, leading to police raids of bars frequented by the LGBTQ+ community. *Id.* During raids, police officers would force people to strip their clothing and undergo a search for the requisite number of gender-specific clothing items. *Id.* Later, the names of those violating the law would be published in the newspaper, often leading these individuals to lose their families, friends, and jobs. *Id.* For a brief discussion of the history of discrimination against transgender individuals and the transgender activism throughout history that served as a precursor to the appointment of the first openly transgender judge, Phyllis Randolph Fry, see Deborah Sontag, *Once a Pariah, Now a Judge: The Early Transgender Journey of Phyllis Frye*, N.Y. TIMES (Aug. 29, 2015), <https://www.nytimes.com/2015/08/30/us/transgender-judge-phyllis-fryes-early-transformative-journey.html> [<https://perma.cc/3F2R-4K9L>].

53. In 2021 alone, twenty-five “anti-LGBTQ bills” were enacted, including thirteen “anti-transgender laws across [eight] states.” *An Epidemic of Violence: Fatal Violence Against Transgender and Gender Non-Conforming People in the United States in 2021*, *supra* note 51; see also Grant Gerlock, *Transgender Girls and Women Now Barred from Female Sports in Iowa*, NPR (Mar. 3, 2022), <https://www.npr.org/2022/03/03/1084278181/transgender-girls-and-women-now-barred-from-female-sports-in-iowa> [<https://perma.cc/SE3U-WHMW>] (“Iowa Gov. Kim Reynolds has signed a law that bans transgender girls and women in the state from competing in sports according to their gender identity. The measure applies to public and private K-12 schools and community colleges as well as colleges and universities affiliated with the NCAA and NAIA.”); J. David Goodman, *How Medical Care for Transgender Youth Became ‘Child Abuse’ in Texas*, N.Y. TIMES (Mar. 11, 2022), <https://www.nytimes.com/2022/03/11/us/texas-transgender-youth-medical-care-abuse.html> [<https://perma.cc/7TDM-DHV7>] (“The abuse investigations ordered by Mr. Abbott, the first of their kind, represent the peak of a new round of action in state capitals aimed at transgender Americans, the most significant push by groups opposed to transgender rights since the national campaign to limit bathroom access founded in 2017 and 2018.”). Although not enacted, more than “130 anti-transgender bills were introduced across 33 states.” *An Epidemic of Violence: Fatal Violence Against Transgender and Gender Non-Conforming People in the United States in 2021*, *supra* note 51; see also Betsy Z. Russell, *House*

physical violence.<sup>54</sup> While this Note discusses discrimination against transgender and non-binary individuals generally, it is important to emphasize that discrimination against these individuals is intersectional in nature. Race, class, national origin, disability status, and other demographic factors contribute to discrimination against gender diverse persons.<sup>55</sup> Specifically, transgender women of color live with numerous marginalizations and experience violence, and even death, “in epidemic numbers.”<sup>56</sup> Transgender individuals with disabilities have the highest rate of lifetime suicide attempts.<sup>57</sup>

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*Passes Anti-Trans Youth Treatment Bill*, IDAHO PRESS (Mar. 8, 2022), [https://www.idahopress.com/news/local/house-passes-anti-trans-youth-treatment-bill/article\\_ebb0623c-6df9-5a94-8beb-16d5c7688834.html](https://www.idahopress.com/news/local/house-passes-anti-trans-youth-treatment-bill/article_ebb0623c-6df9-5a94-8beb-16d5c7688834.html) [<https://perma.cc/JC8Y-NETD>] (describing Idaho legislation that, if passed by the Idaho Senate, would make it a felony, punishable by life in prison, to provide gender care to transgender youth); Elizabeth Bibi, *Florida Senate Passes “Don’t Say Gay or Trans” Bill, Legislation Heads to DeSantis’ Desk for Signature or Veto*, HUM. RTS. CAMPAIGN FOUND. (Mar. 8, 2022), <https://www.hrc.org/news/florida-senate-passes-dont-say-gay-or-trans-bill-legislation-heads-to-desantis-desk-for-signature-or-veto> [<https://perma.cc/Z4MT-PPJA>] (explaining a Florida bill that once enacted, “would block teachers from talking about LGBTQ+ issues or people, further stigmatizing LGBTQ+ people and isolating LGBTQ+ kids... [and] also undermin[ing] existing protections for LGBTQ+ students.”).

54. In 1996, the National Coalition of Anti-Violence Programs (NCAVP) began reporting on national violence against the LGBTQ+ community. WATERS ET AL., *supra* note 50. Beginning in 2013, the Federal Bureau of Investigations (FBI) began reporting on hate crimes “motivated by anti-transgender bias.” *An Epidemic of Violence: Fatal Violence Against Transgender and Gender Non-Conforming People in the United States in 2021*, *supra* note 51. Both reports consistently revealed similarly disturbing trends of violence against gender diverse persons, demonstrating an increase in violence against transgender and non-binary individuals. WATERS, *supra* note 50, at 6 (reporting an eighty-six percent increase in hate violence related homicides of LGBTQ people between 2016 and 2017); *An Epidemic of Violence: Fatal Violence Against Transgender and Gender Non-Conforming People in the United States in 2021*, *supra* note 51 (analyzing FBI data of hate crimes motivated by anti-transgender bias collected since 2013 and characterizing the results as a disturbing trend in increased violence). In 2021, more gender diverse individuals were killed in a single year than ever before. *Id.*

55. Jefferson et al., *Transgender Women of Color: Discrimination and Depression Symptoms*, NIH PUB. ACCESS, 2 (2014), <chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4205968/pdf/nihms594631.pdf> [<https://perma.cc/MV8Q-MKPZ>] (“While trans women of color share experiences of transphobia and cisnormativity with other transgender people, experiences of sexism with other women, and experiences of racism with other people of color, these experiences interact and cannot be separated: trans women of color experience discrimination uniquely as trans women of color.”); Nadine Ruff et al., *Hope, Courage, and Resilience in the Lives of Transgender Women of Color*, 24 THE QUALITATIVE REP. 1990, 1991 (2019) (explaining the intersectionality of the oppression transgender individuals face).

56. Jefferson et al., *supra* note 55, at 2, 8–10 (discussing data that shows a statistical significance between transgender individuals of color experiencing transphobic and racist events with increased likelihood of depression symptoms).

57. ANNA P. HAAS ET AL., SUICIDE ATTEMPTS AMONG TRANSGENDER AND GENDER NON-CONFORMING ADULTS 7 (2014), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans->

In addition to experiencing discrimination in nearly all aspects of daily life,<sup>58</sup> gender diverse individuals experience disproportionately high levels of discrimination in the workplace compared to cisgender coworkers.<sup>59</sup> In 2020, over half of surveyed transgender individuals reported that discrimination “moderately or significantly affected their capacity to be hired, with four in ten saying that their ability to be hired was negatively affected to a significant degree,” and almost half reporting at least a moderate impact on their ability to retain employment.<sup>60</sup> A staggering ninety percent “of transgender workers report some form of harassment or mistreatment on the job.”<sup>61</sup> Gender diverse individuals also

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GNC-Suicide-Attempts-Jan-2014.pdf [https://perma.cc/7FZJ-7NPM] (“The highest prevalence of lifetime suicide attempts (65%) was found among those on disability.”).

58. In 2020, sixty-two percent of transgender respondents and sixty-nine percent of non-binary respondents to a Center for American Progress (CAP) survey reported experiencing discrimination within the last year. LINDSAY MAHOWALD ET AL., *THE STATE OF THE LGBTQ COMMUNITY IN 2020* 4 (2020), <https://americanprogress.org/wp-content/uploads/2020/10/LGBTQpoll-report.pdf> [https://perma.cc/S34A-VMT7]; *see also* Clawson, *supra* note 7, at 255–57 (describing generally the discrimination transgender individuals face daily). More than half of transgender and non-binary respondents experienced this discrimination “in a public place such as a store, public transportation, or a restroom,” and many experienced it in school, apartment complexes, and “through interactions with law enforcement.” MAHOWALD ET AL., *supra* note 58, at 4 (reporting that specifically twenty-one percent experienced discrimination in school, twenty percent in apartment complexes, and fifteen percent through interactions with law enforcement). Over one-third of gender diverse individuals reported discrimination having at least a moderate impact on their ability to rent or buy a home. *Id.* at 7. Some gender diverse individuals are even intentionally misgendered and deadnamed throughout the legal process as part of disturbing tactics of opposing counsel. *See* McNamara, *supra* note 36, at 42–43 (explaining the use of intentional misgendering and deadnaming by attorneys in the legal process in order to harass opposing parties who are transgender).

Gender diverse individuals also face ongoing discrimination in accessing health care. Close to one-third of transgender respondents to a CAP survey indicated that a health care provider refused to see them due to their gender identity, or saw them, but fondled, sexually assaulted, or raped them, and many reported having been intentionally misgendered or deadnamed by a health care provider. *See* Shabab Ahmed Mirza & Caitlin Rooney, *Discrimination Prevents LGBTQ People from Accessing Health Care*, CTR. FOR AM. PROGRESS (Jan. 18, 2018), <https://www.americanprogress.org/article/discrimination-prevents-lgbtq-people-accessing-health-care/> [https://perma.cc/SB3M-FUQ9]. Sexual violence against gender diverse individuals is far from uncommon, with roughly half of transgender individuals experiencing sexual violence at some point in their lifetime. *See* SANDY E. JAMES ET AL., *THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY* 5 (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> [https://perma.cc/S5XM-VEUQ].

59. *See generally*, Dan Avery, *Half of LGBTQ Workers Have Faced Job Discrimination, Report Finds*, NBC NEWS (Sept. 8, 2021), <https://www.nbcnews.com/nbc-out/out-news/half-lgbtq-workers-faced-job-discrimination-report-finds-rcna1935> [https://perma.cc/TP2Y-UE8V] (discussing the discrimination LGBTQ persons face in the workplace).

60. MAHOWALD ET AL., *supra* note 58, at 9–10.

61. Crosby Burns & Jeff Krehely, *Gay and Transgender People Face High Rates of Workplace Discrimination and Harassment*, CTR. FOR AMERICAN PROGRESS 1, 2 (June 2, 2011),

report numerous other forms of employment discrimination based on their transgender or non-binary status, such as being: denied a job they applied for; removed from direct contact with clients, customers, or patients; denied a promotion; forced to present a gender they did not identify with to keep their job; denied access to the proper restroom; asked inappropriate questions about their genitalia; micromanaged more than cisgender employees; and subjected to improper release of information about them by supervisors that should not have been released, amongst other actions.<sup>62</sup>

For instance, Aveda Adara, a transgender woman, describes being “laughed out of interviews” for many years and “constantly misgendered by managers, supervisors, and employees.”<sup>63</sup> Olivia Hill, the first employee at Vanderbilt University to transition while employed, describes being called a “trans freak” by her direct supervisor, who also inappropriately discussed Hill’s transition with other university employees.<sup>64</sup> Similarly, Patrick Callahan, a transgender man and criminology consultant for the federal government, was denied a job at a police department and later told by a friend who worked there that after the department received Callahan’s background check and saw previous female names (Callahan’s deadname) on the reports, it became a “joke around the department, that some ‘it thing’ wanted to work there.”<sup>65</sup> These are just a few instances of routine workplace discrimination that gender diverse individuals face.<sup>66</sup>

It comes with no surprise that the relentless degrading and horrific experiences of discrimination toward transgender and non-binary individuals face result in grave consequences for the gender diverse community. A research study of the effects of misgendering on transgender individuals showed that misgendering left individuals feeling

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[https://cdn.americanprogress.org/wp-content/uploads/issues/2011/06/pdf/workplace\\_discrimination.pdf](https://cdn.americanprogress.org/wp-content/uploads/issues/2011/06/pdf/workplace_discrimination.pdf) [<https://perma.cc/CHG5-JXXY>].

62. MAHOWALD ET AL., *supra* note 58, at 10–11; HAAS ET AL., *supra* note 57, at 11.

63. Julie Moreau, *‘Laughed Out of Interviews’: Trans Workers Discuss Job Discrimination*, NBC NEWS (Oct. 6, 2019), <https://www.nbcnews.com/feature/nbc-out/laughed-out-interviews-trans-workers-discuss-job-discrimination-n1063041> [<https://perma.cc/PJ44-VUCR>].

64. *Transgender Woman Files Discrimination Lawsuit Against Vanderbilt University*, NEWS CHANNEL 5 NASHVILLE (Sept. 30, 2021), <https://www.newschannel5.com/news/transgender-woman-files-discrimination-lawsuit-against-vanderbilt-university> [<https://perma.cc/ALX3-VVLL>].

65. Jo Yurcaba, *Transgender Recruit Sues New Orleans Police Department for Alleged Hiring Discrimination*, NBC NEWS (June 29, 2021), <https://www.nbcnews.com/feature/nbc-out/transgender-recruit-sues-new-orleans-police-department-alleged-hiring-discrimination-n1272488> [<https://perma.cc/J5TA-D7XT>].

66. See Burns & Krehely, *supra* note 61, at 1–2 (discussing the staggering number of transgender people who face some form of discrimination at work based on their gender identity).

stigmatized.<sup>67</sup> Additionally, it found “a positive association between [this] felt stigma and stress and depression” and that “[b]oth perceived frequency [of misgendering] and feeling stigmatized were positively associated with psychological distress.”<sup>68</sup> Misgendering and deadnaming alike can bring gender diverse individuals back to a distressful or traumatic time in their life before they were able to take steps to acknowledge or express their gender identity, leading to psychological anguish.<sup>69</sup> Compared to five percent of the general United States population, nearly half of the respondents to the U.S. Transgender Survey reported experiencing severe psychological distress due to experiencing discrimination in just a month prior to participating in the survey.<sup>70</sup>

Gender diverse individuals often report feeling the need to take extensive measures to avoid future discrimination, such as hiding a personal relationship, avoiding public places, changing the way they dress or their mannerisms around others, and making difficult decisions about where to work.<sup>71</sup> Additionally, workplace discrimination has a “ripple effect” that “contributes to a crisis of homelessness, poverty, and violence” for gender diverse individuals.<sup>72</sup> This fact is not shocking, as many transgender and non-binary individuals frequently call out sick or quit to avoid deadnaming and misgendering in the workplace, which can lead to discipline and unemployment.<sup>73</sup> Notably, transgender individuals experience especially high rates of poverty and homelessness compared to that of cisgender straight persons.<sup>74</sup>

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67. Kevin A. McLemore, *A Minority Stress Perspective on Transgender Individuals' Experiences with Misgendering*, 3 STIGMA AND HEALTH 53, 54 (2013).

68. *Id.* at 53.

69. For example, Chase Strangio, a transgender activist, describes the feeling of being deadnamed as follows:

It does not represent who I am but rather a painful past that I worked hard to move beyond; it is as mean-spirited and useless for you to try to seek this information out as it would be for me to go in search of some painful experience of your childhood to define who you are for others.

Strangio, *supra* note 48; *see also* *Why Deadnaming Is Harmful*, CLEVELAND CLINIC (Nov. 18, 2021), <https://health.clevelandclinic.org/deadnaming/> [<https://perma.cc/CGZ7-CUQL>] (explaining that deadnaming is harmful because “[i]t can remind them of that period in their lives before they could take steps to affirm who they are.”).

70. JAMES ET AL., *supra* note 58, at 5.

71. MAHOWALD ET AL., *supra* note 58, at 11–13.

72. Moreau, *supra* note 63.

73. *See id.* (discussing multiple transgender individuals’ stories about the discrimination they faced at work).

74. *See* M.V. LEE BADGETT ET AL., LGBT POVERTY IN THE UNITED STATES: A STUDY OF DIFFERENCES BETWEEN SEXUAL ORIENTATION AND GENDER IDENTITY GROUPS 39 (2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/National-LGBT-Poverty-Oct-2019.pdf>

The compounding effects of feeling stigmatized, psychological distress, poverty, and violence are reflected in the devastatingly high suicide attempt rates in the gender diverse community. Forty percent of Transgender Survey participants reported having attempted suicide at some point during their life.<sup>75</sup> In the same year, the attempted suicide rate amongst United States adults was four percent,<sup>76</sup> making the national rate of gender diverse attempts at least ten times that of the general population. Notably, those experiencing verbal discrimination and violence at work, or unemployment due to their gender identity, experienced an even higher suicide attempt rate.<sup>77</sup> In particular, transgender individuals who were: unemployed had an increased attempted suicide rate of fifty percent, harassed by someone at work had an increased rate of fifty-one percent, victims of violence by someone at work had an increased rate of sixty-five percent, victims of sexual assault at work had an increased rate of sixty-four percent, denied access to appropriate bathrooms at work had an increased rate of fifty-nine percent, and misgendered repeatedly and intentionally by someone at work had an increased rate of fifty-six percent.<sup>78</sup>

## II. CURRENT LEGAL PROTECTIONS IN THE WORKPLACE

Although discrimination can take place in every stage of the employment process for gender diverse individuals, this Note focuses on discrimination in the form of sexual harassment within the workplace. Federal legal protections exist for gender diverse individuals in the employment sphere, but their application to transgender and non-binary persons is relatively new. Some states have created legislation that protects these employees from discrimination, but as indicated in Part I, many other states have or are in the process of adopting discriminatory legislation against gender diverse individuals and their family members. Such measures lead to increased stigma and fewer protections in all

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[<https://perma.cc/Z6BX-QRXF>] (finding the rate of poverty for transgender persons to be 29.4%, while the rate for cisgender straight persons is 15.7%); Moreau, *supra* note 63 (“Almost one third of respondents to the 2015 survey reported living in poverty, compared to 14 percent of the general U.S. population.”).

75. JAMES ET AL., *supra* note 58, at 5; *see also* Ruff et al., *supra* note 55, at 1991 (showing that a study of transgender women in California found that sixty-one percent of participants had attempted suicide at least once).

76. *See* Kathryn Piscopo et al., *Suicidal Thoughts and Behavior Among Adults: Results from the 2015 National Survey on Drug Use and Health*, SUBSTANCE ABUSE AND MENTAL HEALTH SERV. ADMIN. (Sept. 2016), <https://www.samhsa.gov/data/sites/default/files/NSDUH-DR-FFR3-2015/NSDUH-DR-FFR3-2015.pdf> [<https://perma.cc/D524-UELE>] (“The estimated 9.8 million adults aged 18 or older in 2015 who had serious thoughts of suicide in the past year represent 4.0 percent of adults aged 18 or older.”).

77. *See* HAAS ET AL., *supra* note 57, at 7, 11.

78. *Id.* at 11.



aspects of life for gender diverse persons, ultimately escalating the need for further safeguards in the workplace for these individuals.

### A. Title VII Generally & Bostock

Title VII was enacted “to improve the economic and social conditions of minorities and women by providing equality of opportunity in the workplace, [as workplace] conditions were part of a larger pattern of restriction, exclusion, discrimination, segregation, and inferior treatment of minorities and women in many areas of life.”<sup>79</sup> Title VII applies to private employers of fifteen or more employees “for each working day in each of twenty or more calendar weeks in the current or preceding calendar year” and protects employees from employment discrimination based on their membership in a recognized protected class.<sup>80</sup> Specifically, Title VII, employers are prohibited from failing or refusing to hire, discharging, or otherwise discriminate against “any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex[.]”<sup>81</sup> Employers are also forbidden from limiting, segregating, or classifying employees and applicants from employment “in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s . . . sex[.]”<sup>82</sup>

Before the *Bostock*<sup>83</sup> decision, whether discrimination “because of sex” under Section 703 of Title VII applied to discrimination and harassment based on one’s gender identity or sexual orientation was uncertain.<sup>84</sup> Traditionally, sex discrimination and harassment under Title VII only protected from such behavior because of biological sex and did not include discrimination against employees based on their sexual orientation or gender identity. In its 1989 *Price Waterhouse v. Hopkins*<sup>85</sup> decision, the Supreme Court held that discrimination and sexual harassment “because of sex” was not limited to being on the basis of biological sex but also encompassed discrimination and harassment on the basis of sex stereotypes.<sup>86</sup> *Price Waterhouse* involved a situation in which a female employee was denied partnership due to her employer’s

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79. 29 C.F.R. § 1608.1(b) (2022).

80. 42 U.S.C. § 2000e.

81. 42 U.S.C. § 2000e-2 (a)(1).

82. 42 U.S.C. § 2000e-2 (a)(2).

83. *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020).

84. *See generally* 42 U.S.C. § 2000e-2.

85. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

86. *See id.* at 250–52 (holding that “an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender” because Congress intended to strike discrimination based on sex stereotypes).

gendered criticisms of her demeanor, which was similar to the demeanor of many male colleagues who had become partners in the office.<sup>87</sup> The Court found these sex stereotype-based statements and the adverse employment actions taken on such a basis to be discrimination because of sex and therefore prohibited under Title VII.<sup>88</sup> The Court's opinion produced no further clarification on whether harassment or discrimination on the basis of an employee's sexual orientation or gender identity fell under Title VII's reach. Following *Price Waterhouse*, years of disagreement amongst federal courts about Title VII's protections of gender diverse persons, and more specifically whether discrimination on the basis of gender identity and sexual orientation were prohibited, plagued the legal field.<sup>89</sup> That was until the Supreme Court's monumental *Bostock* decision in 2020, which had a release so highly anticipated and viewed that it crashed the Court's computer system.<sup>90</sup>

The *Bostock* decision rested upon the combination of three unfortunate yet common cases where an employer discharged an employee after the employee revealed they were homosexual or transgender.<sup>91</sup> All three employees filed suit under Title VII, arguing that their employment termination was on the basis of their sexual orientation or transgender status, which was prohibited sex discrimination "because

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87. *Id.* at 234–36; see also Meredith Rolfs Severtson, Note, *Let's Talk About Gender: Nonbinary Title VII Plaintiffs Post-Bostock*, 74 VAND. L. REV. 1507, 1517 (2021) (“[A]n accounting firm refused to elevate a high-performing woman associate to partner status because firm leadership found her to be too abrasive and insufficiently feminine. The partners reviewing Ms. Hopkins for potential partnership criticized her in gendered terms, calling her ‘macho,’ suggesting that her demeanor was an ‘overcompensat[ion] for being a woman,’ and suggesting that she take ‘a course at charm school.’”).

88. *Price Waterhouse*, 490 U.S. at 250–52, 255–57.

89. See *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1737 (2020) (finding that an employer firing someone simply for being homosexual or transgender is forbidden by Title VII); see also Clawson, *supra* note 7, at 261–62 (explaining conflicting statements on Title VII protections between the Obama and Trump Administrations); compare *Ulane v. Eastern Airlines, Inc.* 742 F.2d 1081, 1084–86 (7th Cir. 1984) (finding that transgender individuals were not protected under Title VII), and *Etsitty v. Utah Transit Authority*, 502 F.3d 1215, 1221 (10th Cir. 2007) (holding that discrimination based on a person's status as “transsexual” was not discrimination “because of sex” under Title VII), *overruled by Bostock*, 140 S. Ct. 1731, with *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004) (finding there is not “any reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is [transgender],” as “discrimination against a plaintiff who is [transgender]—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against Ann Hopkins in *Price Waterhouse*, who, in sex-stereotypical terms, did not act like a woman.”).

90. Linda Greenhouse, *What Does ‘Sex’ Mean? The Supreme Court Answers*, N.Y. TIMES (June 18, 2020), <https://www.nytimes.com/2020/06/18/opinion/supreme-court-sex-discrimination.html> [<https://perma.cc/UAS3-CL9M>].

91. *Bostock*, 140 S. Ct. at 1737–38.

of [their] sex.”<sup>92</sup> Finally, the time for the Supreme Court to further clarify whether Title VII’s “because of sex” provision applied to discrimination and harassment on the basis of gender identity and sexual orientation had arrived. Generally, Justice Gorsuch’s majority opinion further elucidated Title VII’s “because of sex” language to prohibit harassment and the taking of adverse employment actions against employees on the basis of their homosexual or transgender status.<sup>93</sup>

The Court reasoned that in these types of discriminatory employment actions against gender and sexual orientation diverse individuals, sex plays a “but for” cause.<sup>94</sup> Specifically, the Court explained that by firing employees “for actions or attributes it would tolerate in an individual of another sex,” the employers had intentionally treated homosexual and transgender employees worse on the basis of their sex, constituting discriminatory action against them.<sup>95</sup> For example, if an employer fired a woman for dating women, the employer would terminate that employee’s employment for an action that it allows male employees to partake in.<sup>96</sup> Therefore, sex played “a necessary and undisguisable role in the [adverse] decision” and constitutes an actionable claim under Title VII.<sup>97</sup>

It is important to note that *Bostock* uses the language “homosexual and transgender” to describe the type of gender and sexual orientation diverse individual that Title VII protects.<sup>98</sup> The Court did not engage in discussion regarding non-binary individuals, which has led to some discussions regarding whether non-binary individuals would be protected under *Bostock*’s interpretation of Title VII.<sup>99</sup> Based on the Court’s logic in *Bostock* and EEOC guidance, it is likely that non-binary individuals would be protected under Title VII for discrimination on the basis of their

92. Brief of William N. Eskridge Jr. & Andrew M. Koppelman as Amici Curiae in Support of Employees at 2, *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020) (Nos. 17-1618, 17-1623 & 18-107) (“But for Zarda’s and Bostock’s male sex, their employers would not have objected to their dating men. But for Stephens’ sex assigned at birth, her employer would not have objected to her sex presentation.”); *see also* Brief for Petitioner at 10–12, *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020) (No. 17-1618) (“Sexual orientation discrimination is discrimination ‘because of sex’ because sexual orientation is a sex-based classification within the meaning of Title VII, and it is disparate treatment of an employee that would not occur ‘but for’ his sex.”).

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

94. *Id.* at 1739.

95. *Id.* at 1740.

96. *Sexual Orientation and Gender Identity (SOGI) Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/sexual-orientation-and-gender-identity-sogi-discrimination> [<https://perma.cc/RK57-XR25>] (last visited Apr. 15, 2022).

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

98. *Id.*

99. *E.g.*, Severtson, *supra* note 87, at 1524–30 (discussing *Bostock*’s implications on nonbinary employees).

gender identity, but further developments in the law could prove otherwise.<sup>100</sup>

### B. Title VII Hostile Work Environment Sexual Harassment Claims

Although *Bostock* primarily dealt with cases involving discriminatory employment termination, *Bostock*'s definition of "because of sex" to include sexual orientation and transgender identity applies broadly to other protections guaranteed by Title VII, such as the prohibition against sexual harassment in the workplace.<sup>101</sup> In 2020 alone, 11,497 sexual harassment charges were filed with the Equal Employment Opportunity Commission (EEOC), the federal agency charged with enforcing federal laws prohibiting employers from discriminating against an applicant or employee on the basis of their sex.<sup>102</sup> Notably, it is estimated that only a small fraction of employees who have faced workplace sexual harassment have reported the conduct to the EEOC due to fear of retaliation from their employer.<sup>103</sup> The EEOC defines sexual harassment as: "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment."<sup>104</sup>

There are two forms of prohibited workplace sexual harassment under Title VII. The first form is quid pro quo sexual harassment, which occurs

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100. See *Sexual Orientation and Gender Identity (SOGI) Discrimination*, *supra* note 96 ("It is unlawful to subject an employee to workplace harassment that creates a hostile work environment based on sexual orientation or gender identity.").

101. See *generally* *Doe v. Triangle Doughnuts, LLC*, 472 F. Supp. 3d 115, 129 (E.D. Pa. 2020) ("Very recently, in [*Bostock*,] the Supreme Court held that Title VII's language protects homosexual and transgender individuals from discrimination . . . It naturally follows that discrimination based on gender stereotyping falls within Title VII's prohibitions."); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) ("When the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated.").

102. 42 U.S.C. § 2000e-4; *Overview*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/overview> [<https://perma.cc/9EC4-MH8N>] (last visited Apr. 15, 2022); *Charges Alleging Sex-Based Harassment (Charges Filed with EEOC) FY 2010 – FY 2021*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/statistics/charges-alleging-sex-based-harassment-charges-filed-eeoc-fy-2010-fy-2020> [<https://perma.cc/2RH8-N6GW>] (last visited Apr. 10, 2022).

103. Yuki Noguchi, *Sexual Harassment Cases Often Rejected by Courts*, NPR (Nov. 28, 2017), <https://www.npr.org/2017/11/28/565743374/sexual-harassment-cases-often-rejected-by-courts> [<https://perma.cc/S3UM-9UY3>].

104. *Fact Sheet: Sexual Harassment Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/laws/guidance/fact-sheet-sexual-harassment-discrimination> [<https://perma.cc/R76F-G4ZL>] (last visited Mar. 26, 2023).

when an individual explicitly or implicitly conditions a job, benefit, or absence of a job or benefit upon an employee's acceptance of sexual conduct.<sup>105</sup> This Note focuses on the second form of prohibited sexual harassment: hostile work environment sexual harassment. Generally, to successfully bring a *prima facie* hostile work environment claim, an employee has the burden of showing that: (1) they were subjected to unwelcome harassment; (2) the unwelcome harassment was on the basis of their sex;<sup>106</sup> (3) the harassment was sufficiently severe or pervasive (or both) as to alter the terms and conditions of employment and create a work environment that was hostile or abusive; and (4) there is a basis for holding the employer liable for the misconduct.<sup>107</sup> This Note focuses on the third prong of the hostile work environment *prima facie* case requirement.

When showing that alleged harassment was severe or pervasive so as to alter the conditions of employment and create a hostile or abusive working environment, a plaintiff can show that the conduct was *either* severe, pervasive, or both.<sup>108</sup> To analyze whether harassment is sufficiently severe or pervasive to make out a *prima facie* sexual harassment claim under Title VII, courts look through both an objective and subjective lens.<sup>109</sup> More specifically, courts ask whether a reasonable person would find the conduct harassment and whether the employee found it to be so.<sup>110</sup> Courts look at the totality of the circumstances throughout this analysis by considering the frequency of the conduct, the severity of the conduct, whether the conduct unreasonably interfered with work performance, and how it affected the employee's psychological

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105. *The Law and Your Job*, A.B.A. (Mar. 18, 2013), [https://www.americanbar.org/groups/public\\_education/resources/law\\_issues\\_for\\_consumers/sexualharassment\\_quidproquo/plk](https://www.americanbar.org/groups/public_education/resources/law_issues_for_consumers/sexualharassment_quidproquo/plk) [<https://perma.cc/57S4-CQ5P>].

106. Regardless of the sex of the harasser, an employee plaintiff must show the harassment would not have taken place but for their sex. See *Oncala v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 78 (1998).

107. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986) (holding that a hostile work environment is a valid claim under Title VII and to prove this claim the harassment "must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment'") (citation omitted); *Faragher v. City of Boca Raton*, 524 U.S. 775, 787–88 (1998) (determining whether the work environment was hostile by looking at all the circumstances of the conduct); *Vance v. Ball State Univ.*, 646 F.3d 461, 469 (7th Cir. 2011) ("Ball State, however, is not liable to Vance under Title VII for a hostile work environment unless Vance can prove (1) that her work environment was both objectively and subjectively offensive; (2) that the harassment was based on her race; (3) that the conduct was either severe or pervasive; and (4) that there is a basis for employer liability."), *aff'd*, 570 U.S. 421 (2013).

108. *E.g.*, *Vance*, 646 F.3d at 469.

109. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–22 (1993).

110. *Id.*

well-being,<sup>111</sup> although an employee plaintiff does not need to show psychological injury.<sup>112</sup> “Simple teasing . . . , offhand comments, and isolated incidents (unless extremely serious)” do not amount to “discriminatory changes in the ‘terms and conditions of employment.’”<sup>113</sup>

Notably, there is a slight circuit split on “whether the severity or pervasiveness of alleged sexual harassment in the workplace should be looked at from the perspective of a reasonable person or a reasonable woman.”<sup>114</sup> But a majority of circuits follow a reasonable person standard that is arguably more difficult for plaintiffs to satisfy than the reasonable woman standard.<sup>115</sup> The Supreme Court has been silent regarding the use of the reasonable woman standard, but in *Oncale* elaborated that the perspective from which harassment should be judged is from “that of a reasonable person in the plaintiff’s position, considering ‘all the circumstances.’”<sup>116</sup> Some proponents of the reasonable woman standard saw the Court’s *Oncale* decision as both a protection of the standard and an implicit encouragement of its use.<sup>117</sup> Conversely, others found Scalia’s *Oncale* decision to hold the potential to chill hostile work environment claims within certain industries. These opponents of *Oncale* argue, amongst other problems, that the case implied that under the reasonable person standard, considering the totality of the circumstances, employees in certain industries might be desensitized to certain behaviors that would

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111. *Faragher*, 524 U.S. at 787–88 (“We directed courts to determine whether an environment is sufficiently hostile or abusive by “looking at all the circumstances,” including the “frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.”) (quoting *Harris*, 510 U.S. at 23).

112. *Harris*, 510 U.S. at 22.

113. *Faragher*, 524 U.S. at 788 (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998)).

114. V. Blair Druhan, *Severe or Pervasive: An Analysis of Who, What, and Where: An Analysis of Who, What, and Where Matters When Determining Sexual Harassment*, 66 VANDERBILT L. REV. 355, 361 (2013).

115. Currently, only the Ninth and Third Circuits have adopted the reasonable woman standard while the Fifth, Eighth, and First Circuits have rejected the standard. See *Ellison v. Brady*, 924 F.2d 872, 879–80 (9th Cir. 1991) (adopting the reasonable woman standard); *Hurley v. Atl. City Police Dep’t*, 174 F.3d 95, 115–16 (3d Cir. 1999) (finding that the reasonable woman standard “recognize[s] and respect[s] the difference between male and female perspectives on sexual harassment.”); see also *Ford v. Cty. of Hudson*, 729 F. App’x 188 (3d Cir. 2018) (applying a form of the reasonable woman standard); *Christian v. Umpqua Bank*, 984 F.3d 801, 811 (9th Cir. 2020) (applying the reasonable woman standard); Druhan, *supra* note 114, at 357–58 (“To date, only the Ninth and Third Circuits have adopted this theory, and the Supreme Court has not resolved this circuit split.”).

116. Nicole Newman, *The Reasonable Woman: Has She Made a Difference?*, 27 B.C. THIRD WORLD L.J. 529, 539 (2007) (quoting *Oncale*, 523 U.S. at 81).

117. *Id.*

constitute sexual harassment in other industries.<sup>118</sup> Critics have called *Oncale* “a clever way to limit sexual harassment suits generally” for this very reason.<sup>119</sup>

### C. Current EEOC Guidance and Recent Adjudications

Following the *Bostock* decision, the EEOC released new guidance resources “to educate employees, applicants and employers about the rights of all employees, including lesbian, gay, bisexual and transgender workers, to be free from sexual orientation and gender identity discrimination in employment.”<sup>120</sup> Although *Bostock* primarily dealt with cases involving discriminatory employment termination, *Bostock*’s defining “because of sex” to include sexual orientation and gender identity applies to hostile work environment claims under Title VII as well.<sup>121</sup> The EEOC delineates harassment against gender diverse individuals as including offensive or derogatory remarks regarding someone’s sexual orientation, offensive or derogatory remarks about someone’s transgender status, as well as intentional misgendering or deadnaming.<sup>122</sup>

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118. See *Oncale*, 523 U.S. at 81–82 (“We have emphasized, moreover, that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff’s position, considering ‘all the circumstances’ . . . In same-sex (as in all) harassment cases, that inquiry requires careful consideration of the social context in which particular behavior occurs and is experienced by its target. A professional football player’s working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field—even if the same behavior would reasonably be experienced as abusive by the coach’s secretary (male or female) back at the office. The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff’s position would find severely hostile or abusive.”) (internal citation omitted).

119. Catherine J. Lanctot, *The Plain Meaning of Oncale*, 7 WM. & MARY BILL RTS. J. 913, 915–17 (1999) (“Much of the analysis has highlighted *Oncale*’s call for ‘common sense,’ in evaluating sexual harassment claims ‘in context,’ as evidence that Justice Scalia intentionally sowed the seeds of destruction in his opinion; rather than being viewed as a victory for plaintiffs, *Oncale* has been characterized as a ‘Trojan horse.’”).

120. *EEOC Announces New Resources about Sexual Orientation and Gender Identity Workplace Rights*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (June 15, 2021), <https://www.eeoc.gov/newsroom/eeoc-announces-new-resources-about-sexual-orientation-and-gender-identity-workplace-rights> [<https://perma.cc/UHF9-UPJA>].

121. See *Sexual Orientation and Gender Identity (SOGI) Discrimination*, *supra* note 96 (“It is unlawful to subject an employee to workplace harassment that creates a hostile work environment based on sexual orientation or gender identity.”).

122. The EEOC also provides guidance that “[o]ffensive conduct may include, but is not limited to, offensive jokes, slurs, epithets or name calling, physical assaults or threats,

EEOC adjudications regarding intentional misgendering and deadnaming of employees have found that “inadvertent and isolated slips of the tongue,”<sup>123</sup> or one intentional instance of misgendering, is not severe or pervasive enough to rise to the level of a hostile work environment.<sup>124</sup> But, notably, the EEOC has cautioned employers on repeated intentional misgendering, as the conduct “[has] the potential to create a hostile work environment,”<sup>125</sup> due to the harm it can cause a gender diverse employee.<sup>126</sup> The EEOC has also encouraged employers to “advise its managers and employees about what behavior is appropriate in the workplace” with regards to misgendering.<sup>127</sup> Specifically, the agency states that “supervisors and coworkers should use the name and pronoun of the gender that the employee identifies with in employee records and in communications with and about the employee.”<sup>128</sup>

### III. LEGAL ANALYSIS

#### A. *Satisfaction of the Severe or Pervasive Standard*

From the time that the *Bostock* decision opened an avenue for hostile work environment claims to gender diverse individuals, courts have varied in their determinations of whether intentional misgendering and deadnaming are severe or pervasive enough to create a hostile work environment. While few hostile work environment claims brought by gender diverse individuals have yet to see their day in court since *Bostock*, as of the time this Note was composed, a handful of cases, like

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intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance.” *Sexual Orientation and Gender Identity (SOGI) Discrimination*, *supra* note 96.

123. Lusardi, EEOC DOC 0120133395, 2015 WL 1607756 at \*11 (Apr. 1, 2015).

124. *See* Royce O., EEOC DOC 2021001172, 2021 WL 5890398 at \*6 (Nov. 15, 2021) (holding that the supervisor’s actions were not severe or pervasive enough to rise to the level of a hostile work environment because the wrong pronoun was only used once and the supervisor apologized for using it).

125. *See id.* (“While isolated incidents of harassment generally do not violate federal law, a pattern of such incidents may be unlawful. We do not condone the statement made by S1 in reference to Complainant and caution the Agency against any future similar statements or conduct. We find that S1’s statement regarding claim 2 may have the potential to create a hostile work environment.”).

126. *See* Jameson, EEOC DOC 0120130992, 2013 WL 2368729, at \*1 (May 21, 2013) (“Intentional misuse of the employee’s new name and pronoun may cause harm to the employee, and may constitute sex based discrimination and/or harassment.”).

127. *Royce O.*, 2021 WL 5890398, at \*6.

128. *Jameson*, 2013 WL 2368729, at \*2.



*Doe v. Triangle Doughnuts, LLC*,<sup>129</sup> *Grimes v. County of Cook*,<sup>130</sup> and *Membreno v. Atlanta Restaurant Partners, LLC*,<sup>131</sup> have been heard by federal district courts.

Additionally, in January 2022, *Eller v. Prince George's County Public Schools*<sup>132</sup> was heard by a federal court; here, the plaintiff employee was subjected to five years' worth of severe verbal harassment on the basis of her transgender status while in the workplace.<sup>133</sup> Specifically, the employee "was repeatedly misgendered, including being deliberately referred to as 'he,' 'it,' 'sir,' 'mister,' 'guy in a dress,' and her former name."<sup>134</sup> "She was also called, both behind her back and to her face, a wide range of derogatory terms referring to her transgender status," and based on sex stereotypes, terms associated with being a pedophile or child

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129. In *Triangle Doughnuts*, the United States District Court of the Eastern District of Pennsylvania found that a transgender employee showed sufficiently severe and pervasive harassment to bring a hostile work environment claim. *Doe v. Triangle Doughnuts, LLC*, 472 F. Supp. 3d 115, 129 (E.D. Pa. 2020). Over a three-month span, the plaintiff experienced repeated intentional misgendering and deadnaming, threats of physical violence, and being subjected to a stricter dress code than other employees. *Id.* at 122–23. Although the alleged harassment occurred over a shorter span than in *Grimes* and *Membreno*, the court found the treatment severe enough to make out a prima facie case. *Id.* at 129–30.

130. In *Grimes*, the Northern District of Illinois denied an employer's motion to dismiss of a sexual harassment claim from a transgender employee, concluding the employee made a showing of pervasive alleged harassment. *Grimes v. Cty. of Cook*, 455 F. Supp. 3d 630, 645 (N.D. Ill. 2020). In *Grimes*, the employee's complaint alleged that based upon his transgender status, his "[c]o-workers . . . shunn[ed] [him] and would not communicate with him . . . on a daily basis" over several months and described three specific instances of harassment. *Id.* at 645. The harassment included a co-worker telling the employee, "You really do have a big ass, don't you?"; a coworker referring to him as a "girl," and another co-worker "referring to an unidentified individual who appeared to be female," remarking to the plaintiff, "You see that. That's a man. People ought to tell who they really are. That's how people get killed." *Id.* The court found that these instances, given their daily occurrence over several months, were sufficiently pervasive conduct to state a hostile work environment claim. *Id.* While the court followed EEOC guidance in this case, it is unclear how the court would have ruled if the plaintiff had experienced misgendering alone, without other forms of discrimination.

131. In *Membreno*, the plaintiff, a transgender woman, was subjected to almost ten years of "inhumane" treatment from coworkers and supervisors at the restaurant she worked at. *See Membreno v. Atlanta Rest. Partners, LLC*, 517 F. Supp. 3d 425, 431–34 (D. Md. 2021) (describing the pervasive history of harassment and discrimination the plaintiff faced on the basis of their gender identity). The General Manager repeatedly misgendered and deadnamed her, both publicly on the work schedule and in front of other employees and in private. *Id.* at 431. Other coworkers called her offensive slurs and threatened to hit her. *Id.* at 431–32. The United States District Court of Maryland found that "a reasonable factfinder could conclude that the persistent 'personal gender-based remarks that single out individuals for ridicule' were sufficient to create a hostile work environment." *Id.* at 442 (citing *EEOC v. Fairbrook Med. Clinic*, 606 F.3d 320, 328–29 (4th Cir. 2010)).

132. *Eller v. Prince George's Cnty. Pub. Schs.*, 580 F. Supp. 3d 154 (D. Md. 2022).

133. *See id.* at 176–77 (referring to the negative comments made by parents at the school and stating that the school took no action concerning this harassment).

134. *Id.* at 173.

molester.<sup>135</sup> The plaintiff was subjected to threats of physical violence and three assaults in the workplace and was able to provide medical evidence that the harassment she endured resulted in complex post-traumatic stress disorder.<sup>136</sup> Emphasizing that “[n]ames can hurt as much as sticks and stones,” the United States District Court of Maryland held that the conduct the plaintiff faced was severe and pervasive enough to create a hostile work environment.<sup>137</sup> Notably, the court collectively considered all of the conduct alleged in the claim but did not address whether the intentional misgendering and deadnaming were sufficient on their own to satisfy the severe or pervasive standard requirement of a hostile work environment claim.

Although the importance of cases like *Eller*—where the court not only found in favor of a transgender employee bringing a hostile work environment claim, but also acknowledged the deeply harmful nature of misgendering and deadnaming—should not be understated, *Eller* is only *one* district court case and provides no binding precedent on other circuits or higher-level federal courts. To avoid uncertainty for employers on what conduct creates a hostile work environment and to protect gender diverse individuals in the workplace, courts should recognize that intentional misgendering and deadnaming satisfies the severe or pervasive standard for hostile work environment claims. This could be a reality if courts (1) adopted a reasonable gender diverse person standard comparable to that of the reasonable woman standard used in some circuits, and (2) deferred to EEOC guidance and adjudications regarding sexual harassment, which finds that intentional misgendering and deadnaming in the workplace are sufficient to satisfy the severe or pervasive standard for hostile work environment claims under Title VII.

### 1. Reasonable Gender Diverse Person Standard

The analysis of whether conduct is severe or pervasive enough to alter the terms and conditions of employment is highly dependent on the court’s view of the alleged harassment. This makes the perceptible standard the court applies determinative of the claim’s livelihood. Specifically, the analysis can be impacted by judges’ and juries’ own biases, religious beliefs, gender identity, and personal behavioral practices.<sup>138</sup> With less than *one percent* of sitting judges identifying as

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135. *Id.*

136. *Id.*

137. *Id.* (citing EEOC v. Sunbelt Rentals, 521 F.3d 306, 318 (4th Cir. 2008)).

138. See Faragher v. City of Boca Raton, 524 U.S. 775, 787–88 (1998) (“[S]imple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment.”); see also Noguchi, *supra* note 103 (discussing judges’ biases and lack of uniformity in analyzing whether conduct is severe

LGBTQ,<sup>139</sup> the overall composition of the federal judiciary being exceptionally nondiverse, and an ongoing epidemic of discrimination against gender diverse individuals, the notion of a reasonable person standard is concerning. This standard is further problematic because the average person, judge, or jury has not experienced the hardships of being a transgender or nonbinary person in a cis-normative world.

Thus, due to the uniquely oppressive and discriminatory nature of the experiences transgender and non-binary individuals face in and outside of the workplace, the severity or pervasiveness of alleged sexual harassment against such individuals should be viewed through a lens comparable to that of the reasonable woman standard.<sup>140</sup> It should be noted that a reasonable gender diverse individual standard would not imply that transgender women are not women, but rather acknowledges the heightened forms of oppression and harassment transgender women face compared to that of cisgender persons and particularly, cisgender women.

The argument for adopting a reasonable gender diverse person standard follows a similar line of thought to that in favor of a reasonable woman standard, but is arguably more persuasive due to the ongoing minority status and discrimination gender diverse persons face daily. Proponents of the reasonable woman standard support their stance with numerous studies that show women are more likely than men to believe certain actions constitute harassment, as women have different experiences with and reactions to sexual harassment than men.<sup>141</sup> For example, in *Ellison v. Brady*,<sup>142</sup> a case where the Ninth Circuit adopted the reasonable woman standard in hostile work environment claims, the court discussed how “women are more likely to experience sexual

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or pervasive enough); Alexia Fernández Campbell, *How the Federal Courts Have Failed Victims of Sexual Harassment*, VOX (Dec. 14, 2018), <https://www.vox.com/policy-and-politics/2017/12/24/16807950/sexual-harassment-courts-lawsuit> [<https://perma.cc/BA7R-VBBN>] (“In the past 40 years, they say federal judges across the country (who are mostly men) have developed an extremely narrow interpretation of what sexual harassment is under the law[.]”).

139. *Examining the Demographic Compositions of U.S. Circuit and District Courts*, CTR. FOR AMERICAN PROGRESS (Feb. 13, 2020), <https://www.americanprogress.org/article/examining-demographic-compositions-u-s-circuit-district-courts/> [<https://perma.cc/TMF9-L5PD>].

140. *See Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991) (“We adopt the perspective of a reasonable woman primarily because we believe that a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women.”); *see also* *Christian v. Umpqua Bank*, 984 F.3d 801, 809–11 (9th Cir. 2020) (applying the reasonable woman standard to evaluate whether the alleged harassment a woman experienced amounted to that of severe or pervasive harassment).

141. A female employee is 13.8 percentage points more likely to report that sexually suggestive looks from a coworker constitute harassment and 12.9 percentage points more likely to believe sexual jokes and teasing from a coworker constitute sexual harassment. Druhan, *supra* note 114, at 374.

142. *Ellison*, 924 F.2d 872.

harassment, including sexual assault, making them more likely to be concerned with sexual harassment and more likely to believe certain conduct constitutes harassment.”<sup>143</sup> As recognized by the court, the implications of the above differing perceptions of conduct combined with a male-biased judicial system and society, “a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women.”<sup>144</sup> Although *Oncale* requires the court to view alleged harassment through a lens of that of “a reasonable person in the plaintiff’s position, considering ‘all the circumstances,’”<sup>145</sup> proponents of the reasonable woman standard, such as the Ninth Circuit, argue that most courts’ reviews of alleged harassment will likely be inherently male-biased, in line with much of American jurisprudence.<sup>146</sup>

Similarly, under the reasonable person standard (and even the reasonable woman standard), gender diverse individuals’ experiences and perspectives can easily be ignored, as these standards are inherently cisgender-biased forms of review. For example, transgender and non-binary individuals are intentionally misgendered *outside* of the workplace, arguably making even a few instances of intentional misgendering in the workplace more severe due to its compounding nature. For the same reason, gender diverse individuals are likely more aware of such offenses in the workplace than their cisgender colleagues.

Additionally, like the Ninth Circuit’s emphasis on the heightened likelihood of women experiencing sexual harassment, gender diverse individuals are more likely to experience harassment, discrimination, and assault on the basis of their sex and gender identity compared to cisgender individuals. Furthermore, intentional misgendering and deadnaming are largely harassment tactics used against gender diverse persons only, making it unlikely that a cisgender judge, or a reasonable cisgender person, would understand the gravity of intentional misgendering and deadnaming.<sup>147</sup>

Regardless of the predominately cis-normative perceptions of misgendering and deadnaming within courts, extensive data paints a picture of the destructive effects of intentional misgendering on gender diverse individuals, and the perceived severity of even just a few

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143. Druhan, *supra* note 114, at 365 (describing *Ellison*).

144. *Ellison*, 924 F.2d at 879.

145. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998).

146. *See Newman, supra* note 116, at 542 (quoting *Oncale*, 523 U.S. at 81).

147. *See generally* Sam Killermann, *30+ Examples of Cisgender Privileges*, IT’S PRONOUNCED METROSEXUAL, <https://www.itspronouncedmetrosexual.com/2011/11/list-of-cis-gender-privileges/> [<https://perma.cc/E4RK-ZDDA>] (last visited Mar. 22, 2023) (providing a general list of privileges cisgender people enjoy that transgender and non-binary individuals do not).

instances of such conduct.<sup>148</sup> Comparable to the premise of the reasonable woman standard, a reasonable gender diverse individual standard would provide a perspective for courts to adopt that reflects the heightened discrimination transgender and non-binary individuals face. Such a standard would also better capture subjectively severe or pervasive discrimination in the eyes of those experiencing and suffering from it most.<sup>149</sup>

The harm of a cis-normative reasonable person perception of the severity or pervasiveness of harassment is apparent in the *Teeter v. Loomis Armored US, LLC*<sup>150</sup> decision. In this Eastern District of North Carolina case, the plaintiff-employee transitioned to a male while employed by the employer.<sup>151</sup> After transitioning, a colleague told other employees about the plaintiff's transition, was overheard misgendering the plaintiff, and made derogatory comments about the plaintiff behind his back "quite often."<sup>152</sup> The plaintiff reported that the colleague's behavior was getting "worse and worse" to management and that "nobody would talk to [him]" because of a rumor spread that he had reported all of his coworkers for discriminating against him.<sup>153</sup> Based on this treatment, the Eastern District Court of North Carolina concluded that the colleague's intentional "eight or nine uses of feminine pronouns and single profane insult" toward the plaintiff employee were not sufficient to satisfy the severe or pervasive burden needed for a hostile work environment claim.<sup>154</sup> Specifically, the court viewed the above instances of intentional misgendering—which the plaintiff felt disturbed enough by to report to management—as simply "incivility and callous mistreatment" that is to be expected in the modern workplace.<sup>155</sup> Further, the court characterized the misgendering as "personalized and offensive" but overall "comparatively benign" in light of other Fourth Circuit hostile work environment claims alleging "unwanted touching, propositions, or other physically threatening or humiliating conduct."<sup>156</sup> Ultimately, the

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148. See McLemore, *supra* note 67, at 54 (discussing the detrimental effects that misgendering has on transgender individuals' identity).

149. One method of implementing a reasonable gender diverse individual standard is through introducing social framework evidence from expert testimony to provide background information on the experiences unique to transgender and non-binary individuals. See Anna I. Burke, Note, "It Wasn't That Bad:" *The Necessity of Social Framework Evidence in Use of the Reasonable Woman Standard*, 105 IOWA L. REV. 771, 797–98 (2020) (discussing the cost and practicality of applying a reasonable gender diverse individual standard).

150. *Teeter v. Loomis Armored US, LLC*, No. 7:20-CV-00079, 2021 WL 6200506 (E.D.N.C. Nov. 23, 2021).

151. *Id.* at \*3.

152. *Id.* at \*3–4.

153. *Id.* at \*4.

154. *Id.* at \*13–14.

155. *Id.* at \*13.

156. *Teeter*, 2021 WL 6200506, at \*13–14.

court found that no reasonable person would find the plaintiff's treatment severe or pervasive, granting the employer's motion for summary judgment.<sup>157</sup>

With a heightened attempted suicide rate almost thirteen times that of cisgender adults in the United States due to experiences of discrimination in the workplace, the characterization of intentional and repeated misgendering as benign is an outrageous slight to gender diverse individuals and a free pass for unlawful behavior to those intentionally misgendering individuals in the workplace.<sup>158</sup> The *Teeter* court (comprised of all cisgender judges) erred in its review of the conduct by viewing it from the perspective of the average *cisgender* individual. To this type of reasonable person, the conduct may not seem severe or pervasive. But if the court had viewed the harassment from the perspective of a reasonable gender diverse person who had faced similar intentional misgendering, likely for most of their life, it very well may have found the harassment sufficiently severe or pervasive.

Opponents of the reasonable woman standard argue that "a separate reasonableness standard for women is actually a legal setback because it sends the message that women are inherently unreasonable," making it contrary to principles of equality pushed by Title VII.<sup>159</sup> Additionally, some have argued that the standard has made no difference in whether a claim is more likely to succeed at the summary judgment stage than those claims where it is not applied.<sup>160</sup> Similar critiques of a reasonable gender diverse person standard likely exist with opponents potentially arguing that the standard further stigmatizes and creates less equality for gender diverse persons by implying that they are unreasonable or in need of a special standard different from that of cisgender persons.<sup>161</sup>

But a reasonable gender diverse person standard would apply to all gender diverse individuals equally without detracting from a court's review of the conduct at issue from the perspective "of a reasonable person in the plaintiff's position, considering 'all the circumstances,'" as instructed by *Oncale*.<sup>162</sup> For instance, some transgender and non-binary persons, like those of color or living in poverty, are likely to face more

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157. *Id.*

158. See HAAS ET AL., *supra* note 57, at 2 (stating that the prevalence of suicide attempts found by the National Gay and Lesbian Task Force and National Center for Transgender Equality is 41%, which vastly exceeds the 4.6% of the U.S. population who have attempted suicide and that fifty to fifty-nine of the respondents experienced discrimination at work).

159. Newman, *supra* note 116, at 540.

160. Elizabeth L. Shoenfelt et al., *Reasonable Person Versus Reasonable Woman: Does It Matter?*, 10 AM. UNIV. J. OF GENDER, SOCIAL POL'Y & L. 633, 669–70.

161. See Newman, *supra* note 116, at 540 ("[A] separate reasonableness standard for women is actually a legal setback because it sends the message that women are inherently unreasonable.").

162. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998).

discrimination than others with the same gender identity, like those who are white or upper class. While both gender diverse individuals would be negatively impacted by intentional misgendering and deadnaming in the workplace, the former may be more deeply (or easily) impacted, as they have likely faced more frequent harassment or discrimination in other aspects of their life. The intersectional nature of the human experience is essential to understanding whether a person experienced severe and pervasive behavior.

Another potential quibble with a reasonable gender diverse person standard is that it leaves one asking the question: why can't transgender and non-binary persons be included under the current reasonable person standard? After all, *Oncale's* current reasonable person standard claims to be a neutral, genderless individual that considers the totality of the circumstances in a situation. Is this not intersectional enough? In theory, a truly neutral reasonable person standard is ideal. But the reasonable person standard is constrained by reality—where cisgender males dominate the demographics of the judicial field. Gender diverse persons remain a significant and vulnerable minority and require a standard that views conduct through their eyes. Therefore, a reasonable gender diverse person would not create more inequality for transgender and non-binary persons, but rather, it would level the playing field of opportunities to succeed in the workplace, as Title VII was intended to do.

A reasonable gender diverse person standard is essential to better fulfilling Title VII purposes of access to equal employment opportunities, regardless of one's sex. As *Harris* recognized, "[a] discriminatorily abusive work environment . . . can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers."<sup>163</sup> Transgender and non-binary individuals who face intentional misgendering and deadnaming at work can be adversely impacted by even one instance of such discrimination, and are often derailed from successful careers due to such discrimination. This impact ultimately leads to the above-average rates of unemployment and poverty, further contributing to the marginalization of already severely marginalized gender diverse individuals.

## 2. Deferring to EEOC Guidance and Adjudications

Courts should defer to EEOC guidance and decisions when determining whether alleged harassment is severe or pervasive enough to withstand summary judgment in a hostile work environment claim. Limited deference to EEOC guidance can lead to inaccurate interpretations and applications of anti-discrimination statutes, giving

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163. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 22 (1993).

them meaning less than the “full remedial scope Congress intended.”<sup>164</sup> Evidence of this error can be seen “[o]n at least three occasions [where] the Supreme Court’s decision to disregard EEOC interpretation of federal antidiscrimination laws . . . led Congress to reverse the Court’s decisions and essentially to enact the EEOC’s interpretation directly into law.”<sup>165</sup>

Although courts are not required to follow EEOC guidance or adjudication decisions, they give varying levels of deference to agency interpretations and actions.<sup>166</sup> When Congress created Title VII, it did not “confer upon the EEOC authority to promulgate substantive rules.”<sup>167</sup> Accordingly, the Supreme Court has modeled a reluctance to defer to the EEOC’s guidance regarding Title VII, finding that “[EEOC] guidelines construing statutory meaning or legislative intent were not entitled to the same weight as rules that Congress had declared to carry the force of law.”<sup>168</sup> Additionally, the Court has stated that “policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law,” warrant even less deference.<sup>169</sup> Although not guaranteed, a court can defer to the EEOC’s guidance or adjudications in varying degrees. Under this form of deference, often characterized as *Skidmore*<sup>170</sup> deference, the weight a court places on EEOC guidance or adjudications can alter depending “upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”<sup>171</sup>

Interestingly, the EEOC’s role under Title VII was expanded in 1972, as Congress “recognized a need for an administrative agency with

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164. Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 FORDHAM L. REV. 1937, 1938 (2006).

165. *Id.* at 1950.

166. *See generally*, *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) (finding that administrative rulings are not controlling but may be used for guidance); *see also* *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) (“We have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations.”).

167. James J. Brudney, *Chevron and Skidmore in the Workplace: Unhappy Together*, 83 FORDHAM L. REV. 497, 505 (2014) (citing *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 141 (1976)).

168. *Id.* (citing *Gilbert*, 429 U.S. at 141–43); *see also* Hart, *supra* note 164, at 1942 (“Much of the time, whether it agrees with the agency or not, the Court has simply declined to decide what standard of deference it should apply to an EEOC interpretation, even when the interpretation at issue is made pursuant to the agency’s explicitly delegated authority.”); Laura Anne Taylor, Note, *A Win for Transgender Employees: Chevron Deference for the EEOC’s Decision in Macy v. Holder*, 15 UTAH L. REV. 1165, 1187–88 (“The EEOC’s guidelines, unlike its more formal proceedings, have routinely been given *Skidmore* deference.”).

169. *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000).

170. Taylor, *supra* note 168, at 1187.

171. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (describing the *Skidmore* factors).



acknowledged expertise in the area of discrimination.”<sup>172</sup> Not only did House and Senate Committee Reports to the amendment recognize the EEOC as *the* experts on employment discrimination issues, but they also explained that it would be expected “that through the administrative process, the Commission [would] continue to define and develop the approaches to handling serious problems of discrimination that are involved in the area of employment.”<sup>173</sup>

The EEOC expressly states that intentional misgendering and deadnaming can “contribute to an unlawful hostile work environment.”<sup>174</sup> Additionally, the EEOC repeatedly states that intentional, persistent misgendering and deadnaming create a hostile work environment.<sup>175</sup> For instance, in *Lusardi*, the EEOC adjudicated a case in which a supervisor persistently intentionally misgendered and deadnamed a transgender female employee both over e-mail and in the workplace.<sup>176</sup> Specifically, the supervisor called the employee “sir” on “approximately seven occasions,” as well as referred to the employee by male names and their deadname.<sup>177</sup> Citing *Oncale*’s standard, the EEOC stated that “[p]ersistent failure to use the employee’s correct name and pronoun may constitute unlawful, sex-based harassment if such conduct is either severe or pervasive enough to create a hostile work environment when ‘judged from the perspective of a reasonable person in the employee’s position.’”<sup>178</sup> In this case, the EEOC Commission found that the “repeated and intentional conduct was offensive and demeaning to [the employee] and would have been so to a reasonable person in [the employee’s] position.”<sup>179</sup> In particular, because the employee had clearly communicated “that her gender identity is female and her personnel records reflected the same . . . [y]et [the supervisor] continued to frequently and repeatedly refer to [the employee] by a male name and male pronouns,” the supervisor’s actions and demeanor made it clear that

172. Hart, *supra* note 164, at 1952.

173. *Id.* (citing S. Rep. No. 92-415, at 19 (1971)); *see also* H.R. Rep. No. 92-238, at 10 (1972), *as reprinted in* 1972 U.S.C.C.A.N. 2146 (“Administrative tribunals are better equipped to handle the complicated issues involved in employment discrimination cases.”).

174. *See Sexual Orientation and Gender Identity (SOGI) Discrimination*, *supra* note 96.

175. *Lusardi*, EEOC DOC 0120133395, 2015 WL 1607756, at \*11 (Apr. 1, 2015); *see also* Royce O., EEOC DOC 2021001172, 2021 WL 5890398, at \*6 (Nov. 15, 2021) (“While isolated incidents of harassment generally do not violate federal law, a pattern of such incidents may be unlawful.”); Jameson, EEOC DOC 0120130992, 2013 WL 2368729, at \*2 (May 21, 2013) (“Intentional misuse of the employee’s new name and pronoun may cause harm to the employee, and may constitute sex based discrimination and/or harassment.”).

176. *Lusardi*, 2015 WL 1607756, at \*10–11.

177. *Id.*

178. *Id.* at \*11 (citing *Oncale v. Sundowner Offshore Services*, 523 U.S. 75, 81 (1998)).

179. *Id.*

their misgendering and deadnaming of the employee “was not accidental, but instead was intended to humiliate and ridicule” her.<sup>180</sup>

Post-*Bostock*, not many hostile work environment sexual harassment claims by transgender and non-binary individuals have made it to trial. So, courts have had minimal opportunities to defer, or decline to defer, to the EEOC’s guidance. Some of the cases that have ended up in court, like *Triangle Doughnuts*, *Grimes*, and *Membreno*, have resulted in holdings that conform with EEOC guidance on what behavior constitutes severe or pervasive harassment towards gender diverse persons.<sup>181</sup> But others, like *Teeter*, have declined to do so by permitting repeated, intentional misgendering directly in conflict with EEOC guidance.<sup>182</sup> The lack of deference granted to the EEOC’s guidance in cases like *Teeter* results in inconsistent applications of the law and inadequate protections of gender diverse individuals in the workplace compared to those upon which the EEOC has provided guidance and adjudications. The contrast between *Teeter* and EEOC guidance and adjudications also creates uncertainty for employers on whether intentional misgendering and deadnaming of gender diverse persons creates a hostile work environment for liability purposes.

In applying the *Skidmore* factors (which can garner more deference to EEOC guidance and adjudications from courts than traditional *Skidmore* deference), there is a strong argument that courts should defer to EEOC guidance and adjudications on intentional misgendering and deadnaming in their decisions.<sup>183</sup>

First, “an administrative interpretation is particularly persuasive when the administrative agency has demonstrated ‘thoroughness evident in its

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180. *Id.*

181. *See Doe v. Triangle Doughnuts, LLC*, 472 F. Supp. 3d 115, 129 (E.D. Pa. 2020) (concluding that plaintiff plead sufficient facts for a hostile work environment based on the intentional discrimination she faced including being misgendered, asked about her anatomy, and subjected her to a stricter dress code than other female employees); *Grimes v. Cnty. of Cook*, 455 F. Supp. 3d 630, 645 (N.D. Ill. 2020) (holding that the constant harassment of the employee, which occurred for several months, was severe and pervasive); *Membreno v. Atlanta Rest. Partners, LLC*, 517 F. Supp. 3d 425, 442 (D. Md. 2021) (finding sufficient evidence of a hostile work environment because employee was repeatedly ridiculed, mocked, and assaulted).

182. *Compare Lusardi*, 2015 WL 1607756, at \*11 (finding that intentional misgendering and deadnaming on at least seven occasions was sufficient to create a hostile work environment), *with Teeter v. Loomis Armored US, LLC*, No. 7:20-CV-00079, 2021 WL 6200506, at \*13 (E.D.N.C. Nov. 23, 2021) (finding that eight or nine instances of intentional misgendering and deadnaming was not sufficient to make a hostile work environment).

183. *See Eirhart v. Libbey-Owens-Ford Co.*, 616 F.2d 278, 281–82 (7th Cir. 1980) (finding that a district court erred by not giving deference to an EEOC determination because the *Skidmore* factors had all been satisfied, signifying that courts should give greater deference to EEOC determinations when they meet these factors); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) (explaining the *Skidmore* factors).

consideration' of the issue."<sup>184</sup> Years of EEOC expertise and work have aimed to understand and better protect transgender and non-binary individuals. Arguably, the EEOC has a much better grasp on how gender diverse persons perceive and are affected by intentional misgendering and deadnaming than primarily cisgender heterosexual courts and juries. Additionally, like in the *Lusardi* case, the EEOC released multiple-page adjudications, signifying the depth of its thoroughness regarding its determination of intentional misgendering and deadnaming as severe or pervasive.<sup>185</sup>

Second, the "validity of [an agency's] reasoning' can make its interpretation more persuasive."<sup>186</sup> Extensive data from various reliable sources show that the EEOC's reasons for classifying intentional misgendering and deadnaming as harassment are valid.<sup>187</sup> These forms of harassment deeply impede transgender and non-binary individuals' equality of opportunity in the workplace, directly conflicting with the purpose of Title VII.<sup>188</sup> Additionally, the EEOC found that even under the reasonable person standard of *Oncale*, being on the receiving end of intentional misgendering and deadnaming is sufficient to create a hostile work environment.<sup>189</sup>

Third, the consistency of agency decisions can contribute to the weight in favor of deference.<sup>190</sup> In its 2012 adjudication of *Macy v. Holder*,<sup>191</sup> the EEOC acknowledged that "claims of discrimination based on transgender status, also referred to as claims based on gender identity, are cognizable under Title VII's sex discrimination prohibition."<sup>192</sup> Since 2012, the EEOC has also held steady in its determination that persistent,

184. Taylor, *supra* note 168, at 1188 (citing *Skidmore*, 323 U.S. at 140).

185. See *Lusardi*, 2015 WL 1607756, at \*11; see also Taylor, *supra* note 168, at 1188 (describing the thoroughness of the EEOC's *Macy v. Holder* decision and arguing for heightened *Skidmore* deference for the decision before *Bostock*).

186. Taylor, *supra* note 168, at 1188 (citing *Skidmore*, 323 U.S. at 140).

187. See *supra* notes 50–78 (describing the severe effects of misgendering and deadnaming within the workplace on transgender and nonbinary individuals).

188. See generally 29 CFR § 1608.1(b) (2022) ("Congress enacted title VII in order to improve the economic and social conditions of minorities and women by providing equality of opportunity in the work place."); see also *McMenemy v. City of Rochester*, 241 F.3d 279, 284 (2d Cir. 2001) (finding an EEOC interpretation of Title VII persuasive because it was consistent with a primary purpose of Title VII's retaliation clause).

189. See *Lusardi*, 2015 WL 1607756, at \*11 ("[U]nder the facts of this case, [the supervisor's] actions and demeanor made clear that [their] use of a male name and male pronouns in referring to [the employee] was not accidental, but instead was intended to humiliate and ridicule [her]. As such, [the supervisor's] repeated and intentional conduct was offensive and demeaning to [the employee] and would have been so to a reasonable person in [the employee's] position.")

190. *Skidmore*, 323 U.S. at 140.

191. Mia Macy, EEOC DOC 0120120821, 2012 WL 1435995 (Apr. 20, 2012).

192. *Id.* at \*4–6; see also Complainant, EEOC DOC 0120133080, 2015 WL 4397641, at \*4 (July 16, 2015).

intentional misgendering and deadnaming can create a hostile work environment.<sup>193</sup> Lastly, *Skidmore*'s fourth factor—"all those factors which give it power to persuade"<sup>194</sup>—serves as a catchall for additional circumstances that make the EEOC's judgment more persuasive to courts.<sup>195</sup>

Fortunately, EEOC guidance and adjudications, although not binding on courts, can still alter employers' actions, as an agency hearing is something many employers likely want to avoid. Additionally, warnings from EEOC hostile work environment hearings may chill further allowance, or impartiality, towards intentional misgendering and deadnaming in the workplace by employers.<sup>196</sup> Thus, there is hope that the EEOC's recognition of intentional misgendering and deadnaming as forms of harassment against gender diverse individuals will push employers to include education on such discriminatory conduct in workplace trainings and take reports of the conduct seriously. But the ultimate question is whether the courts will catch up in correcting such discriminatory conduct or remain complacent, in conflict with EEOC guidance and adjudications.

### B. *Reform of the Severe or Pervasive Standard in Hostile Work Environment Claims*

Additionally, regardless of whether intentional misgendering and deadnaming can satisfy the present severe or pervasive standard, a better solution to inconsistencies amongst courts would be to reform the burden on plaintiffs bringing hostile work environment claims. The unduly restrictive severe or pervasive burden should be lowered to that of proving an employee was subjected to inferior terms, conditions, or privileges of employment because of their sex. While federal reform would be the gold standard of rectification, it has proven unlikely.<sup>197</sup>

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193. See *Lusardi*, 2015 WL 1607756, at \*11; Royce O., EEOC DOC 2021001172, 2021 WL 5890398, at \*6 (Nov. 15, 2021); Jameson, EEOC DOC 0120130992, 2013 WL 2368729, at \*2 (May 21, 2013).

194. *Skidmore*, 323 U.S. at 140.

195. Taylor, *supra* note 168, at 1189.

196. See Royce O., 2021 WL 5890398, at \*6 ("We do not condone the statement made by S1 in reference to Complainant and caution the Agency against any future similar statements or conduct. We find that S1's statement regarding claim [two] may have the potential to create a hostile work environment so we caution the Agency to advise its managers and employees about what behavior is appropriate in the workplace.").

197. For example, The Bringing an End to Harassment by Enhancing Accountability and Rejecting Discrimination (BE HEARD) in the Workplace Act of 2021 has been introduced in both the U.S. Senate and U.S. House of Representatives multiple times but has yet to succeed. See *Congress Reintroduces BE HEARD Act That Covers All Workers, Regardless of Size of Workplace*, NAT'L WOMEN'S L. CTR. (Nov. 17, 2021), <https://nwlc.org/press-release/congress->

Thus, state reform is more realistic, evidenced by the recent adoption of such standards in numerous states. These measures benefit both gender diverse employees and employers. Specifically, parties are put on clear notice of conduct that constitutes hostile work environment sexual harassment, employers avoid crippling liability, and employees are better safeguarded against potentially deadly abuses rooted in misgendering and deadnaming that cause inequality of employment opportunities on the basis of sex to linger in the employment sphere.

Regardless of whether intentional misgendering and deadnaming can satisfy the present severe or pervasive standard, a better solution to inconsistencies amongst courts' applications of the standard would be reform of the burden on plaintiffs bringing hostile work environment claims. Hostile work environment claims have been recognized for over thirty-five years, yet a staggering ninety percent of gender diverse individuals report having faced employment discrimination in the form of workplace harassment.<sup>198</sup> Additionally, the number of filed sexual harassment claims with the EEOC has remained relatively steady since 2010.<sup>199</sup> Clearly, something within the Title VII hostile work environment scheme needs adjustment to account for prevalent modern-day issues. As one of the documented hurdles for plaintiffs bringing claims, the severe or pervasive standard is an exceptional starting point for hostile work environment claim requirement revisions.<sup>200</sup>

Proof of the severe or pervasive standard-rooted hardships in bringing a successful *prima facie* hostile work environment claim lies in the minimal percentage of claims that make it to trial and the frequent awarding of employer summary judgments in those claims that do survive.<sup>201</sup> The severe or pervasive standard is challenging for plaintiffs

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reintroduces-be-heard-act-that-covers-all-workers-regardless-of-size-of-workplace-2/ [https://perma.cc/A6U3-R9MH]; see also Sabato, *supra* note 6, at 155 ("BE HEARD refines the [severe or pervasive] standard by articulating multiple factors to determine whether conduct amounts to harassment. The factors include: 1) frequency and duration of the conduct; 2) location where the conduct occurred; 3) number of individuals engaged in the conduct; 4) whether the conduct was humiliating, degrading, or threatening; 5) any power differential between the alleged harasser and the person allegedly harassed; and 6) whether the conduct involves stereotypes about the protected class involved. By providing a more comprehensive set of factors to consider, the courts may be better positioned to rule more consistently and effectively.").

198. Burns & Krehely, *supra* note 61; see also Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66 (1986) (recognizing hostile work environment claims as discrimination under Title VII for the first time).

199. Since 2010, the number of sexual harassment claims filed with the EEOC has ranged between 11,497 (2020), and 13,055 (2018). See *Sexual Orientation and Gender Identity (SOGI) Discrimination*, *supra* note 96.

200. See Christiansen, *supra* note 6 ("The new state laws soften this standard, which has frequently resulted in employer summary judgments in federal court.").

201. See Noguchi, *supra* note 103 ("Nielsen's random sampling of cases showed half of cases settle out of court and another 37 percent were dismissed pretrial.").

to satisfy, as what is considered severe or pervasive has narrowed over time, leaving employees asking whether they have been “harassed enough” to bring a claim.<sup>202</sup> The narrowing of what conduct meets the standard is often cited as a preventative measure by courts to ensure Title VII does not become a “general civility code.”<sup>203</sup> To better protect all employees, especially those most marginalized, like gender diverse individuals, the unduly burdensome severe or pervasive standard should be lowered to that of proving an employee was subjected to inferior terms, conditions, or privileges of employment on the basis of their sex. Even though the current severe or pervasive standard is enveloped by critical discourse, no movement towards a lower standard has been successful on a federal level yet.<sup>204</sup> On a state level, this reform is entirely possible, indicated by its recent adoption in some state employment anti-discrimination statutory schemes.<sup>205</sup>

While after *Bostock*, gender diverse persons can now seek remedy for employment discrimination experienced in any state on a federal level, many states have laws that explicitly prohibit discrimination on the basis of sexual orientation, gender identity, or both.<sup>206</sup> Some of these states provide no further protections for gender diverse individuals than what Title VII provides.<sup>207</sup> Others, like New York and California, provide more extensive safeguards against employment discrimination on the

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202. Sandra Sperino, a University of Cincinnati professor, describes reading through thousands of sexual harassment cases involving situations where a person was groped at work, just to then have their case dismissed before going to trial due to a judge finding the conduct insufficiently severe or pervasive to satisfy Title VII sexual harassment standards. See Noguchi, *supra* note 103; see also Rachel Ford, *Sure, You Were Harassed at Work. But Were You Harassed Enough? A Look at the Supreme Court’s ‘Severe or Pervasive’ Standard Under Title VII*, UNIV. CIN. L. REV. (2021), <https://uclawreview.org/2021/06/30/sure-you-were-harassed-at-work-but-were-you-harassed-enough-a-look-at-the-supreme-courts-severe-or-pervasive-standard-under-title-vii/> [<https://perma.cc/9B55-4BFE>] (“[A] massive number of victims still have no actionable claims under federal discrimination statutes due to the ‘severe or pervasive standard.’ Before bringing suit, an employee must ask herself, ‘Have I been harassed enough to reach the ‘severe or pervasive’ standard for a hostile work environment claim?’”).

203. *Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998) (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998)).

204. See *Sabato*, *supra* note 6, at 153 (“[S]tates applying federal law continue to employ the existing standard from case law, where the lower courts have required treatment that is pervasive or severe as the standard of a hostile work environment.”).

205. The Movement Advancement Project has compiled a list of federal, state, and local laws that protect transgender and nonbinary persons in the workplace. *Employment Nondiscrimination*, MOVEMENT ADVANCEMENT PROJECT, [https://www.lgbtmap.org/equality\\_maps/employment\\_non\\_discrimination\\_laws/state](https://www.lgbtmap.org/equality_maps/employment_non_discrimination_laws/state) [<https://perma.cc/PM7D-45SK>] (last visited Mar. 29, 2022).

206. See *id.*

207. As of March 20, 2022, Alabama, Arkansas, Georgia, Idaho, Indiana, Louisiana, Mississippi, Missouri, Montana, North Carolina, Oklahoma, South Carolina, South Dakota, Tennessee, West Virginia, and Wyoming had “[n]o explicit prohibitions for discrimination based on sexual orientation or gender identity in state law.” *Id.*

basis of an employee's sex, gender identity, or sexual orientation in the workplace for transgender and nonbinary individuals.<sup>208</sup>

In 2019, in response to the "#MeToo" movement, New York enacted legislation to "explicitly remove the restrictive severe or pervasive standard for establishing a hostile work environment claim."<sup>209</sup> The new standard defines harassment as an "unlawful discriminatory practice when it subjects an individual to inferior terms, conditions, or privileges of employment because of the individual's [sex],"<sup>210</sup> regardless of whether such harassment is severe or pervasive.<sup>211</sup> Although, employers "may still raise a defense if the actions were not more than 'petty slights or trivial inconveniences.'"<sup>212</sup>

In 2018, California legislators expanded state anti-discrimination statutes to include harassment that not only creates a hostile work environment, but also offensive, oppressive, or intimidating environments as well.<sup>213</sup> Additionally, California law now defines this actionable level of harassment as "conduct [that] sufficiently offends, humiliates, distresses, or intrudes upon its victim, so as to disrupt the victim's emotional tranquility in the workplace, affect the victim's ability to perform the job as usual, or otherwise interfere with and undermine the victim's personal sense of well-being."<sup>214</sup> Finally, the state's law clarifies what the severe or pervasive standard means, explaining that a "single incident of harassment is sufficient to create a hostile work environment if the harassment has unreasonably interfered with the employee's work performance or created an intimidating, hostile or offensive working

208. See ANDREA JOHNSON ET AL., 2020 PROGRESS UPDATE: METOO WORKPLACE REFORMS IN THE STATES 16–17 (2020), [https://nwlc.org/wp-content/uploads/2020/09/v1\\_2020\\_nwlc2020\\_States\\_Report.pdf](https://nwlc.org/wp-content/uploads/2020/09/v1_2020_nwlc2020_States_Report.pdf) [<https://perma.cc/VX2X-4UYC>] (stating that both New York and California made changes to the severe and pervasive standard); see also Robert H. Bernstein et al., *Attention New York Employers: When It Comes to Workplace Harassment, Times Are Changing*, NAT'L L. REV. (Aug. 20, 2019), <https://www.natlawreview.com/article/attention-new-york-employers-when-it-comes-to-workplace-harassment-times-are> [<https://perma.cc/Q4ZW-RNTJ>] (discussing the new legislation amending the New York State Human Rights Law); Janine Dayeh, "Locker Room Talk" or Sexual Harassment? The Push for a Federal Modification of the Severe or Pervasive Standard, 46 SETON HALL LEGIS. J. 375, 376–77 (2022).

209. JOHNSON ET AL., *supra* note 208, at 16; see also Governor Cuomo Signs Legislation Enacting Sweeping New Workplace Harassment Protections, N.Y. STATE DIV. HUM. RTS. (Aug. 12, 2019), <https://dhr.ny.gov/newworkplaceharassmentprotections> [<https://perma.cc/8NN7-H8NN>].

210. The Human Rights Law (HRL), N.Y. EXEC. LAW § 296 (2022); *Sexual Harassment Is Against the Law*, N.Y. STATE DIV. HUM. RTS., <https://dhr.ny.gov/system/files/documents/2022/05/nysdhr-sexual-harassment.pdf> [<https://perma.cc/WHZ7-GH9D>] (last visited Apr. 15, 2022); JOHNSON ET AL., *supra* note 208, at 16.

211. N.Y. EXEC. LAW § 296(h).

212. Sabato, *supra* note 6, at 151 (citing *New Workplace Discrimination and Harassment Protections*, N.Y. DIV. HUM. RTS., <https://dhr.ny.gov/new-workplace-discrimination-and-harassment-protections> [<https://perma.cc/2HK3-D78A>] (last visited Mar. 22, 2023)).

213. CAL. GOV'T CODE § 12923 (West 2018).

214. *Id.*

environment.”<sup>215</sup> A California victim must only show that the harassment made it more difficult to do their job and not that their productivity decreased due to the harassment.<sup>216</sup>

Both of these state standards provide more employee protections than the current severe or pervasive requirements for Title VII hostile work environment claims and recognize the need for better access to remedies for victims of employment discrimination.<sup>217</sup> The benefit of both standards is that they lower the burden on plaintiffs bringing state hostile work environment claims, which ultimately allows employees facing harmful intentional misgendering and deadnaming in the workplace to forego enduring multiple months, or even years, of such treatment before bringing a claim. Rather than asking whether the harassment they have endured is enough, transgender and non-binary employees could seek redress more expeditiously.

A downside of legislation like that of California’s is its broad nature. Although the legislation only applies to discrimination based on membership in a protected class, conduct that “sufficiently offends”<sup>218</sup> someone is a vague prohibition. Imposing employer liability based on offensive conduct arguably veers away from Title VII’s purpose in that it has the potential to operate as a “general civility code for the American workplace.”<sup>219</sup> Paired with the legislature’s clarification that one instance of harassment could be sufficient to satisfy the severe or pervasive standard, employers may face more liability than necessary for their employees’ actions that happen once, or infrequently. Such behaviors are better off being prohibited through post-harassment measures like reprimand, suspension, or termination, than litigation. Further, while state law can exceed the maximum protections afforded under Title VII, unpredictable employer liability is a major disadvantage of implementing a legally enforced civil code of conduct in the workplace.

Additionally, the California legislation has the potential to raise issues when determining the intention of the alleged harasser’s conduct, such as misgendering or deadnaming, if one instance is sufficient to create a

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215. Kristy D’Angelo-Corker, *Severe or Pervasive Should Not Mean Impossible and Unattainable: Why the “Severe or Pervasive” Standard for a Claim of Sexual Harassment and Discrimination Should Be Replaced with a Less Stringent and More Current Standard*, 50 HOFSTRA L. REV. 1, 32 (2021) (citing S.B. 1300, 2018 Legis. Counsel (Cal. 2018)); JOHNSON ET AL., *supra* note 208, at 17.

216. See JOHNSON ET AL., *supra* note 208, at 17.

217. See D’Angelo-Corker, *supra* note 215, at 32–33, 37 (noting that it is “manageable, as it lowers the bar for victims of sexual harassment and discrimination as to what will constitute actionable conduct and gives those victims a viable path to justice”); see also Sabato, *supra* note 6, at 153 (noting that “the implemented state laws from both California and New York demonstrate the prevalence of sexual harassment and the need for a response”).

218. S.B. 1300, 2018 Legis. Counsel (Cal. 2018).

219. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998).



hostile work environment. Oftentimes, whether misgendering and deadnaming were intentional or accidental is determined by assessing whether the alleged harasser had misgendered or deadnamed the gender diverse individual before, was instructed the naming was incorrect based on the individual's identity, and then continued to refer to the individual with the wrong terms.<sup>220</sup> But, one could foresee a situation in which it may be uncertain whether the alleged harasser would act similarly in the future after being disciplined or educated.

For these reasons, a standard like that of New York is more appropriately tied to protecting gender diverse individuals while also avoiding creating a civil code of conduct by which employers can be held liable for their employee's violations. New York's legislation prohibits conduct that "subjects an individual to inferior terms, conditions, or privileges of employment because of the individual's [sex]."<sup>221</sup>

This standard does not go so far as California's to prohibit offensive behavior in the workplace, but it does remove the traditional severe or pervasive burden for plaintiffs. New York's standard also removes the need for a reasonable gender diverse person standard, as intentional misgendering and deadnaming are clearly inferior conditions within the workplace that for the most part, only gender diverse persons will face. Most importantly, this standard protects transgender and non-binary employees who bring state employment discrimination claims for work conditions faced like that of the employee in *Teeter*<sup>222</sup>—who was denied protection under Title VII. This state safeguard is important, as federal courts like that in *Teeter*<sup>223</sup> have demonstrated a readiness to leave gender diverse individuals who have been intentionally misgendered and deadnamed in the workplace without a legal remedy under Title VII as it stands today.

## CONCLUSION

Transgender and nonbinary individuals have been thrust into the center of an epidemic of hate and violence that doesn't stop at the office entrance. This Note has shown the dire need for a heightened and tailored application of workplace protections for transgender and non-binary individuals under Title VII and similar state schemes. Intentional misgendering and deadnaming in the workplace causes significant

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220. See McNamarah, *supra* note 36, at 2263 (stating that intentional misgendering occurs when "a speaker knows and is fully aware of the referent's gender-appropriate language and deliberately chooses not to use it or chooses to use language at odds with it. Intentional misgendering is perhaps most obvious with respect.").

221. The Human Rights Law (HRL), N.Y. EXEC. LAW § 296 (2022).

222. See *Teeter v. Loomis Armored US, LLC*, No. 7:20-CV-00079, 2021 WL 6200506, at \*1 (E.D.N.C. Nov. 23, 2021).

223. See *id.*

impacts on the lives and careers of gender diverse individuals. To better satisfy Title VII's purpose of creating equal employment opportunities for all, regardless of one's gender identity or sexual orientation, courts should first use a reasonable gender diverse person standard rather than a reasonable person standard when determining whether alleged workplace conduct is sufficiently severe or pervasive to create a hostile work environment. Second, courts should defer to EEOC guidance and adjudicative decisions prohibiting intentional misgendering and deadnaming in the workplace. And third, plaintiffs' burden of proof for showing severe or pervasive harassment under Title VII should be lowered to a standard like that of New York, requiring proof that the plaintiff was subjected to inferior terms, conditions, or privileges of employment because of their sex. This is necessary on both the federal and state levels to ensure uniform protection of gender diverse persons nationwide.

Not only would these three proposed measures further protect gender diverse individuals, but they would also serve as notice for employers that intentional misgendering and deadnaming are prohibited within the employment sphere, and will result in consequences if allowed to occur. While a rose called by another name would smell just as sweet, employers, colleagues, and society at large should stick to addressing individuals by their preferred identifiers, as "[w]hat's in a [dead]name" is far from sweet.