United States Court of Appeals

for the

Seventh Circuit

Case No. 24-3250

ALMA SANCHEZ, on behalf of herself and all others similarly situated,

Plaintiff-Appellant,

– v. –

EL MILAGRO, INC., doing business as EL MILAGRO,

Defendant-Appellee.

ON APPEAL FROM AN ORDER ENTERED IN THE
NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

BRIEF ON BEHALF OF *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT ALMA SANCHEZ FOR REVERSAL

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 24-3250

Short Caption: Sanchez v. El Milagro, Inc.

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ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

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(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

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Attorney's Printed Name: s/ Catherine Bendor

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IDENTITY & INTEREST OF AMICI CURIAE[1]

Equal Rights Advocates (ERA) is a nonprofit organization that has been advocating for gender justice in workplaces across the country since 1974. ERA has represented plaintiffs in dozens of sexual harassment cases, including cases alleging sex discrimination based on a hostile work environment standard, and litigated the first case in the Ninth Circuit to find that sexual harassment is a violation of Title VII, *Miller v. Bank of America*, 600 F.2d 211 (9th Cir. 1979). ERA has also appeared as *amicus curiae* in numerous federal court sexual harassment cases, including *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), *Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993), and others. In addition, ERA has educated hundreds of women through its Advice and Counseling program regarding their legal right to be free from sexual harassment. ERA has a strong interest in the proper application of Title VII to combat workplace discrimination.

Chicago Alliance Against Sexual Exploitation (CAASE) is a not-for-profit that opposes sexual harm by directly addressing the culture, institutions and individuals that perpetrate, profit from, or support such harms. CAASE engages in direct legal services, prevention education, community engagement, and policy reform. CAASE's legal department provides advice and representation to survivors

[1] Pursuant to Federal Rule of Appellate Procedure 19(c)(5), counsel for *Amici Curiae* certifies that no party's counsel authored this brief in whole or in part. No party or party's counsel or any other person – other than *Amici*, their counsel and their members — contributed money intended to fund the brief's preparation or submission. Counsel for Plaintiff-Appellant consents to the filing of this brief, but counsel for Defendant-Appellee does not consent. *Amici* has therefore filed a motion, together with this brief, requesting the Court's permission to file this brief.

of sexual assault, including to survivors who were harmed in the workplace. On behalf of its individual clients, its prevention philosophy, and in support of its overall mission, CAASE is interested in seeing that laws and precedent related to workplace discrimination are appropriately interpreted and applied so as to further — and not undermine — efforts to hold both systems and individuals appropriately accountable for their actions.

Legal Momentum, the Women's Legal Defense and Education Fund, is a leading national non-profit civil rights organization that for over 50 years has used the power of the law to define and defend the rights of women and girls and to promote gender equality. Legal Momentum works to ensure that all employees are treated fairly in the workplace, regardless of their gender, sexual orientation, or status as a survivor of gender-based violence. Legal Momentum has litigated cutting-edge gender-based employment discrimination cases, including sexual harassment cases such as *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and has participated as *amicus curiae* in many Supreme Court and other leading cases, including cases that address whether sexual harassment creates a hostile work environment in violation of Title VII.

National Partnership for Women & Families is a nonprofit, nonpartisan advocacy group that has over 50 years of experience in combating barriers to equity and opportunity for women. The organization has a long history of combating workplace harassment, including successfully litigating *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977) the first sexual harassment case in the country, and contributing

amicus briefs in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), the landmark Supreme Court case recognizing sexual harassment as sex discrimination. The National Partnership believes that fair labor and employment practices are critical to women's ability to succeed and thrive in our economy and to building an economy that benefits workers, businesses and the nation as a whole. This is particularly true for women of color, disabled women, LGBTQI+ people, and women living at the intersection of multiple identities more broadly.

National Women's Law Center (NWLC) is a nonprofit legal organization that fights for gender justice, including the right of all persons to be free from sex discrimination. Since 1972, NWLC has worked to advance workplace justice, educational opportunities, health and reproductive rights, and income security. NWLC has participated in numerous workplace civil rights cases in state and federal courts, including through filing amicus briefs in the Seventh Circuit and elsewhere that highlight the critical importance of Title VII and other antidiscrimination suits as an option for survivors of sexual violence seeking justice.

NELA/Illinois is the Illinois affiliate of the National Employment Lawyers Association ("NELA"). Founded in 1986, NELA/Illinois advocates for employee rights and justice in the workplace for Illinois' workers. NELA/Illinois' approximately 185 members are primarily attorneys from Illinois who typically represent individuals in employment-related matters. Courts throughout the country, including the United States Supreme Court, the United States Court of Appeals for the Seventh Circuit,

the Illinois Supreme Court, the Illinois Appellate Court, and the Court of Appeals of Ohio, have accepted NELA/Illinois' amicus briefs on myriad employment law issues.

Shriver Center on Poverty Law (Shriver Center) provides national leadership to promote justice and improve the lives and opportunities of people with low incomes. The Shriver Center advances laws and policies through litigation, legislative and policy advocacy, and administrative reform, to achieve economic, racial, gender, and social justice. The Shriver Center's Women's Law and Policy initiative specifically focuses on the economic security and advancement of low-income women. Sexual harassment prevents workers from attaining economic security and advancement and should never be tolerated.

Women Employed's mission is to improve the economic status of women and remove barriers to economic equity. Since 1973, the organization has assisted thousands of working women with problems of discrimination and harassment and developed specific, detailed proposals for improving policies and enforcement efforts, particularly on the systemic level, including advocating for stronger protections at the federal level and in Illinois, where Women Employed is based. Women Employed strongly believes that sexual harassment is one of the main barriers to achieving equal opportunity and economic justice for women in the workplace and particularly imperils the safety of women in low-wage jobs. Sexual harassment continues to be an insidious form of sex discrimination and creates ongoing harms faced by all women, with compounding effects for women of color.

SUMMARY OF ARGUMENT

Workplace sexual harassment remains a serious and widespread problem, particularly for low-income women. A robust body of social-science research demonstrates the wide-ranging effects of workplace harassment, underscoring how certain factors, including an employer's failure to effectively respond or a combination of verbal and physical harassment, can heighten the impact. Despite growing public recognition of the problem in recent years, sexual harassment often goes unreported (or underreported) due to justified fears of retaliation, employer inaction, or reputational harm. For women who do report harassment, civil litigation often provides their only meaningful opportunity to present evidence and vindicate their right to a harassment-free workplace.

The district court's grant of summary judgment to Defendant-Appellee ("El Milagro") was based on at least three material errors. *First*, the district court heightened the summary-judgment standard by minimizing Plaintiff-Appellant Sanchez's ("Sanchez") evidence and imposing unworkable requirements that contradict binding precedent and workplace realities, as demonstrated by social-science research. *Second*, in making its own fact and credibility determinations, the district court ignored the legislative history and public policy interests undergirding Title VII, specifically Congress's intent for harassment victims to have the right to present viable claims to a jury. *Third*, in dismissing Sanchez's Illinois Human Rights Act (IHRA) claims as identical to Title VII, the district court ignored the Illinois legislature's criminalization of the conduct alleged herein, provision for additional civil remedies under the Gender Violence Act, and adoption of a broader definition of

sexual harassment, which demonstrate Illinois's choice to view Sanchez's harassment as objectively severe and unlawful in both the criminal and civil contexts.

If left uncorrected, this decision risks establishing precedent that contravenes federal and state law by imposing heightened burdens of proof and depriving plaintiffs of the right to have factual disputes resolved in their favor before taking their claims away from the jury. This would impact not only Sanchez, but also other plaintiffs who will face additional scrutiny and diminished jury-trial rights and protections under Title VII and IHRA. This Court should reverse or vacate and remand.

ARGUMENT

I. The District Court Improperly Heightened Sanchez's Burden Under Title VII by Imposing Unfounded Requirements That Contradict the Realities of Workplace Harassment and Binding Precedent.

A. The District Court's Decision Conflicts with Social Science Research on the Nature and Impact of Sexual Harassment.

Sanchez alleged three incidents of offensive, intimate touching (including her harasser, Francisco Gutierrez, intentionally rubbing his genitals against her and grabbing her buttocks), physically threatening or humiliating taunts (that male co-workers could do the same to her because El Milagro would not intervene), "near daily" sexist comments, and an overall environment where harassment was tolerated. In concluding no reasonable juror could find "severe or pervasive" harassment, the district court disregarded the realities of how harassment is perceived and experienced in the workplace, and thus, how it would likely be judged by a jury.

Workplace sexual harassment remains a prevalent — and serious — problem for women in the United States.[2] Women in low-wage jobs are especially vulnerable, as they often have less power or capacity to stop the harassment because of their position at the bottom of the organization's hierarchy and greater financial vulnerability.[3] The vast majority of women who experience workplace harassment neither file a formal complaint nor informally report misconduct,[4] and those who do often face troubling outcomes, including reduced promotion prospects[5] and other negative or retaliatory consequences.[6]

A robust body of social-science research demonstrates that most people consider unwanted physical touch to be a serious form of harassment,[7] and that

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[2] While people of all genders can (and do) experience sexual harassment, this discussion focuses on research concerning the harassment of women, like Sanchez.

[3] *See, e.g.*, Luz S. Marin et al., *Workplace Sexual Harassment and Vulnerabilities among Low-Wage Hispanic Women*, 5 Occupational Health Sci. 391, 395 (2021); Louise F. Fitzgerald, *Unseen: The Sexual Harassment of Low-Income Women in America*, 39(1) Equal., Diversity & Inclusion: An Int'l J. 5, 5-10 (2020) (discussing experiences of female low-wage earners).

[4] *See, e.g.*, Nat'l Academies of Sci., Eng'g & Med., *Sexual Harassment of Women* 80 (2018) ("NASEM"); EEOC Select Task Force on the Study of Sexual Harassment in the Workplace, *Report and Recommendations* 16 (2016) ("EEOC 2016 Task Force") ("gender-harassing conduct was almost never reported and unwanted physical touching was formally reported only 8% of the time" and "on average, anywhere from 87% to 94% of individuals do *not* file a formal complaint").

[5] *See, e.g.*, Chloe Grace Hart, *The Penalties for Self-Reporting Sexual Harassment*, 33 Gender & Soc'y 534, 534 (2019).

[6] *See, e.g.*, Louise F. Fitzgerald and Karla Fischer, *Why Didn't She Just Report Him? The Psychological and Legal Implications of Women's Responses to Sexual Harassment*, 51 J. of Soc. Issues, 117, 127 (1995); Mindy E. Bergman et al., *The (Un) Reasonableness of Reporting: Antecedents and Consequences of Reporting Sexual Harassment*, 87 J. of Applied Psych. 230, 230, 237 (2002) (reporting did not improve, and at times worsened, job, psychological, and health outcomes).

[7] Theresa M. Beiner, *Let the Jury Decide: The Gap Between What Judges and Reasonable People Believe Is Sexually Harassing*, 75 S. Cal. L. Rev. 791, 834, 843

harassment considered to be less severe, such as verbal taunting, when repeated over time, can be just as damaging as more severe harassment, such as sexual coercion.[8] The combination of different types of misconduct, e.g., unwelcome physical touch accompanied by frequent sexist comments, also heightens the harassment's overall adverse effects.[9] Moreover, when employers fail to take complaints seriously — e.g., brushing them off, putting the onus on victims to avoid further harassment, or failing to discipline wrongdoers — this, too, materially compounds stress and interferes with work, even if the employee does not quit or change their employment status.[10]

B. The District Court Heightened the Legal Standard by Minimizing Plaintiff's Evidence and Imposing Unworkable Requirements for Hostile-Work Environment Claims.

Instead of viewing the facts in the light most favorable to Sanchez, as required at summary judgment,[11] the district court made improper judgment calls and cherry-

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(2002) (studies show majority of people surveyed believe sexual teasing and physical touch constitutes harassment, including that 90% of respondents believed "deliberate touching or cornering" was "definitely" or "probably" harassment).

8 *See, e.g.*, V.E. Sojo et al., *Harmful Workplace Experiences and Women's Occupational Well-Being: A Meta Analysis*, 40(1) Psych. of Women Quarterly 10, 20 (2016).

9 Sandy Lim and Lilia Cortina, *Interpersonal Mistreatment in the Workplace: The Interface and Impact of General Incivility and Sexual Harassment*, 90 J. of Applied Psych. 483, 493 (2005) ("addition of each type of mistreatment" correlates with "incremental worsening of outcomes").

10 Alec M. Smidt et al., *Institutional Courage Buffers Against Institutional Betrayal, Protects Employee Health, and Fosters Organizational Commitment Following Workplace Sexual Harassment*, 18 PLOS ONE 1, 17 (2023) (55% of participants experienced institutional betrayal, which correlated with workplace withdrawal); Chelsea Willness et al., *A Meta-Analysis of the Antecedents and Consequences of Workplace Sexual Harassment,* 60 Personnel Psych. 127, 143 (2007) (organizational tolerance contributes to decreased job satisfaction, lower commitment, withdrawing from work, and poor physical and mental health).

11 *Hall v. City of Chi.*, 713 F.3d 325, 330 (7th Cir. 2013) (non-movant's evidence must be viewed "in the light most favorable to her" at summary judgment).

picked facts from dissimilar cases to find Sanchez's allegations lacking simply because they could have been worse. This creates precedent that, if affirmed, will make it harder for harassment victims to vindicate their rights.

A plaintiff establishes Title VII liability by showing the harassment she experienced was subjectively hostile and sufficiently "severe or pervasive" to create an objectively "hostile" working environment. *Harris v. Forklift Sys.*, 510 U.S. 17, 21 (1993) (quoting *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986)). Factfinders should consider "all the circumstances" including but not limited to the following factors ("*Harris* factors"): "[1] the frequency of the discriminatory conduct; [2] its severity; [3] whether it is physically threatening or humiliating, or a mere offensive utterance; and [4] whether it unreasonably interferes with an employee's work performance." *Id.* at 23. The district court narrowed Title VII's reach by heightening the burden for each *Harris* factor and neglecting to weigh other relevant considerations favoring Sanchez.

1. Frequency

Instead of fairly analyzing the harassing conduct's frequency, the district court downplayed Sanchez's allegations, minimized their cumulative effect, and imposed unfounded requirements untethered to binding authority.

As to physical harassment, the district court mischaracterized Sanchez's allegations as "isolated incidents of brief physical contact," Short Appendix ("S.A.") 29, when in fact she alleged a repeated pattern of intimate contact by Gutierrez, Docket Entry ("D.E.") 135-3 at 20-21, 25, 28-30; D.E. 145-4 at 6, 8-9. It further suggested that harassment must occur over a short, concentrated period of time to be

actionable. S.A. at 29 (finding three offensive contacts in "around four months" to be insufficient compared to case, "where all the incidents occurred over the span of one month") (citing *Patton v. Keystone RV Co.*, 455 F.3d 812 (7th Cir. 2006)). But harassment can be pervasive even if it is not concentrated in a short period of time. *See, e.g.*, *Hicks v. Sheahan*, No. 03 Civ. 327, 2004 U.S. Dist. LEXIS 26791, at *42-43 (N.D. Ill. Dec. 17, 2004) (denying summary judgment where plaintiff alleged occasional sexual comments and gestures over nearly two years).

Further, the district court gave no weight to the frequent ("near-daily") verbal harassment that Sanchez alleged, including multiple threats directed at or about her. D.E. 135-15 at 25-26; D.E. 145-1 at 28; D.E. 145-5 at 7-8. It instead erroneously concluded that Sanchez identified only a *single* "instance of verbal harassment" and "general sexual comments." S.A. 27. But if Sanchez's allegations were credited, a reasonable jury could have found them to be severe or pervasive, as backed by relevant research.[12] *See Passananti v. Cook Cnty.*, 689 F.3d 655, 668 (7th Cir. 2012) ("[t]here is no question that gender-based comments . . . when used pervasively in the workplace, can meet the standard for severe or pervasive harassment"); *cf. Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 675-76 (7th Cir. 1993) (racial slur used five and ten times sufficient).

[12] As noted above (at 8), research shows frequent but less intense incidents can be *just as* corrosive as a small number of more intense incidents.

2. Severity

Even though Sanchez's allegations fall firmly on the side of "severe," actionable harassment (as opposed to merely "vulgar banter"),[13] the district court adopted its own requirements and substituted its judgment for that of the jury to trivialize the misconduct as merely "boorish," simply because other cases alleged more severe harassment. This outdated conclusion ignores the serious impacts of forcible, intimate contact, verbal threats, and sexist comments on women in the workplace, as demonstrated by relevant research and data.

a. Repeated, Unwanted, Intentional Physical Contact Strongly Suggests "Severe" Harassment.

In accordance with social-science research, intentional, repeated physical contact is considered a "more intimate, intrusive forms of contact" that should not be lightly "writ[ten] . . . off as a pedestrian annoyance." *Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 808 (7th Cir. 2000).[14] Instead of recognizing its potential severity, the district court took pains to minimize the conduct: describing the first incident (of genital rubbing) as "brushing up against [Sanchez]," and excusing it by noting Gutierrez "apologized" afterwards, S.A. 19, 29 (omitting that Sanchez characterized the apology as mocking and offensive, D.E. 145-4 at 4, 6). However, "[i]ntentionally

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[13] In clarifying the often hazy line between "severe" harassment and merely crude behavior, this Court explained "on one side lie sexual assaults; other *physical contact, whether amorous or hostile, for which there is no consent express or implied* . . . intimidating words or acts; obscene language or gestures," and "[o]n the other side lies the occasional vulgar banter, tinged with sexual innuendo, of coarse or boorish workers." *Worth v. Tyer,* 276 F.3d 249, 267 (7th Cir. 2001) (citation omitted) (emphasis in original).

[14] Beiner, *supra* n.7 at 834, 843.

grabbing, squeezing, or otherwise feeling an intimate part of another's body is *vastly different* than *brushing against* it." *Reid v. Ingerman Smith LLP*, 876 F. Supp. 2d 176, 185-86 (E.D.N.Y. 2012) (citing cases) (emphasis added). Finding conduct "not to be severe as a matter of law" is "dubious" when it constitutes "unwelcome contact with the intimate parts of one's body." *Hostetler*, 218 F.3d at 809. The district court provided no supportable grounds for doing so here.[15]

b. Unwanted Physical Contact Need Not Occur Under the Clothes or for Extended Periods of Time to be Severe.

The district court erred in reasoning that unwanted touching must be under a victim's clothes to be "severe," finding "no genuine dispute" that the misconduct was unactionable because "[Sanchez] was [] subjected to unwanted touching outside of her clothes (unlike the plaintiff in *Patton*)." S.A. 29; *see id.* at 28 (Patton's co-worker "slid his hand up [her] shorts and reached her underwear"). This is not the rule, *Worth*, 276 F.3d at 267, nor should it be, as such arbitrary line drawing would lead to unreasonable outcomes, like here, where rubbing one's genitals against a person is categorically insufficient because it could have been worse.

Similarly, the district court unjustifiably suggested that unwelcome intimate contact must last for an extended period to be severe, faulting Sanchez for not alleging the contact "lasted more than a couple seconds." S.A. 19, 29. To the contrary, this Court has recognized that unwelcome contact which "lasted for several seconds" may

[15] As discussed below (at 24), the Illinois legislature has also criminalized this conduct and created additional civil remedies to address it. If publicly-elected officials found it severe enough to criminalize, a reasonable jury could find it severe enough to trigger civil liability.

"increase[] its severity." *Worth*, 276 F.3d at 268. Under contemporary workplace norms, no one should endure "several seconds" of intentional, uninvited intimate touching, and at minimum, it should go to the jury to weigh context and intent.

c. Plaintiffs Need Not Allege Feeling "Out of Control" to Establish a Hostile Work Environment.

The district court also improperly heightened Sanchez's burden by suggesting it could only be met by alleging that she felt she was *not* "in control." S.A. 29 (faulting Sanchez for "provid[ing]] no evidence that . . . she did not feel like she was in control"). The district court appears to have relied on a unique, non-dispositive fact from a single case, *Swyear v. Fare Foods Corp.*, 911 F.3d 874 (7th Cir. 2018), wherein the court affirmed summary judgment for defendant based on plaintiff's testimony that "she always felt in control" when a drunk co-worker harassed her at a work event. *Id.* at 879. Unlike here, in *Swyear*, "none of [the co-worker's] actions were forceful," *id.* at 882, and critically, nothing in *Swyear* (or otherwise) suggests plaintiffs must prove the opposite, i.e., they felt *not* in control, to establish a hostile environment.[16]

3. Whether the Conduct Is Physically Threatening or Humiliating

The district court failed to give any weight to the harassment's "threatening or humiliating" nature, S.A. 27-30, even though this factor strongly favored Sanchez.

[16] In any event, Gutierrez approached Sanchez from behind and to her side, catching her by surprise where she was unable to defend herself. D.E. 135-3 at 20-21, 25, 28-30; D.E. 145-4 at 6, 8. She felt "very bad" and "very uncomfortable," D.E. 145-4 at 7; D.E. 135-3 at 12, and frustrated by El Milagro's inaction because it was "not fair for [her] to be the one having to watch out for [Gutierrez]," D.E. 145-4 at 9. Such facts suggest that she was not "in control."

First, repeated, forcible, unwanted intimate contact *(i.e.*, rubbing genitalia into another person's buttocks, grabbing their buttocks) at work, and sometimes in front of other co-workers, is inherently humiliating and threatening. *Koerber v. Journey's End, Inc.*, No. 99 Civ. 1822, 2004 U.S. Dist. LEXIS 5424, at *15 (N.D. Ill. Mar. 31, 2004) (repeated touching and grabbing of Plaintiff's buttocks and breasts was physically threatening and humiliating).

Second, Sanchez's co-workers taunted that they could "also grab her ass" because Gutierrez "felt up her ass and [El Milagro] didn't do anything to him," D.E. 135-15 at 25-26; D.E. 145-5 at 7-8. In this same context, other co-workers remarked, while laughing, that "[Sanchez] isn't even that hot; it isn't worth it." D.E. 135-15 at 26; D.E. 145-5 at 37. These were not "general sexual comments in the workplace," S.A. 27, but specific, serious threats showing that Sanchez's co-workers believed they had unrestricted license to make intimate contact with her, which a jury could view as threatening or humiliating.

4. Whether the Conduct Unreasonably Interferes with Work

The district court wrongly concluded the harassment did not interfere with Sanchez's employment because she "continue[d] to work in the same location, in the same department, on the same shift." S.A. 29. This sets a dangerous precedent that conflicts with well-established caselaw holding that plaintiffs may establish hostile-work environments *without* showing they quit or otherwise changed positions. *Harris*, 510 U.S. at 21; *Id.* at 25 (Scalia, J., concurring) ("[T]he test is not whether work has been impaired, but whether working *conditions have been discriminatorily altered*.") (emphasis added); *EEOC v. Fairbrook Med. Clinic, P.A.*, 609 F.3d 320, 330

(4th Cir. 2010) ("The fact that a plaintiff continued to work under difficult conditions is to her credit, not the harasser's.").

The court's reasoning also ignores the reality that too often, women, especially working mothers or low-wage earners (like Sanchez), cannot leave their workplaces, even if subjected to severe or pervasive harassment. Indeed, most women who experience workplace sexual harassment do not leave their jobs, regardless of the level of harm.[17] Many lack the financial flexibility to leave or fear there are no other opportunities available.[18] Options may be particularly limited for those who lack marketable skills, have limited education or English proficiency, or a disability.[19]

Moreover, research demonstrates that harassment often interferes with employees' working conditions even if they remain in their jobs. It has been shown to cause increased job stress and mental health challenges,[20] reduced performance,[21]

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17 Willness et al., *supra* n.10, at 137 (according to one study, even when victims' experiences legally constituted rape, 81% remained at their job).

18 *Id.*

19 The district court noted Sanchez's "change [in] job duties" to accommodate her disability, S.A. 18, but failed to recognize the possibility of limited options for further reassignment or other job opportunities.

20 Kimberly T. Schneider, Suzanne Swan, and Louise F. Fitgerald, *Job-Related and Psychological Effects of Sexual Harassment in the Workplace: Empirical Evidence from Two Organizations*, 82 J. of Applied Psych. 401, 401-02 (1997) (discussing studies showing 94% of women experienced symptoms of emotional of physical distress); Lim and Cortina, *supra* n.9, at 485 (collecting studies).

21 *See, e.g.*, NASEM, *supra* n.4, at 69 (collecting studies); Julia A. Woodzicka and Marianne LaFrance, *The Effects of Subtle Sexual Harassment on Women's Performance in a Job Interview*, 53(1) Sex Roles, 67, 73 (2005) (discussing negative impact of sexual harassment on work performance).

increased team conflict,[22] difficulties with concentration,[23] diminished morale and commitment or disengagement from work (often to avoid further harassment),[24] — problems which can endure long after the conduct stops.[25] One of the most common responses to workplace sexual harassment is "avoidance," which alters conditions by requiring effort and planning to physically avoid the harasser.[26]

Sanchez suffered extreme emotional distress because of the harassment, requiring her to seek counseling and take prescribed anti-anxiety medication. D.E. 145-4 at 13. Sanchez's supervisor Arturo Brito also expressly instructed her to "avoid" harassing co-workers, D.E. 145-4 at 7-8, even though her assigned role (filling gaps on the production line) prevented her from doing so, D.E. 135-3 at 21-22; D.E. 135-4 at 5. Such allegations are more than sufficient to show altered working conditions. *See, e.g.*, *Gentry v. Export Packaging Co.*, 238 F.3d 842, 851 (7th Cir. 2001) (reasonable jury could find a hostile work environment where plaintiff "found

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22 Jana L. Raver and Michele J. Gelfand, *Beyond the Individual Victim: Linking Sexual Harassment, Team Processes, and Team Performance*, 48(3) Acad. of Mgmt. J. 387, 394 (2005).

23 J. Barling et al., *Behind Closed Doors: In-Home Workers' Experience of Sexual Harassment and Workplace Violence*, 6(3) J. of Occupational Health Psych. 255, 261 (2001).

24 *Id.* at 255 (victims feel less committed to their workplace with increased harassment); Schneider, Swan, and Fitzgerald, *supra* n.18, at 401-02, 403 (common response to harassment is "organizational withdrawal.")

25 Teresa M. Glomb et al., *Structural Equation Models of Sexual Harassment: Longitudinal Explorations and Cross-Sectional Generalizations*, 84(1) J. Applied Psych. 14, 25 (1999) (sexual harassment resulted in decreased work satisfaction and increased psychological problems two years later, whether or not it continued).

26 EEOC 2016 Task Force, *supra* n.4, at 15 (citing studies); Schneider, Swan, and Fitgerald, *supra* n.18, at 401-02, 403 (finding most respondents coped by avoiding the harasser, even though nature of their work required ongoing interactions).

it hard to concentrate on her work," hated her job, "often cried when she went to work," and "was treated for anxiety and depression.").

This Court should reverse or vacate to clarify that plaintiffs are not required to quit or change jobs to prove altered working conditions. Left unaddressed, such a rule would not only prevent women who cannot leave from vindicating their rights, but also improperly place the burden *on victims* to address the hostile environment.

5. The Court Failed to Consider Other Factors Jurors Could Have Relied on to Find a Hostile Work Environment.

Contrary to the Supreme Court's directive that a hostile work environment can only be determined by "looking at *all* the circumstances," *Harris*, 510 U.S. at 23 (emphasis added), the district court failed to consider certain evidence at all.

First, the district court failed to consider that Brito (who himself was accused of harassment by multiple other women) repeatedly brushed off Sanchez's complaints, placed responsibility on her to stop the harassment, and discouraged her from reporting. *See* D.E. 145-4 at 7-8 (telling Sanchez to "avoid putting [herself] in places where [she] would be touched by others" even though her job made that impossible); D.E. 145-4 at 9 (telling her to avoid Gutierrez); D.E. 145-4 at 11 (warning Sanchez by asking if she was "aware that [complaining could cause you] problems").

As noted above (at 8), research demonstrates when a supervisor brushes off complaints or fails to discipline wrongdoers, this enhances stress, exacerbates harm, and increases fears of future harassment, thus increasing an employee's negative

perception of her workplace.[27] Instead of considering that a reasonable juror could find that Brito's indifference, and even hostility, towards Sanchez contributed to the environment's hostility, the district court discounted it, focusing on minor discrepancies in the record, like whether Sanchez mentioned Gutierrez by name when reporting the first incident. S.A. 19.

Second, the district court did not consider that harassment was a common occurrence at El Milagro, which a reasonable jury could have relied on to bolster Sanchez's allegations of a hostile work environment. Evidence of harassment experienced by similarly situated employees is relevant to assessing a plaintiff's work environment. *See, e.g.*, *Warf v. U.S. Dep't of Veterans Affs.*, 713 F.3d 874, 878 (6th Cir. 2013) (while weighed less heavily, "[e]vidence of other sexual harassment claims may help support a hostile work environment claim"); *Ziskie v. Mineta*, 547 F.3d 220, 225 (4th Cir. 2008) ("[h]ostile conduct directed toward a plaintiff that might of itself be interpreted as isolated or unrelated to gender might look different in light of evidence that a number of women experienced similar treatment").

Sanchez alleged that El Milagro's HR department investigated 27 instances of sexual harassment in 2021 and 2022 alone. D.E. 145-2 at 12. She further alleged that El Milagro is a male-dominated space, D.E. 145-2 at 5, and that she and other women were regularly exposed to vulgar comments about female coworkers, D.E. 135-

[27] Such fears are well-founded. Research shows organizational tolerance of harassment results in higher incidences of sexually harassing conduct. Lilia M. Cortina and Maira A. Arbequina, *Putting People Down and Pushing Them Out: Sexual Harassment in the Workplace,* 8(1) Ann. Rev. of Org. Psych. & Org. Behav. 285, 295-96 (2021).

15 at 22, 25-26. Several female employees also credibly accused Brito of sexual harassment, D.E. 145-12 at 3; D.E. 145-2 at 14, though one backed down after receiving a threatening call and the other quit shortly after making her complaint, D.E. 145-12 at 5.

By failing to consider these circumstances, and selectively relying on facts from dissimilar cases as *de facto* requirements, the district court heightened the burden of proof to prevent all but the most egregious harassment claims from reaching a jury.

C. The District Court Undermined Title VII Plaintiffs' Jury Trial Rights in Prematurely Resolving Close Factual Questions Against Sanchez.

1. The Right to a Jury Trial Under Title VII.

In enacting the Civil Rights Act of 1991, Congress specifically amended Title VII to provide additional protections against unlawful harassment and guarantee the right to a jury trial. 42 U.S.C. § 1981a(a)(1), 2000e-5(g)(1), (k).[28] In so doing, Congress intended that, apart from cases in which no reasonable juror could conclude otherwise, *juries* — not judges — should determine whether harassing conduct creates a hostile environment. *Id.*[29] This makes sense because the existence of a

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[28] Before the 1991 amendments, Title VII provided only equitable remedies, and jury trials were not available. *See* 42 U.S.C. § 2000e-5(g)(1).

[29] *See Hearings on H.R. 1, The Civil Rights Act of 1991 Before the House Comm. On Educ. and Labor*, 102nd Cong. 77-131, 168-235, 581-629 (1991); *Joint Hearings on H.R. 4000, The Civil Rights Act of 1990, Before the House Comm. on Educ. and Labor and the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 101st Cong. (1990) ("*1990 Hearings*"), vol. 2 at 59; *id.* ("a jury of your peers can make a determination about whether you were too sensitive or whether you were properly offended and whether, in fact, you were damaged") (Rep. Miller); *id.* at 70 (under proposed legislation, "a jury of peers would determine that point along the continuum at which a person is harassed as opposed to just being kidded").

"hostile work environment" is ultimately a question of fact, requiring "[c]ommon sense, and an appropriate sensitivity to social context" to distinguish between "simple teasing . . . and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998). Juries reflect "a fair cross section of the community," 28 U.S.C. § 1861, and possess "familiarity and direct involvement with workplace norms"[30] necessary to evaluate the "surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed," *Oncale*, 523 U.S. at 81-82. *Cf. Gallagher v. Delaney*, 139 F.3d 338, 342 (2d Cir. 1998) (juries better suited than trial courts in "interpreting subtle sexual dynamics of the workplace"). Assessing witness credibility and intent also often requires live testimony not available at summary judgment.[31]

2. Whether Harassment Is "Severe or Pervasive" Is a Fact Question for the Jury.

Courts have thus correctly held that "[w]hether harassment is so severe or pervasive as to constitute a hostile work environment" is quintessentially "a question of fact for the jury." *Johnson v. Advocate Heath & Hosps. Corp.*, 892 F.3d 887, 901 (7th Cir. 2018); *Passananti*, 689 F.3d at 669 ("It [is] up to the jury to decide [] context and credibility"); *Robinson v. Perales*, 894 F.3d 818, 828 (7th Cir. 2018) (if a reasonable jury could find a hostile work environment, "the claim must go to trial").

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[30] M. Isabel Medina, *A Matter of Fact: Hostile Environments and Summary Judgments*, 8 S. Cal. Rev. L. & Women's Stud. 311, 358 (1999).

[31] Michael W. Pfautz, *What Would a Reasonable Jury Do? Jury Verdicts Following Summary Judgment Reversals*, 115 Colum. L. Rev. 1255, 1287 (2015).

The consequences of taking cases from the jury are particularly acute for civil-rights plaintiffs. According to one empirical study, a disproportionate percentage (over 60 percent) of "verified improper grants" occurred in civil rights cases, even though they comprised only 40 percent of the jury trials in the study.[32] In these cases, summary judgment was granted for the defendant, the court of appeals reversed, and the jury returned a plaintiff verdict (thus, a "verified improper" grant).[33] The study proves judges sometimes err in determining if a reasonable jury could find for the plaintiff, and they do so much more often in civil rights cases, including employment discrimination.[34] This is precisely why summary judgment for employers should be denied in close factual situations, where, as here, a reasonable jury could find an objectively hostile work environment.

3. A Reasonable Jury Could Have Found the Alleged Harassment To Be Severe or Pervasive.

As noted above (at 8-19), under the guise of a legal ruling, the district court substituted its own fact-finding for that of the jury and minimized Sanchez's evidence. Further demonstrating that reasonable minds could disagree, other courts have reached an opposite conclusion when considering similar facts to those alleged here. *See, e.g.*, *Copantitla v. Fiskardo Estiatorio, Inc.,* 788 F. Supp. 2d 253, 300, 300-01 (S.D.N.Y. May 27, 2011) (jury could find co-worker allegedly "rubb[ing] his genitals

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32 *Id.* at 1286; *see also id.* at 1281-82 (collecting studies).

33 *Id.*

34 *Id.* at 1286 & n.165-66 (citing various reports, including one by the Federal Judicial Center finding that "summary judgment motions were more likely to be made and granted in employment discrimination" cases, and another finding that plaintiffs alleging employment discrimination claims "prevailed before juries at nearly twice rate they won trials in front of judges").

against [the plaintiff] 'for mere seconds'" was not incidental and altered working conditions); *Wolfe v. Colum. Coll., Inc.*, No. 20 Civ. 1246, 2023 U.S. Dist. LEXIS 174953, at *4, *22 (D. Md. Sept. 29, 2023) (hostile environment could be established by "single incident of harassment" where, "in a sexually suggestive manner," a co-worker "grabbed [plaintiff] from behind, without [plaintiff's] consent, and rubbed her body against [plaintiff's] backside"); *cf. Turner v. Saloon, Ltd.,* 595 F.3d 679, 686 (7th Cir. 2010) (while plaintiff alleged other harassment, fact that harasser "grabbed [plaintiff's] penis through his pockets" was "probably *severe enough on its own* to create a genuine issue of material fact") (emphasis added). While these cases focus on physical harassment, Sanchez alleged other facts — threatening and humiliating taunts, frequent sexist comments, and a workplace where harassment was tolerated while complaints were discouraged — such that a reasonable jury could find a hostile environment.[35]

II. The District Court Erred by Dismissing Sanchez's Illinois Claims as Co-Extensive with Title VII.

The district court erred in granting summary judgment on Sanchez's claim under the IHRA, without any analysis, by finding it to be co-extensive with Title VII. S.A. 25 n.7. The Illinois legislature enacted the IHRA to be broader than Title VII. Moreover, the Illinois legislature enacted both criminal and civil laws that prohibit rubbing one's genitals against another person without consent, including through

[35] It is unclear why the district court deemed the environment to fall short of the objective standard when it rightfully recognized "Plaintiff [herself] *understandably* felt that she has been subjected to a sexually hostile work environment." S.A. 30.

clothing, which strongly suggests this type of conduct constitutes actionable sexual harassment under the IHRA.

A. The Illinois Legislature Intended the IHRA to Be Broader than Title VII.

The Illinois legislature enacted the IHRA to strengthen protections against workplace sexual harassment by providing additional safeguards that go beyond Title VII. For example, the IHRA applies to employers with one or more employees, 775 ILCS 5/1-101(B), whereas Title VII applies only to employers with fifteen or more employees, 42 U.S.C. § 2000e(b). The IHRA also imposes strict liability on employers for the sexual harassment of an employee by a supervisor, whereas Title VII requires additional grounds. *Sangamon Cnty. Sheriff's Dep't v. Illinois Hum. Rts. Comm'n,* 908 N.E.2d 39, 44-47 (Ill. 2009).

Importantly, unlike Title VII, the statute expressly prohibits a broad scope of sexual harassment, defined as any conduct with the "purpose or effect" of creating an "*intimidating*, hostile *or offensive* working environment." 775 ILCS 5/2-101(E) (emphasis added). While the IHRA's approach is consistent with EEOC regulations, 29 C.F.R. § 1604.11(a)(3), the Supreme Court has not wholly adopted those regulations in interpreting Title VII, *Harris*, 510 U.S. at 21 (harassment actionable under Title VII only if it creates a "hostile" or "abusive" environment, but "conduct that is *merely offensive*" is not actionable) (emphasis added). While the district court presumed the IHRA and Title VII to be identical, the IHRA is broader. The court's dismissal of Sanchez's IHRA claim in a footnote on the grounds that it should be analyzed "in the same fashion" as her Title VII claim ignored these differences.

B. Illinois Public Policy Makes Clear Rubbing One's Genitals on a Person Without Consent is Objectively Offensive and Unlawful.

The Illinois legislature has both criminalized and created a separate civil cause of action for the type of non-consensual physical touching that occurred here.

First, a person is guilty of criminal sexual abuse when they commit "sexual conduct" and "know[] that the victim . . is unable to give knowing consent." 720 ILCS 5/11-1.50 (a)(2). "Sexual conduct" includes the "knowing touching" by "the accused, either directly or through clothing, of the sex organs" if "for the purpose of sexual gratification or arousal." 720 ILCS 5/11-0.1. A violation is a Class 4 felony, 720 ILCS 5/11-1.50(d), and punishable by one to three years in prison, 730 ILCS 5/5-4.5-45(a).

Second, the Gender Violence Act authorizes a civil action for "physical intrusion or physical invasion of a sexual nature under coercive conditions satisfying the elements of battery under the laws of Illinois." 740 ILCS 82/5, 10.[36] Illinois courts may award actual damages, emotional distress damages, punitive damages, injunctive relief, and attorneys' fees, for violations of the statute. 740 ILCS 82/15.

Gutierrez rubbing his genitals against Sanchez's buttocks, while she was facing away and unable to give consent, likely violates Illinois criminal and civil law. If for sexual gratification, it violates both criminal law and the Gender Violence Act. If not for such purpose, it at least violates the Gender Violence Act.

Critically, neither law requires the abuse or gender violence to last for a particular amount of time to be actionable, which, as discussed above (at 9-10, 12-13),

[36] Under Illinois law, "battery" includes "mak[ing] physical contact of an insulting or provoking nature with an individual." 720 ILCS 5/12-3.

the district court considered in finding the conduct not objectively severe. Nor does Illinois law require, as the district court did here (discussed above (at 13)), that the victim establish that she did not feel "in control." Lack of consent is sufficient. Nor is it of any consequence under Illinois law, as it was for the district court (discussed above (at 12-13)), that the groping was not underneath the victim's clothing. *Compare* ILCS 5/11-0.1 (defining sexual conduct as conduct that may occur through clothing) *with* S.A. 29 (dismissing Sanchez's claims as not "severe" in part because the contact was "outside of her clothes").

That the Illinois legislature separately prohibits this conduct — regardless of duration or whether it occurs through clothing — lends credence to the finding that it is "severe," and supports the contention that a reasonable jury could find it to have created an "intimidating, hostile, or offensive" environment under the IHRA.

CONCLUSION

The Court should reverse or vacate the district court's grant of summary judgment and remand for further proceedings.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I hereby certify that the foregoing brief of Equal Rights Advocates, Chicago Alliance Against Sexual Exploitation, Legal Momentum, National Partnership for Women & Families, National Women's Law Center, NELA/Illinois, Shriver Center on Poverty Law, and Women Employed as *Amici Curiae* in Support of Plaintiff-Appellant complies with (1) the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) and Cir. R. 32(b) because it was written in Century Schoolbook, 12-point font, and (2) the type-volume limitations contained in Cir. R. 29, because it contains 6,901 words, excluding those parts of the brief excluded from the word count under Federal Rule of Appellate Procedure 32(f).

Dated: May 9, 2025

/s/ Moira Heiges-Goepfert
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CERTIFICATE OF SERVICE

I hereby certify that, on May 9, 2025, I electronically filed the foregoing Brief via the Court's CM/ECF Electronic Filing System. The Court's CM/ECF Electronic Filing System sends a Notice of Docket Activity to all registered users and service on them will be accomplished by the appellate CM//ECF system.

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