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Recommended Citation

Robert T. Carter, & Thomas D. Scheuermann, *Legal and Policy Standards for Addressing Workplace Racism: Employer Liability and Shared Responsibility for Race-Based Traumatic Stress*, 12 U. Md. L.J. Race Relig. Gender & Class 1 (2012).

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LEGAL AND POLICY STANDARDS FOR ADDRESSING WORKPLACE RACISM: EMPLOYER LIABILITY AND SHARED RESPONSIBILITY FOR RACE-BASED TRAUMATIC STRESS

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With the celebrated election of the first African-American President, the United States has come a long way from the ugly days of Jim Crow,¹ but there is a paucity of evidence that we are living in anything approaching a “post-racial” America.² While overt bigotry

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The authors express their deepest appreciation to Dr. Larry Roper, Vice Provost for Student Affairs and Professor of Ethnic Studies at Oregon State University, for introducing them and encouraging their collaboration on this article, and to Mr. Jeffrey Turnoy of Willamette University School of Law, for his work in editing the draft manuscript.

1. For a brief history of the Jim Crow imagery and related laws, see David Pilgrim, *Who was Jim Crow?*, FERRIS STATE UNIVERSITY JIM CROW MUSEUM (Sept. 2000), <http://www.ferris.edu/news/jimcrow/who.htm>; For a contemporary view of Jim Crow, see MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2011).

2. Commentator Matt Bai notes that “any hope that Mr. Obama’s election might magically erase the tension of recent decades has faded, as the N.A.A.C.P. and the Tea Party

may have receded in recent decades, rumors of its demise as an ongoing social problem are greatly exaggerated.³ “Race,” as Cornel West eloquently advised a decade and a half ago, still “Matters.”⁴

Despite progress in the half century since *Brown v. Bd. of Educ.*⁵ and the demise of the “separate but equal”⁶ doctrine, harmful and costly levels of discrimination, racism, and racial harassment continue to exist, including in the workplace.⁷ Attempts to redress these ills, particularly in the employment setting, have been cumbersome and often ineffective for aggrieved employees as they have sought redress either administratively through the U.S. Equal Employment Opportunity Commission (EEOC), or in the federal courts.⁸ One indication of the dismal prospects for employees injured by racial discrimination and harassment is that, in spite of diligent efforts (and until recently a shrinking staff), the EEOC backlog of cases numbered 86,338 as of September 2010.⁹ Furthermore, when employee–plaintiffs seek to pursue their cases through state or federal administrative agencies or courts, the standards established in federal statutes and court rulings present a daunting “web” of choices for them. The choices are complex for defendant employers and their respective counsel as well.¹⁰ This confusion is most acutely felt in the

traded accusations over race. Black leaders have discovered that you still can’t raise legitimate questions about racism without being accused of ‘playing the race card.’” Matt Bai, *Still Too Hot to Touch*, N.Y. TIMES, July 25, 2010, at WK1.

3. See TIM WISE, BETWEEN BARACK AND A HARD PLACE 18 (2009) (“For while the political ascent of Barack Obama . . . certainly says something about race, what it says is far from that which most . . . seem to believe. Yes, it suggests that blind and irrational bigotry of the kind that animated so much white opinion for so long in the United States may well have receded But given the evidence regarding entrenched racial inequities in employment. . . housing and elsewhere – and studies indicating these are due in large measure to discrimination, either past, present, or a combination of the two – it most definitely does not suggest that racism has been truncated as an ongoing social problem for persons of color generally.”).

4. CORNEL WEST, RACE MATTERS 9 (1993).

5. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

6. See generally *Plessy v. Ferguson*, 163 U.S. 537 (1896).

7. In all, it is estimated that African American workers alone lose over \$120 billion in wages each year thanks to labor market discrimination of one kind or another; monies they would be paid if opportunity were truly equal, but which they do not in fact receive, much to their detriment, and much to the benefit of the mostly white employers for whom they work who get to retain the unpaid amount in their own coffers. WISE, *supra* note 3, at 44 (citing JOE R. FEAGIN, SYSTEMATIC RACISM: A THEORY OF OPPRESSION 196 (2006)).

8. Robert T. Carter & Jessica M. Forsyth, *A Guide to the Forensic Assessment of Race-based Traumatic Stress Reactions*, 37 J. AM. ACAD. PSYCHIATRY & L., 28, 30 (2009).

9. Jenna Greene, *On Borrowed Time*, THE NAT’L L.J., Nov. 29, 2010, at 42.

10. Lisa M. Durham Taylor, *Untangling the Web Spun by Title VII’s Referral and Deferral Scheme*, 59 CATH. U. L. REV. 427, 430 (2010). Taylor analogizes the aggrieved employee–plaintiff’s path to a “spider’s web.” She summarizes the web this way: “First the

case of employees who have experienced severe injuries such as race-based traumatic stress (RBTS) resulting from workplace harassment, as they seek just compensation for their injuries and for the harassment to cease.¹¹

This Article proposes a legal and policy framework for more effective prevention of and legal redress for workplace harassment and discrimination.¹² This approach focuses on employees who have suffered a severe, demonstrable emotional and psychological injury due to harassment or discrimination, i.e. race-based traumatic stress (RBTS).¹³ The Article begins with the assertion that America is not in a “post-racial” stage and that racism and racial harassment, both intentional and more subtle, are unfortunately still present in various settings including the workplace. A brief overview of current federal employment law related to racial harassment and discrimination, and its deficits, is provided, and the use of tort concepts to complement and strengthen current avenues to legal redress is proposed and discussed. Finally, this Article proposes a comprehensive approach to workplace harassment and discrimination.

A more comprehensive and multifaceted approach to workplace harassment and discrimination is needed, because attempts by aggrieved employee-plaintiffs to achieve redress under established

[Supreme] Court has drawn a line between state administrative proceedings and any subsequent judicial review by state courts, so that the state-agency determinations on un-reviewed claims covered by Title VII have no preclusive effect in a subsequent suit asserting the same claims in federal court. Thus, a claimant whose grievance receives full consideration by the relevant state or local agency but does not reach the state courts may, without facing a preclusive bar, assert that same claim to the EEOC and in a subsequent federal lawsuit. This scenario is most likely to arise when the claimant does not prevail in the state or local administrative forum. Having failed to convince the local administrative authorities of his claim’s merit, he may turn to the federal system with the hope of obtaining a better result. Of course, he could also seek direct review of the state agency’s determination by filing an appeal with the appropriate state court. However, a claimant receiving sound legal advice should be wary of following this course in light of the risk that it carries of a binding adverse determination.” *Id.* (citing *Univ. of Tenn. v. Elliott*, 478 U.S. 788, 795–96 (1986); *CONN. GEN. STAT. ANN. § 4-183(a)* (West 2009); 18B *CHARLES ALAN WRIGHT ET AL., FED. PRAC. AND PROC. § 4471.3* (2d ed. 2002)) (alteration added). Taylor goes on to caution: “[t]he law affords plaintiffs a choice to pursue relief under state law, under federal law, or under both, but it does not allow them to manipulate the system by seeking separate remedies in sequence. A plaintiff cannot have his cake and eat it too.” *Id.* at 478.

11. See Robert T. Carter, *Race Based Traumatic Stress*, *PSYCHIATRIC TIMES*, Dec. 1, 2006, at 1–5 [hereinafter Carter, *Race-based Traumatic Stress*]; see also Robert T. Carter, *Racism and Psychological and Emotional Injury: Recognizing and Assessing Race-Based Traumatic Stress*, 35 *THE COUNSELING PSYCHOLOGIST* 13 (2007) [hereinafter Carter, *Recognizing and Assessing Race-based Traumatic Stress*].

12. See *infra* Sections V, VI.

13. See Carter, *Recognizing and Assessing Race-based Traumatic Stress*, *supra* note 11, at 87.

law have had relatively little success; recent research on more than a decade of federal employment discrimination cases underscores the deficits in current legal approaches.¹⁴ A more robust approach to prevent and respond to racial harassment would benefit employees and their employers. A legal and policy strategy, “Employer Liability, and *Shared Responsibility* for Race–Based Traumatic Stress,” is presented in Section VI; which calls for a three–pronged approach:

- (1) Legal scholars and courts developing more effective applications of established employment law, primarily Title VII to cases of race–based traumatic stress;
- (2) Courts and judges making available and viable tort remedies such as intentional infliction of emotional distress to employees who have suffered race–based traumatic injuries in the workplace; and
- (3) Development, education on, and implementation of clearer workplace policies on workplace harassment and discrimination to prevent and to respond to employee RBTS.

In the area of workplace harassment, the development and application of clearer, more viable, and fairer legal standards are needed to advance fundamental racial justice for employees and foster the duty of employers to provide a harassment–free workplace. Access to a more comprehensive and effective approach to redress, through both federal and state legal systems, is long overdue in situations involving employees who have experienced RBTS. This Article aims to raise the awareness of employers and employees to the realities and harms of RBTS. Adoption of the *shared responsibility* approach proposed herein would benefit the employers who have the responsibility to provide workplace environments free of discrimination and harassment: employees who work in them; businesses, organizations, and society, who benefit from their productivity, services, and products.

Racial discrimination and harassment still exist in the employment setting; we are not living and working in environments that evidence the existence of a “post–racial America,” but rather the continuation of racism and racial harassment albeit sometimes in

14. See Pat K. Chew & Robert E. Kelley, *Unwrapping Racial Harassment Law*, 27 BERKELEY J. EMP. & LAB. L. 49, 53–54 (2006).

different forms. In Section II, we note that some employees who are members of protected classifications (e.g., race, ethnicity, or nationality) continue to experience real discrimination and harassment that harms them (and their fellow employees, and their employers). Current approaches to responding to and remedying racial harassment are outlined in Section III, and an overview of workplace harassment and discrimination law is provided in Section IV. A more focused approach to addressing workplace harassment is addressed in Section V – specifically how to deal with the psychological impairment and RBTS injuries and their broader impact on workplace environment and productivity. A proposal for a comprehensive approach to this aspect of the problem, involving both policy and law considerations – and a call to reflection and action for employers, courts, employees, and legal scholars – is detailed in Section VI.

I. “POST-RACIAL” AMERICA: CONTEMPORARY RACISM, INJURIES, AND LIMITED REDRESS

A. Contemporary Racism and the Resulting Workplace Injury: The Negative Health Effects of Psychological and Emotional Impairment and Race-Based Traumatic Stress Injury

All Americans, regardless of race or ethnic origin, share a range of common values, aspirations and emotions. We all feel fear and worry about things that are beyond our control, and we feel anger and dismay toward people who do not show respect, treat us unfairly, or interact with some form of bias toward us. When we encounter daily hassles we feel stressed and frustrated. North America has a long and painful history of racial stratification and unequal rights and treatment based on skin color, physical features, and language. While national polls have found that 69% of White and 59% of Black Americans believe that race relations have improved over time,¹⁵ the historical legacy of racism remains in the memory of those who survived or witnessed the segregation and racial terrorism of the Jim Crow years, and in some instances it is possible to find racism alive and well today.

Many respected social and government organizations have identified racism as a social-political issue that contributes to health,

15. Jeffrey M. Jones, *Americans Hold Improving View of Race Relations in U.S.*, GALLUP POLL NEWS SERVICE, 1–14, Wash., D.C., June 30, 2003.

mental health, educational, and other types of disparities.¹⁶ These reports do not question the existence of racism as a current feature of everyday life in the United States.

Black Americans have been and continue to be stereotyped as amoral, unintelligent, lazy, violent, and criminal.¹⁷ These pervasive stereotypes, which originated during slavery, persist to this day and have been shown to influence a variety of social perceptions and political opinions including support for punitive policies and penalties.¹⁸ Racism is evident when a person harbors negative feelings and attitudes towards Blacks or other racial minorities and expresses these feelings and attitudes through behavior or action on an interpersonal or institutional level.

Racism may take several forms, many of which have been investigated in research that examines the impact of racism on mental and physical health. One form of racism is discrimination that is characterized by avoidance or social exclusion wherein people are rejected or ignored because of their race or ethnicity. Another form is racial harassment, which includes verbal and non-verbal acts directed at people to demean, intimidate, silence, or communicate inferior status based on their race (e.g., that the person is stupid). Racial harassment can also involve potential or actual damage to one's person (psychological, emotional or physical injury). A third kind of racism, aversive-hostility can occur in schools, organizations or in the workplace when people encounter barriers, lack of opportunity and, in some instances, a racially hostile environment, because of their race or ethnicity.¹⁹ These forms of racism can be expressed overtly as in the use of racial slurs, intimidation and threats, or they can be covert,²⁰ and can occur in a variety of contexts. Whatever form it takes, racism

16. See UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC HEALTH DISPARITIES IN HEALTHCARE 9–13 (Brian D. Smedley et al. eds., 2003); U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, MENTAL HEALTH: CULTURE, RACE, AND ETHNICITY; A SUPPLEMENT TO MENTAL HEALTH: A REPORT OF THE SURGEON GENERAL 11–15 (2001).

17. Jones, *supra* note 15 at 10; Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876 (2004); Francis J. Flynn, *Having an Open Mind: The Impact of Openness to Experience on Interracial Attitudes and Impression Formation*, 88 J. PERSONALITY & SOC. PSYCHOL., 816 (2005).

18. Lincoln Quillian & Devah Pager, *Black Neighbors, Higher Crime? The Role of Racial Stereotypes in Evaluations of Neighborhood Crime*, 107 AM. J. SOC. 717, 723 (2001); James D. Unnever & Francis T. Cullen, *The Racial Divide in Support for the Death Penalty: Does White Racism Matter?*, 85 SOC. FORCES 1281, 1283–84 (2007).

19. See *infra* note 20.

20. Elizabeth Brondolo et al., *Coping with Racism: A Selective Review of the Literature and a Theoretical and Methodological Critique*, 32 J. BEHAV. MED. 64, 65 (2009) [hereinafter Brondolo, *Coping with Racism*]; Carter, *Recognizing and Assessing Race-based Traumatic Stress*, *supra* note 11, at 37.

is a significant stressor whose adverse health and mental health effects on Black Americans and other racial minorities has been well documented in the empirical research literature.²¹

*B. Prevalence of and Injuries Resulting from Racial
Discrimination*

Research on racism shows that many Americans continue to experience racial discrimination in various areas of life (e.g., housing, school, work, etc.).²² Studies of 233 Black, Asian, Biracial, and Hispanic peoples' experiences with racial discrimination, found that 89% of the participants had experienced perceived racial discrimination.²³ Recent studies have found that African Americans, in particular, face high rates of exposure to racial discrimination. For example, using data from a national probability sample from a longitudinal study (conducted over a fifteen-year period) that included Whites (1,813) and African Americans (1,507), Borrell and colleagues (2007) found that most (89%) African Americans experienced racial discrimination in one of several life domains (e.g., school, getting a job, at work, housing, medical care, public settings, and with police/courts) and 34% experienced racial discrimination in at least three of the domains.²⁴ In comparison, only 1% of White Americans reported experiencing racial discrimination in at least three of the domains.²⁵ Similarly, in a study of the prevalence of workplace abuse (i.e., verbal aggression, disrespectful behavior), sexual harassment and racial discrimination in a racially diverse sample of 1200 low-income workers, high levels of exposure to racial discrimination was reported by 37% of the workers of Color, as compared to 10% of White

21. See generally Brondolo, *Coping with Racism*, *supra* note 20; Carter, *Recognizing and Assessing Race-Based Traumatic Stress*, *supra* note 11, at 14–15; see generally John F. Dovidio et al., *Why Can't We Just Get Along? Interpersonal Biases and Interracial Distrust*, 8 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 88 (2002); David R. Williams & Selina A. Mohammed, *Discrimination and Racial Disparities in Health: Evidence and Needed Research*, 32 J. BEHAV. MED. 20, 21 (2009).

22. Robert T. Carter et al., *Racial Discrimination and Race-based Traumatic Stress: An Exploratory Investigation*, in HANDBOOK OF RACIAL-CULTURAL PSYCHOLOGY AND COUNSELING: TRAINING AND PRACTICE VOL. 2, 467 (Robert T. Carter ed., 2004) [hereinafter Carter, HANDBOOK]; Carter, *Recognizing and Assessing Race-based Traumatic Stress*, *supra* note 11, at 19.

23. *Id.*

24. See generally Luisa N. Borrell et al., *Self-reported Racial Discrimination and Substance Use in the Coronary Artery Risk Development in Adults (CARDIA) Study*, 166 AM. J. EPIDEMIOLOGY 1068 (2007).

25. *Id.*

workers. Among the workers of Color, Black Americans reported the highest level of exposure at 44%.²⁶

Recent research focusing only on African American samples provided similar results to those found in mixed race samples. A study using data from the National Survey of Black Workers found that the majority (71%) of the sample reported having had an experience of racial discrimination in their lifetime.²⁷ In a study examining the frequency of racial discrimination in health care settings, Lewis and colleagues found that most (85%) of the African American women in their study experienced “everyday” forms of discrimination (i.e., minor, everyday insults that individuals may experience as members of a minority group), and 76.9% of them reported that the discrimination they experienced was related to their race.²⁸ Williams and Williams–Morris suggest that racism and racial discrimination affects mental health through multiple pathways.²⁹ One is the restriction on socioeconomic opportunity and access to care.³⁰ Another is exposure to poor living conditions.³¹ A third is being subjected to negative stereotypes that contribute to justifications for racial disparities or bias, and that can lead to the internalization of the stigma of inferiority and cultural deprivation.³² These pathways may lead to impaired health and psychological functioning due to the repeated and daily stress they produce.³³

The pathways that effect health have been investigated for nearly three decades using a variety of methods (i.e., cross-sectional, longitudinal, experimental), various measures of different types of racism and discrimination (i.e., major, acute events versus chronic

26. Nancy Krieger et al., *Social Hazards on the Job: Workplace Abuse, Sexual Harassment, and Racial Discrimination – A Study of Black, Latino and White Low-Income Women and Men Workers in the United States*, 36 INT’L J. HEALTH SERV. 51 (2006).

27. Jack K. Martin et al., *Problem Drinking Patterns Among African Americans: The Impacts of Reports of Discrimination, Perceptions of Prejudice, and “Risky” Coping Strategies*, 44 J. HEALTH & SOC. BEHAV. 408, 415 (2003).

28. Tene T. Lewis et al., *Chronic Exposure to Everyday Discrimination and Coronary Artery Calcification in African-American Women: The SWAN Heart Study*, 68 PSYCHOSOMATIC MED. 362, 363–65 (2006).

29. David R. Williams & Ruth Williams–Morris, *Racism and Mental Health: The African American Experience*, 5 ETHNICITY & HEALTH 243, 251–62 (2000).

30. *Id.* at 248.

31. *Id.* at 251.

32. *Id.* at 255–56.

33. Carter, *Recognizing and Assessing Race-based Traumatic Stress*, *supra* note 11, at 26–27; Rodney Clark et al., *Racism as a Stressor for African Americans: A Biopsychosocial Model*, 54 AM. PSYCHOLOGIST 805, 811–13 (1999); Chalmer E. Thompson & Helen A. Neville, *Racism, Mental Health, and Mental Health Practice*, 27 THE COUNSELING PSYCHOLOGIST 155, 191 (1999).

daily hassles; single items versus multidimensional scales), different timeframes for exposure to racial experiences (i.e., last month, last year, last three years, lifetime), and an assortment of outcome variables (i.e., measures of mental health, self-report and objective measures of health) with a variety of racial minority groups at various stages of life (i.e., adolescents, younger and older adults) has found that racism has a negative impact on a range of indices of health and mental health.³⁴

1. Health Effects

Researchers consistently show the negative effects of racism on the physical health of racial and ethnic minorities. Researchers studying the physiological effects of discrimination have explored these relationships within the context of stress, such that racial discrimination is viewed as a form of stress that triggers physiological responses (e.g., elevated blood pressure, heart rate, cortisol secretions), resulting in health-related problems.³⁵ Self-reported experiences or perceptions of racial discrimination have been linked to risk factors for hypertension, coronary heart disease;³⁶ smoking;³⁷ illicit substance use;³⁸ alcoholism;³⁹ and risk factors for many other diseases.⁴⁰

Chronic experiences of discrimination have also been shown to have negative health outcomes. For example, Lewis et al.⁴¹ examined the relationship between chronic experiences of discrimination and coronary artery calcification (CAC) among 181 African-American women between 42 and 52 years of age.⁴² The researchers examined “everyday” forms of discrimination described as minor, everyday

34. *Id.*

35. See generally Elizabeth A. Pascoe & Laura S. Richman, *Perceived Discrimination and Health: A Meta-Analytic Review*, 135 PSYCHOL. BULLETIN 531 (2009).

36. Brondolo, *Coping with Racism*, *supra* note 20, at 64; Lewis et al., *supra* note 28 at 362.

37. See generally Hope Landrine & Elizabeth A. Klonoff, *Racial Segregation and Cigarette Smoking Among Blacks: Findings at the Individual Level*, 10 HEALTH PSYCOL. 211 (2000); Barbara J. Guthrie et al., *African American Girls' Smoking Habits and Day-to-Day Experience with Racial Discrimination*, 51 NURSING RESEARCH 183 (2002); Gary G. Bennett et al., *Perceived Racial/Ethnic Harassment and Tobacco Use Among African American Young Adults*, 95 AM. J. PUB. HEALTH 238, 238–39 (2005).

38. See generally Luisa N. Borrell et al., *Self-reported Racial Discrimination and Substance Use in the Coronary Artery Risk Development in Adults (CARDIA) Study*, 166 AM. J. EPIDEMIOLOGY 1068 (2007).

39. See generally Martin, *supra* note 27.

40. Williams & Mohammed, *supra* note 21, at 21, 34.

41. Lewis, *supra* note 28, at 363.

42. *Id.*

(chronic) insults that individuals may experience as members of a racial minority group.⁴³ Information was gathered at annual doctor visits over a five-year period.⁴⁴ Most (85%) of the participants reported having experienced discrimination either sometimes or often and most of them (76.9%) reported it was related to their race or ethnicity at some point in the five year period.⁴⁵ The researchers found that chronic exposure to discrimination was significantly associated with the presence of CAC, cardiovascular risk factors, and increases in Body Mass Index (BMI), and that even after adjusting for demographic variables, the association among chronic exposure and CAC remained significant among the women in their study.⁴⁶ The relationship between discrimination and exaggerated cardiovascular responses to stressful events are important to highlight because the exaggerated physiological responses associated with stress are indicators of coronary heart disease and hypertension.⁴⁷

Other studies have found an association between racial discrimination and low-birth weight deliveries as well as a variety of other health risks.⁴⁸ In summary, these empirical studies show that racial discrimination can have a powerful impact on physiological and biological systems. This physiological stress-related impact provides strong evidence that racial discrimination and harassment can also have powerful and significant impact on one's psychological and emotional state.

2. *Mental Health*

The negative effects of discrimination and racial harassment on mental health are well documented. The psychological and emotional responses to racial discrimination and harassment are similar to other experiences of people who are unfairly targeted (e.g., psychological abuse, physical or sexual assault, etc.) that can be immediate and

43. *Id.* at 362.

44. *Id.* at 363.

45. *Id.* at 365.

46. *Id.* at 365–66.

47. See, Nancy L. Marshall et al., *The Changing Workforce, Job Stress, and Psychological Distress*, 2 J. OCCUPATIONAL HEALTH PSYCHOL. 99, 99–100 (1997); Sheldon Cohen et al., *Social Support and Coronary Heart Disease: Underlying Psychologic and Biologic Mechanisms* (1994) (found in SOC. SUPPORT AND CARDIOVASCULAR DISEASE 204 (Sally A. Shumaker & Susan M. Czajkowski eds. 1994)).

48. Carter, *Recognizing and Assessing Race-based Traumatic Stress*, *supra* note 11, at 58; Yin Paradies, *A Systematic Review of Empirical Research on Self-reported Racism and Health*, 35 INT'L J. EPIDEMIOLOGY 888, 894 (2006); Williams & Mohammed, *supra* note 21, at 30.

intense.⁴⁹ Even relatively minor race-related experiences can result in a great deal of suffering, particularly when efforts to cope and adapt fail, resulting in a stress response that can lead to trauma.⁵⁰

Empirical studies have found significant links between self-reported experiences of racial discrimination and negative mood, depressive symptoms, feelings of hopelessness, anxiety and psychological distress.⁵¹ Pascoe and Richman conducted a comprehensive meta-analysis of studies conducted from 1986 to 2007 on the relationships between perceived discrimination and mental health outcomes.⁵² The researchers found 110 studies examining the relationship between perceived discrimination and symptomatology (e.g., depression, anxiety, posttraumatic stress, etc.), psychological distress, and well-being (e.g., self-esteem, life satisfaction, stress, happiness, etc.).⁵³ Their statistical meta-analysis of the results of these studies indicated that perceived discrimination was significantly related to negative mental health outcomes.⁵⁴

Carter, R.T. and other researchers⁵⁵ have written extensively on the trauma associated with racism and racial harassment.⁵⁶ The costs to the individual who has experienced emotional and psychological impairment or who was traumatized have been well-documented; these include both physical and psychological injuries, some of which can be severe and long-standing.⁵⁷ In the work setting, the costs also include those to individual employees as well as their co-workers, and the employer.⁵⁸ Lowered productivity from ill or absent employees who have been traumatized, as well as damage to group and team efforts due to the trauma of one or more members are also costly to businesses and organizations as well as their employees. Communication and creative capabilities, both individual and

49. Thema Bryant-Davis & Carlota Ocampo, *Racist-Incident-based Trauma*, 33 THE COUNSELING PSYCHOLOGIST 479, 485-86 (2005); Carter, *Recognizing and Assessing Race based Traumatic Stress*, *supra* note 11, at 58; Carter & Forsyth, *supra* note 8, at 36.

50. *Id.*

51. *See generally* Paradies, *supra* note 48; Pascoe & Richman, *supra* note 35, at 537.

52. Pascoe & Richman, *supra* note 35, at 536-37.

53. *Id.*

54. *Id.* at 537-38.

55. *See, e.g.*, Pascoe & Richman, *supra* note 35; Williams & Mohammed, *supra* note 21.

56. *See, e.g.*, Carter, HANDBOOK, *supra* note 22; Carter & Mazzula, *infra* note 83; Carter, *Recognizing and Assessing Race-based Traumatic Stress*, *supra* note 11

57. *See generally infra* note 82.

58. Pascoe & Richman, *supra* note 35.

collective, are also arguably damaged by racism and racial harassment in the workplace.⁵⁹

Banks, Kohn–Wood, and Spencer investigated the relationship between everyday (chronic) discrimination, anxiety, and depressive symptoms among 570 African Americans adults using data from the 1995 Detroit Area Study.⁶⁰ Discrimination was significantly related to symptoms of depression and anxiety.⁶¹ Similarly, in a longitudinal study (1996–2001), Schulz et al. examined the relationship between experiences of discrimination over time and depression among 343 African American women living in Detroit.⁶² The researchers found that women who reported increased experiences of discrimination over time also reported increases in depressive symptoms and decreases in self-rated general health, irrespective of age, education, or income.⁶³ Thus, the study provides support for the assertion that everyday encounters with racial discrimination are associated with poor mental health outcomes.⁶⁴

Racial discrimination has also been significantly associated with clinical symptoms and diagnoses. For example, Gee, Spencer, Chen, Yip, and Takeuchi examined the relationship between self-reported racial discrimination and DSM–IV disorders among Asian Americans using the 2002–2003 U.S. National Latino and Asian American Study (n=2047).⁶⁵ After controlling for several confounding variables (e.g., SES, physical conditions, social desirability, etc.), having experiences of racial discrimination increased the likelihood of having a mental disorder.⁶⁶ Specifically, individuals who experienced racial discrimination had twice the risk of having one disorder and three times the risk of having at least two disorders.⁶⁷ They also found that the association was stronger for depressive disorders.⁶⁸

59. Pascoe & Richman, *supra* note 35; Williams & Mohammed, *supra* note 21, at 34.

60. Kira H. Banks et al., *An Examination of the African American Experience of Everyday Discrimination and Symptoms of Psychological Distress*, 42 CMTY. MENTAL HEALTH J. 555, 560–61 (2006).

61. *Id.* at 566.

62. Amy J. Schulz et al., *Discrimination, Symptoms of Depression, and Self-rated Health Among African American Women in Detroit: Results From a Longitudinal Analysis*, 96 AM. J. PUB. HEALTH 1265 (2006).

63. *Id.* at 1267.

64. *Id.* at 1269.

65. Gilbert C. Gee et al., *The Association Between Self-reported Discrimination and 12-month DSM–IV Mental Disorders Among Asian Americans Nationwide*, 64 SOC. SCI. & MED. 1984, 1986–87 (2007).

66. *Id.* at 1986–87, 1992.

67. *Id.* at 1993.

68. *Id.*

Landrine and Klonoff reported that Black study participants' encounters with perceived racial discrimination were related to low self-esteem as well as a variety of stress-related somatic symptoms.⁶⁹ Contrada et al. reported that racial discrimination was related to symptoms of depression.⁷⁰ Schneider et al. found that respondents who experienced racially harassing events reported symptoms of psychological distress.⁷¹ Utsey and Payne explored the relationship between race-related stress, anxiety and depression in Black men.⁷² They found that race related stress predicted anxiety and depression scores.⁷³ Klonoff, Landrine and Ullman found that racist events were predictive of three types of symptoms, total mental health severity scores, somatization and anxiety.⁷⁴ They tested whether stress from racial discrimination added to general life stress and contributed to psychological symptoms and found that race-based stress contributed to all psychological symptoms above and beyond social class and general life stressors.⁷⁵ Broman et al. found that, of the adults studied, targets of racial discrimination exhibited lower levels of mastery (control and problem solving) and higher levels of psychological distress (feeling depressed, restless, etc).⁷⁶

Researchers have shown that Blacks who experience acts of racial discrimination report these incidents as painful, damaging and distressful in the moment, but more importantly, they argue that such incidents have a lasting psychological and emotional impact on individuals.⁷⁷ Blacks are, as a result of racial stereotypes, in many ways limited and often are demeaned for expressions of anger and

69. Hope Landrine & Elizabeth A. Klonoff, *The Schedule of Racist Events: A Measure of Racial Discrimination and a Study of Its Negative Physical and Mental Health Consequences*, 22 J. BLACK PSYCHOL. 144, 154-56 (1996).

70. Richard J. Contrada et al., *Measures of Ethnicity-related Stress: Psychometric Properties, Ethnic Group Differences, and Associations with Well-being*, 31 J. APPLIED SOC. PSYCHOL. 1775, 1802 (2001).

71. Kimberly T. Schneider et al., *An Examination of the Nature and Correlates of Ethnic Harassment Experiences in Multiple Contexts*, 85 J. APPLIED PSYCHOL. 3, 10-11 (2000).

72. See generally Shawn O. Utsey & Yasser. Payne, *Psychological Impacts of Racism in a Clinical Versus Normal Sample of African American Men*, 5 J. AFRICAN AM. MEN 57, 63 (2001).

73. *Id.* at 69.

74. Elizabeth A. Klonoff et al., *Racial Discrimination and Psychiatric Symptoms Among Blacks*, 5 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOL. 329, 332 (1999).

75. *Id.*

76. Clifford L. Broman et al., *The Experience and Consequences of Perceived Racial Discrimination: A Study of African Americans*, 26 J. BLACK PSYCHOL. 165, 177-79 (2000).

77. See, JOE R. FEAGIN & MELVIN SIKES, *LIVING WITH RACISM: THE BLACK MIDDLE-CLASS EXPERIENCE* 23 (1994).

frustration when subjected to racial encounters and these social and interpersonal restrictions may result in further emotional and psychological harm when they experience perceived racial hostility. In another study, participants' reported that their experiences were hurtful and came with psychological costs such as lack of trust and harm to one's sense of self and personal confidence.⁷⁸

Studies by Carter et al. found that 74% (173) of the respondents who had encounters with perceived racial discrimination reported lasting psychological effects and many of the symptoms reported were consistent with trauma reactions.⁷⁹ Across all events and for all racial groups, extreme emotional distress (36%) was the most frequently reported emotional effect, followed by arousal or hyper-vigilance (15%), lowered self-worth (9%), avoidance or withdrawal (8%) and distrust (8%).⁸⁰ In a follow-up investigation, Carter et al. sought to determine whether individuals who experienced racially hostile acts were more likely than individuals who experienced less hostile discrimination to experience psychological injury.⁸¹ The results indicate that the participants who experience racially hostile acts are significantly more likely to report injurious lasting mental health effects.⁸² Carter and Mazzula examined the mental health effects of racial profiling and found that Blacks and Latinos had the most frequent lasting psychological and emotional effects.⁸³ Blacks reported more avoidance symptoms and Latinos reported more arousal.⁸⁴

The danger in (falsely) presuming that we are in a "post-racial America" in the employment setting is that employers could, unwittingly or even negligently, miss or diminish their employees' concerns and complaints regarding racial harassment and discrimination that are real and that can result in injury to the employee. Racism in any setting, including the workplace is costly, and not only to those who are the targets of it.⁸⁵ The reasons for addressing racism include respecting the dignity of all persons, and

78. Jennifer Lee, *The Salience of Race in Everyday Life: Black Customers' Shopping Experiences in Black and White Neighborhoods*, 27 *WORK & OCCUPATIONS* 353, 361, 368 (2000).

79. Carter, *Recognizing and Assessing Race-based Traumatic Stress*, *supra* note 11, at 43.

80. Carter, *HANDBOOK*, *supra* note 22, at 463–64.

81. *Id.*

82. *Id.*

83. Robert T. Carter & Silvia L. Mazzula, *The Mental Health Effects of Racial Profiling*, 6 *L. ENFORCEMENT EXECUTIVE FORUM* 111 (2006).

84. *Id.*

85. *See supra* n.7.

affording them equal protection under the law.⁸⁶ But the interests in combating workplace racism are broader. Beverly Tatum, in her book *Why Are All the Black Kids Sitting Together in the Cafeteria?*,⁸⁷ asks the provocative question: “[w]hy should Whites, who are advantaged by racism want to end that system of advantage?”⁸⁸ Tatum cites a *Money* magazine article called “Race and Money,” which chronicled the many ways the American economy was hindered by institutional racism, including lost productivity, wasted talent, and fear of others who are different.⁸⁹

Speaking to the costs of racism in our educational system, Cecilia Fisher and her colleagues contended that Institutional and interpersonal acts of racism via discrimination or harassment create psychological distress for students, which negatively impact their academic lives and their sense of self-worth.⁹⁰ The harassing acts, which seem far more perverse, are more troubling because they can lead to psychological disengagement from academic achievement and success.⁹¹ Both racial discrimination and racial harassment have serious psychological outcomes for youth being educated in America.⁹²

Each year, a disturbing number of African Americans and other employees of underrepresented groups – primarily racial and ethnic minorities – report being injured emotionally and psychologically in the workplace due to direct (both overt and subtle) acts of racial harassment and/or a work environment that is hostile to them as

86. U.S. CONST. amend. XIV.

87. BEVERLY D. TATUM, *WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA?: AND OTHER OBSERVATIONS ABOUT RACE* 13 (1997) (emphasis in original).

88. *Id.* at 13.

89. *Id.* at 14. Tatum notes that, “[w]hether one looks at productivity lowered by racial tensions in the workplace, or real estate equity lost through housing discrimination, or . . . the warehousing human talent in prison, the economic costs of racism are real and measurable . . . As a psychologist, I often hear about the less easily measured costs. When I ask White men and women how racism hurts them, they frequently talk about their fears of people of color, the social incompetence they feel in racially mixed situations . . . and the interracial friendships they had as children that were lost in adolescence . . . White people are paying a significant price for the system of advantage. The cost is not as high for Whites as it is for people of color, but the price is being paid.” *Id.*

90. Celia B. Fisher et al., *Discrimination Distress During Adolescence*, 29 J. YOUTH & ADOLESCENCE, 679 (2000).

91. *Id.* at 690.

92. *Id.* at 687, 690–93; Toni Schmader et al., *Coping with Ethnic Stereotypes in the Academic Domain: Perceived Injustice and Psychological Disengagement*, 57 J. SOC. ISSUES 93, 94–96 (2001).

minorities.⁹³ Derald Wing Sue discusses the cumulative injurious effects of “microaggressions” on members of racial minority groups in his book of the same title.⁹⁴ A notorious example in recent national news is the case of Shirley Sherrod who, according to the *New York Times* “became an instant celebrity . . . because of a speech she gave to an N.A.A.C.P. convention in March [2010] in which she explained the evolution of her attitudes on race. A conservative blogger triumphantly circulated an edited clip in which Ms. Sherrod seemed to suggest that she had declined to help a white farmer in need of aid. (She hadn’t, to which the farmer attested). From there, Ms. Sherrod was renounced by a jittery N.A.A.C.P., exploited by right-wing commentators, and fired and the unfired from her job, before at last receiving a conciliatory call from the President of the United States.”⁹⁵

A contrast can be drawn between the treatment of Shirley Sherrod, an African American woman who was unjustifiably fired from (and then reinstated in) her job with the federal government, and the historical view of racial harassment law and the tort of “outrage,” which served to protect white plaintiffs. Whereas Sherrod could be justifiably outraged by her treatment in the work setting—which was based on her race, i.e. her status in an under-represented class—the “outrage” experienced by whites in the historical view of the tort often stemmed merely from affronts by non-whites to the privilege they enjoyed as members of the majority.⁹⁶

93. See also DERALD W. SUE, *MICROAGGRESSIONS IN EVERYDAY LIFE: RACE, GENDER, AND SEXUAL ORIENTATION* 128–32, 214–16 (2010) (describing the Psychological Cost of Oppression (Microaggressions) to perpetrators; and ten Psychological Implications in the workplace to those being oppressed, including: depression, sleep difficulties, and loss of drive.).

94. *Id.*

95. Bai, *supra* note 2, at 7.

96. Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 WM. & MARY L. REV. 2115, 2121 (2007). Chamallas notes, “[i]n its early days, the abuses of power addressed by the infliction tort did not encompass the power of white racial privilege [or conferred dominance (as restated by Macintosh)]. The infliction tort provided little protection against severe emotional distress inflicted by racist behavior, nor was it used to recognize the extreme vulnerability of racial minorities to suffering at the hands of whites. During this period, the protection against racial insult or race-based humiliation was more likely to be afforded to white rather than minority plaintiffs.” *Id.* at 2167–68. Particularly pertinent to the thesis of this article, Chamallas notes that the pretext of privilege was actually a mantle of white supremacy: “On issues of race, tort law tended to reinforce white supremacy by providing white claimants damages for the ‘outrage’ of being treated with insufficient deference by black attendants or for mistakenly being assigned to a ‘colored’ facility. *Until the injustice of racial hierarchy was challenged by the civil rights movement, few recognized that discriminatory treatment of racial minorities might qualify as intolerable and outrageous conduct and form the basis of a tort claim for emotional distress.* Before civil rights, tort law

Cases that involve incidents like the one in which Ms. Sherrod was involved constitute more than just losing one's job or harm to one's reputation, although those are certainly deleterious effects. Of even greater concern, the research on the mental health impact of racism has found that targets of racial discrimination and harassment experience a range of negative effects as measured by a variety of mental health outcome measures. Many of these studies show that some people suffer psychological distress such as clinical depression, anxiety disorders, PTSD, or some personality disorders as a result of exposure to racism-related stress.⁹⁷ Despite the strong empirical evidence indicating that racial minorities who report experiencing racial discrimination or harassment find these encounters to be sources of stress, and the evidence that this stress is related to psychological harm in the form of anxiety, depression, lower self worth, and trauma, the mental health impact of racial incidents is not specifically considered in psychiatric assessment.⁹⁸ Moreover, currently, there is a lack of robust theory to draw from in seeking meaningful and timely legal redress for racial discrimination, racial harassment, or racially hostile work environments.⁹⁹

C. Workplace Harassment and Traumatic Injury—Implications for Employers and Employees

Injuries suffered by employees who experience racial harassment and discrimination may have physical as well as psychological manifestations, particularly if they involve traumatic stress or psychological impairment, which is referred to as "race-based traumatic stress."¹⁰⁰ This type of harassment, and the hostile workplace environments in which it occurs, are the result of both intentional and unintentional (including negligent) acts or omissions on the part of fellow employees, and/or managers and supervisors.

was more engaged in vindicating wounded feelings of white racial pride than in compensating for harms of racial subordination." *Id.* at 2168 (emphasis added).

97. Hugh F. Butts, *The Black Mask of Humanity: Racial/Ethnic Discrimination and Post-traumatic Stress Disorder*, 30 J. AM. ACAD. PSYCHIATRY & L. 336, 336–39 (2002); Gee, *supra* note 41, at 1985.

98. See generally DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 345–428 (4th ed. 2000).

99. DERRICK A. BELL, RACE, RACISM, AND AMERICAN LAW 806–906 (3d. ed. 1992); Carter, *Recognizing and Assessing Race-based Traumatic Stress*, *supra* note 12, at 87; Chew & Kelley, *supra* note 14, at 109.

100. Carter, *Recognizing and Assessing Race-based Traumatic Stress*, *supra* note 11, at 25; see also *infra* Section IV.

These acts may also involve and implicate the employer of the business or organization of the injured employee.

These injuries can occur even as those same businesses/organizations may espouse “inclusive” work environments that cite diversity as “part of our success,” and “integrate diversity into . . . business strategies and decisions.”¹⁰¹ These statements could be construed as implied contracts with the company’s employees, and the employer could arguably be liable if they failed to reasonably and consistently deliver on them. Workplace environments that evidence race-based discrimination and harassment and that produce race-based traumatic stress or psychological impairment would seem, to even the ordinary observer, to be antithetical to these public, published corporate statements.¹⁰²

Workplace harassment can have effects that far surpass annoying employees of color or merely making them feel uncomfortable. Real injury can result from such negative behavior, whether from a peer or supervisor. The Supreme Court noted some of these harms in *Harris v. Forklift Systems*.¹⁰³ The injuries are

101. See e.g., Walmart’s Corporate Statement on Diversity, WALMARTSTORES.COM, <http://walmartstores.com/Diversity/> (last visited Mar. 12, 2012) (“Diversity and Inclusion — It’s part of our success. Our commitment to Diversity and Inclusion helps us serve our customers better. And, it helps us provide a positive work environment for our associates — 2.1 million worldwide”); *Why 3M Invests in Diversity*, 3M, http://solutions.3m.com/wps/portal/3M/en_US/us-diversity/diversity/#M/3m-invests-diversity/ (last visited Mar. 12, 2012) (“We are committed to providing an environment where all employees thrive, and Human Resources policies, employee education and executive leadership support this goal. 3M is continuously focusing on building and maintaining an inclusive culture. An inclusive culture at 3M is built on our Human Resource Principles — to respect the dignity and worth of individuals; encourage the initiative of each employee; challenge individual capabilities; and provide equal opportunity.”); AMERICAN RED CROSS, DIVERSITY VISION STATEMENT, available at <http://www.redcross.org/www-files/Documents/pdf/Diversity/DiversityMissionStatement.pdf> (“The American Red Cross empowers people in America to perform extraordinary acts in the face of emergencies and disasters, [t]o ensure full benefit of this experience by all, we deliver our products and services in a culturally sensitive and appropriate manner to all we serve. We fully embrace and promote inclusion across our people, products and services, and we integrate diversity into our business strategies and decisions.”) [hereinafter *Workplace Diversity Policies*]. The authors include these three statements as examples of corporate messages on diversity that could constitute legally-binding commitments, with no implication that these particular organizations condone or permit harassment of employees.

102. While this article does not address contract law as a means to redress for aggrieved employees, a contract remedy could be advanced by an employee who experience harassment in the workplace of an employer whose published statements in effect promise the opposite in treatment by supervisors and fellow employees. Further, employees should expect that the business or organization will consistently deliver on not only the spirit, but more importantly the clearly-stated intent and specifics of these corporate pronouncements.

103. 510 U.S. 17, 22 (1993). “A discriminatory abusive work environment, even one that does not seriously affect employees’ psychological well-being, can and often will detract from

experienced by individuals directly, but also infect the workplace environment for all.¹⁰⁴ Racism and racist attitudes, while not as overt as in decades preceding the Civil Rights Act,¹⁰⁵ continue to manifest themselves, albeit subtly.¹⁰⁶

There may be a perception among some that African Americans use their status as historical victims to further their cause for justice and respect in the workplace. This is the perspective shared by Gerald Early in his opinion piece, “The End of Race as We Know It,” written the month before President Obama’s election.¹⁰⁷ While it is arguable that an attitude of victimization may be present in some causes of action for racial harassment, the authors assert that in many

employees’ job performance, discourage employees from remaining on the job, or keep them from advancing in their careers. Moreover, even without regard to these tangible effects, the very fact that the discriminatory conduct was so severe or pervasive that it created a work environment abusive to employees because of their race, gender, religion, or national origin offends Title VII’s broad rule of workplace equality. The appalling conduct alleged in *Meritor*, and the reference in that case to environments ‘so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers,’ merely present some especially egregious examples of harassment. They do not mark the boundary of what is actionable.” *Id.* at 22 (internal citations omitted).

104. MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW* 82 (2010). Chamallas & Wriggins note that “[s]cholarship on the distinctive harms produced by workplace harassment, using both subordination and antistereotyping theories, has revealed the social dimension of harassment: it can effectively devalue its target and reinforce that person’s inferior status in the workplace . . . racial minorities are subjected to bullying behavior that trades on symbols of slavery and segregation. The ubiquity and the everyday nature of sexual, racial, and other forms of workplace harassment may make it particularly hard for individuals to define and contest their treatment, the more it is naturalized and seems indistinguishable from just the way things are.” *Id.* (internal footnotes omitted).

105. Title VII of the Civil Rights Act of 1964 (Pub. L. 88–352) (codified as amended at 42 U.S.C. § 2000e et seq. 2011).

106. Kenneth B. Nunn, *Diversity as a Dead-end*, 35 PEPP. L. REV. 705, 729 (2008). Nunn notes that, “Much social science research since the commencement of widespread affirmative action policies in the 1960s suggests that racist attitudes persist and have in fact simply been driven underground. John Dovidio, a Yale psychology professor and former Colgate University researcher, has found that nearly half of all whites demonstrate what he calls ‘modern racism,’ defined as a ‘surface belief in racial equality that masks latent although unconscious prejudicial feelings.’ Dovidio’s studies show that ‘modern racists subconsciously find ways to rationalize their biases on the basis of factors that seem on the surface to be unrelated to race . . .’ Dovidio is not alone in his assertions. Other researchers have identified covert forms of racism using concepts such as subtle racism, aversive racism, modern racism, and symbolic racism.” *Id.* (internal citations omitted).

107. Gerald L. Early, *The End of Race as We Know It*, *THE CHRONICLE OF HIGHER EDUCATION*, Oct. 10, 2008, at B11, B13. Early, a Professor of African and African–American Studies, suggests that: “Black Americans have survived, persevered, and even thrived despite the enormous obstacles thrown in our way. In a way, the black American narrative revealed American hypocrisy but simultaneously reinscribed American greatness, for blacks were heroic victims, and only in America could the heroism of the weak win a victory able to humble a nation into recognition of its wrongs.” *Id.*

more cases, the harassment is not only real, but the resultant injuries are demonstrable and can be supported by expert testimony in those cases if they can hurdle motions for summary judgment and are allowed to proceed on their merits.¹⁰⁸ Gerald Early posits that the suggestion that United States culture has evolved to a “post-racial state” actually exacerbates the problem of racial discrimination.¹⁰⁹

The first step in addressing a problem, in this case the continued existence of racism in various aspects of American life including racial harassment in employment, is to recognize that a problem does in fact exist. This article focuses on a particular aspect of continuing racism – racial harassment and discrimination in the workplace that result in employee injury, specifically race-based traumatic stress (RBTS).¹¹⁰ Pat Chew and Robert Kelley note that:

Many in American society imagine that racial discrimination and harassment are no longer prevalent in the workplace . . . A common assumption is that blatant racist insults, such as using racial epithets or the flaunting of nooses, no longer occur – and in the rare instances in which they do, judges and juries certainly would conclude that they are illegal . . . Despite these societal beliefs that the workplace is not racist, evidence to the contrary is mounting.¹¹¹

108. See Carter & Forsyth, *supra* note 8, at 37; Chew & Kelley, *supra* note 14, at 77.

109. Girardeau A. Spann notes that “by pretending not only that the *phenomenon* of race is particularized rather than systematic, but that even particularized instances of discrimination have now largely disappeared. In fact, the Supreme Court itself is one of the social institutions that has historically been responsible for promoting systematic discrimination against racial minorities. Moreover, the contemporary Court has continued that practice by incorporating post-racial assumptions into its equality jurisprudence. Those post-racial assumptions do not simply misidentify the nature of our discrimination problem, they deny that a problem even exists.” Girardeau A. Spann, *Disparate Impact*, 98 GEO. L.J. 1133, 1137 (2010); Ian F. Haney Lopez (professor at the Boalt School of Law at the University of California at Berkeley) asserts “[c]ontemporary colorblindness loudly proclaims its antiracist pretensions. To actually move toward a racially egalitarian society, however, requires that we forthrightly respond to racial inequality today. The alternative is the continuation of colorblind white dominance. As Justice Harry Blackmun enjoined in defending affirmative action in *Bakke*: ‘In order to get beyond racism, we must first take account of race. There is no other way.’” Ian F. Haney Lopez, *Colorblind to the Reality of Race in America*, THE CHRONICLE OF HIGHER EDUCATION, Nov. 3, 2006, at B9.

110. Carter, *Recognizing and Assessing Race-based Traumatic Stress*, *supra* note 11, at 66.

111. Chew & Kelley, *supra* note 14, at 51.

This problem is real, it is costly, and it warrants more attention from employers, legal scholars, and the courts.¹¹²

D. Race-Related Acts in the Workplace: Limited Paths to Redress

Race-related acts are recognized in the law as racial discrimination that may take the form of disparate treatment, disparate impact (group experiences) and hostile work environment.¹¹³ The analyses presented by Chew and Kelley and Carter and Forsyth show that racial minorities who file race-related claims often do not prevail (they lose about 80% of the time), and it is argued that the process of pursuing legal or organizational complaints might add to the harm experienced by targets of racism given the difficulties in pursuing redress.¹¹⁴

Patricia Chew and Robert Kelley, in their recent research on the rulings of judges in racial harassment and racial discrimination cases, describe a troubling pattern of disparate treatment of plaintiffs in discrimination lawsuits. Their findings regarding these patterns are based on the nature of the plaintiff's claim and the race and sex of the respective judge, across both federal and state cases.¹¹⁵ Their research results do not support the notion of a "post-racial America."¹¹⁶ Nor do the observations of a law professor, speaking at the Third National People of Color Legal Scholarship Conference at Seton Hall University School of Law in September 2010:

The media are always talking about how we are in a post-racial era and how discrimination has really decreased, how it's really less of a problem and how African-Americans and minorities are doing better than ever because we have a Black president – so that kind of takes care of the problem . . . Obviously, we don't believe that . . . So we thought we should really analyze

112. See generally Chamallas & Wriggins, *supra* note 104; Carter, *Recognizing and Assessing Race-based Traumatic Stress*, *supra* note 11.

113. Bell, *supra* note 99, at 834–57 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

114. See generally Chew & Kelley, *supra* note 14.

115. WILLIAM J. FORD, REPORT: ETHNICITY INFLUENCES JUDICIARY DECISION-MAKING (Apr. 6, 2010), available at <http://diverseeducation.com/article/136/3c3/report-judiciary-decision-making-swayed-by-race-and-ethnicity.html> (last visited Apr. 2, 2012).

116. See generally Chew & Kelley, *supra* note 14; see also *infra* notes 119–121.

all of the legal areas from the perspective of whether we really are in a “post-racial” area.¹¹⁷

If one believes that he or she has been subjected to acts of racism that are legally prohibited in various societal domains (work, school, shopping, seeking housing, etc.), she or he may have to navigate a complex set of dispute resolution processes prior to seeking relief in the courts, depending upon where the incident occurs.¹¹⁸ If the incident took place at work or school, and falls within the area of what is called in the law disparate treatment racial discrimination, she or he must learn about and use internal organizational grievance procedures.

Many organizations do not have explicit procedures for filing such claims and complaints. For the most part, policies simply state that discrimination is prohibited based on race and other protected characteristics. Furthermore, in the majority of organizations, procedures are not outlined, and the types of actions and behaviors that constitute race-based bias are seldom defined. If the issue is not resolved within the organization, litigation may be considered. If the complaint is work related then the person must follow the procedures established by the EEOC. In this instance, there are strict time limits within which one must file a complaint (i.e., 180 days), after which the EEOC notifies the employer, conducts an investigation and tries to settle the issue.¹¹⁹ If the issues are unresolved, litigation might be an option (the EEOC issues a letter authorizing legal action) assuming that the dispute has not exhausted or taxed the person’s psychological and emotional resources or has not resulted in financial losses.¹²⁰ As the process moves on through dispute resolution the number of legal claims based on race declines.¹²¹

As claimants in work-related racial harassment cases move from the EEOC process to the courts, the number of cases declines.¹²² Between 1980 and 1999, 56,000 racial harassment charges were filed with the EEOC, but there were only 735 judicial opinions regarding

117. Angela P. Dodson, *Rev. Jackson Debunks ‘Post-racial’ Idea at Minority Legal Scholar Conference*, DIVERSE (Sept. 13, 2010), <http://diverseeducation.com/article/14119c4/rev-jackson-debunks-post-racial-idea-at-minority-legal-scholar-conference.html>.

118. Chew & Kelley, *supra* note 14, at 61–63.

119. See *EEOC Process and Procedures*, EEO 21 LLC, available at <http://www.eeo21.com/EEOC.html>.

120. See *EEOC Process and Procedures*, EEO 21 LLC, available at <http://www.eeo21.com/EEOC.html>.

121. Chew & Kelley, *supra* note 14, at 62 (internal footnote omitted).

122. Chew & Kelley, *supra* note 15, at 62 (internal citations omitted).

racial harassment during the same period, which is estimated to be about 1.3% of the possible EEOC charges.¹²³ Though it is not possible to know the specific reasons for the low number of judicial opinions in relation to the EEOC charges, one might infer that the number is low because of the legal and social obstacles associated with racial harassment claims. It is possible that the low number of judicial opinions could be a reflection of the fact that some cases were resolved or settled, perhaps in the plaintiffs favor. Another possibility is that some cases may have been dismissed by the EEOC or the courts. Be that as it may, it is not possible to track every outcome since many are not documented in public records.

Nevertheless, given the possible odds against prevailing, as well as the stress of litigation in general, it seems that pursuit of the avenues of redress might become another source of emotional and psychological distress for non-dominant group members. This inference can be made because racism as a stressor has been documented in social science research on stress, discrimination and race-related stress.¹²⁴ Research evidence shows that in addition to blatant racist conduct, ambiguous, subtle, and perhaps unintended experiences with racism can produce stress, and that stress, when coping fails, can produce trauma.¹²⁵

There is limited scholarship and jurisprudence regarding the definitions and legal understanding of race-based incidents. Empirical and legal scholars and social science researchers have focused more on sexual discrimination and harassment. As a consequence, what is understood to be “harassment” is still not clear because legally defined race-based harassment is often not differentiated from racial discrimination. Thus, the causes, characteristics, and consequences of the two (racial discrimination and racial harassment) are confounded.¹²⁶ Racial harassment is also often confused with sexual harassment and other types of acts of hostility, such as hate crimes.

123. Chew & Kelley, *supra* note 14, at 63 (internal citations omitted).

124. Carter, *Recognizing and Assessing Race-based Traumatic Stress*, *supra* note 11, at 14; David R. Williams et al., *Racial/Ethnic Discrimination and Health: Findings from Community Studies*, 93AM. J. PUB. HEALTH 200, 202 (2003); see generally Williams & Williams-Morris, *supra* note 25; Max Gyll et al., *Discrimination and Unfair Treatment: Relationship to Cardiovascular Reactivity Among African American and European American Women*, 20 HEALTH PSYCHOL. 315 (2001).

125. Carter, *Recognizing and Assessing Race Based Traumatic Stress*, *supra* note 11, at 37.

126. Carter, *Recognizing and Assessing Race-based Traumatic Stress*, *supra* note 11, at 5; Carter & Mazzula, *supra* note 83.

Moreover, there is considerable confusion regarding the various forms and types of acts that constitute race-based harassment because race-based acts can be blatant, overt, subtle, and indirect. Considerable academic discourse exists on the varied ways to conceptualize sexual harassment and sexual harassment jurisprudence, *yet not one major legal article exists to conceptualize racial harassment (or the effects of racism) as a unique social phenomenon and harm deserving its own jurisprudential framework.*¹²⁷ One might argue that it would be useful to use what is known about sexual harassment and discrimination to build an understanding of racism, racial harassment, and race-related issues. Yet to do so would divert our attention from the inquiry into whether a novel legal or social perspective on racial harassment and racism, that is not linked in any way to sexual harassment, is necessary. Although some parallels exist, other issues seem more apropos to one or the other form of harassment. Despite the important and impressive work on sexual harassment laws, that jurisprudence cannot substitute for work on racial harassment laws.¹²⁸

David Glenn, in his opinion piece,¹²⁹ raises a number of serious questions about how bias research may be applied in legal decision-making, including by judges.¹³⁰ Similarly, the application of Fair Employment Law, including § 1981 and Title VII,¹³¹ and its impacts on and implications for persons (employees), has been less than fair.¹³² Bell's interpretation of how these laws actually apply (or do not apply) to protect employees of color is cause for concern about their efficacy.¹³³ Bell's view lends credence to our proposal for a new

127. See generally Carter, *Race-based Traumatic Stress*, *supra* note 11; but see Chamallas, *supra* note 98, and Chamallas & Wriggins, *supra* note 104, for more recent commentary on this issue.

128. Carter, *Race-based Traumatic Stress*, *supra* note 11, at 37.

129. David Glenn, *Our Hidden Prejudices, on Trial*, THE CHRONICLE OF HIGHER EDUCATION, Apr. 25, 2008, at B12, B14.

130. *Id.* In the employment area specifically, Glenn notes that "...implicit-bias research [has been cited to] argue that federal employment-discrimination laws should not require plaintiffs to demonstrate that managers have a conscious animus or conscious intent to discriminate. Instead, Krieger and Fisk have argued, the law should use a simple 'causation' standard that looks at patterns of differential hiring and promotion. If women appear statistically less likely to be promoted within an accounting firm, for example, they would be able to bring forward an argument that implicit biases might have shaped the personnel evaluations they received from their superiors. They would not need to cite a 'smoking gun' comment that revealed their bosses' conscious sexist bias." *Id.* at B14.

131. 42 U.S.C. § 1981 et. seq. (2011); 42 U.S.C. § 2000e et seq (2011).

132. See Bell, *supra* note 99.

133. *Id.* at 834. Bell notes that "In the [Supreme] Court's view, § 1981's major thrust is banning the use of race as a consideration in employment, rather than ensuring that blacks

approach to achieving redress for racial discrimination and harassment in the workplace; one that includes but goes beyond reliance on federal anti-discrimination statutes alone. Similarly, in “How to Read a Noose,”¹³⁴ Troy Duster, the past president of the American Sociological Association, notes that employment-related racism, which can manifest as challenges to “affirmative action,” stems from the fear and rage that white men and women experience as their lives are being disrupted by unemployment and outsourcing.¹³⁵

Rina Wang, in a working paper on jury bias, advocates that “juries should receive special instructions about implicit bias, and that “[o]nce jurors are aware of the common and insidious nature of implicit bias, they may exert conscious control to actively override the unconscious operation of implicit bias.”¹³⁶ Such instructions may work to counteract racial bias as identified by Wendy Parker in her research involving 102 jury trials in cases of racial discrimination. Parker found strong evidence that shows that these trials were not race-neutral, and

achieve equality in the job market. For the many blacks who are unemployed or underpaid, the equal treatment strategy of fair employment laws such as Title VII and §1981 provides only faint hope for achieving their ultimate goal – fair employment.” *Id.*

134. Troy Duster, *How to Read a Noose*, THE CHRONICLE OF HIGHER EDUCATION, NOV. 9, 2007, at 69. The title refers to several instances of nooses that had been hung at various universities, workplaces, and other settings in 2006–07, including those in Jena, La. that received national media attention.

135. *Id.* “In 21st-century America,” Duster states, “where jobs are being outsourced and the manufacturing sector is in decline, and where 12 million to 15 million immigrants have moved into the labor force, white people frequently feel threatened by competition with African-Americans and Latinos. Many white men and women have a simmering rage over large, economic changes disrupting their lives, but they often explain what is happening to them as the result of affirmative-action hiring and preferential admissions policies. Indeed, white people have continuously and overwhelmingly opposed affirmative action from the first opinion polling on the topic in the late 1960s. Whether from the National Opinion Research Council, Gallup, or Newsweek, every national poll has shown white opposition to be about two-thirds across the nation – and even higher in the south.” Duster goes on to note that “In June [2007] the [then] recently appointed chief justice of the United States, John Roberts, presented a decision much more far-reaching than any symbolic noose. ‘The way to stop discrimination on the basis of race...is to stop discriminating on the basis of race,’ [saying this to] justify his deciding vote in a 5–4 decision to revoke a plan to increase racial integration of the heavily segregated Louisville, Ky. School system. Dissenting from this reasoning, Justice Stephen Breyer discussed the tragic irony of Roberts’s use of the language of colorblindness to overrule any practices or policies that limit the historic privilege of whites. Without using a noose, the Supreme Court’s defenders of white privilege successfully appropriated rhetoric from the civil-rights movement, morphing the symbolic language to effectively sustain the old racial order.” *Id.* (alterations added).

136. Rina Wang, *Using Jury Instructions to Correct Implicit Racial Bias* (Sept. 18, 2010), available at <http://ssrn.com/abstract=1679130>.

neither were the juries involved.¹³⁷ Indeed, not only juries of one's peers, but the Supreme Court itself may have adopted the view that we are in a post-racial America in its recent decisions, arguably ignoring its own history in sacrificing the interests of racial minorities to those who would engage in "post-racial discrimination:"

The Supreme Court has always been complicit in the practice of sacrificing racial minority interests for the benefit of the white majority. In its more infamous historical decisions, such as *Dred Scott*, *Plessy*, and *Korematsu*,¹³⁸ the Court's racial biases have been relatively transparent . . . More recently, the Court has invoked three tacit post-racial assumptions to justify the contemporary sacrifice of minority interests in the name of promoting equality for whites. First, current racial minorities are no longer the victims of significant discrimination. Second, as a result, race-conscious efforts to benefit racial minorities at the expense of whites constitute a form of reverse discrimination against whites that must be prevented in the name of racial equality. Third, because the post-racial playing field is now level, any disadvantages that racial minorities continue to suffer must be caused by their own shortcomings rather than the lingering effects of now-dissipated past discrimination. I consider actions that are rooted in these assumptions, and that adversely affect the interests of racial minorities in order to advance the interests of whites, to constitute a form of discrimination that I refer to as "post-racial discrimination."¹³⁹

Given the perspective of so many Americans, particularly white Americans, it is not surprising that discrimination and racism, as well as disparate treatment and even harassment, continue to be

137. See Wendy Parker, *Juries, Race, and Gender: A Story of Today's Inequality*, 46 WAKE FOREST L. REV. 209, 211 (2011) (noting that African Americans and Latinos claiming race discrimination have the lowest jury win rates.) (internal footnote omitted).

138. *Dred Scott v. Sandford*, 60 U.S. 393 (1857); *Korematsu v. United States*, 323 U.S. 214 (1944); *Plessy v. Ferguson*, 163 U.S. 537 (1896).

139. Girardeau A. Spann, *Disparate Impact*, 98 GEO. L. J. 1133, 1134–35 (2010); but cf. Amy L. Wax, *Disparate Impact Realism*, 53 WM. & MARY L. REV. 621, 625 (2011).

disturbingly and stubbornly prevalent in the United States and its workplaces.¹⁴⁰

While not always based on the victim's race or gender, another type of harassment, "workplace bullying," has received more attention in scholarship and in state-level legislative efforts.¹⁴¹ While bullying has consequences for the bully's victim (e.g. stress disorder, increased risk of heart disease, and even suicide), secondary victims (e.g. those witnessing bullying at work) are also at risk, reporting "increased levels of 'destabilizing forces at work, excessive workloads, role ambiguity and work relationship conflict.'"¹⁴² David Yamada's research further shows that "[w]orkplace bullying can have serious, even devastating, effects on targeted individuals. Psychological effects include stress, depression, mood swings, loss of sleep (and resulting fatigue) . . . [M]ore severe effects can include Post-Traumatic Stress Disorder, which if left untreated, may cause an individual to react violently against either the bully or anyone else who happens to be in the vicinity."¹⁴³ The health and safety – and liability – implications for both employee and employer are obvious.

The *shared responsibility* framework advocated in this article is consistent with the work of Chew and Kelley, Carter, and others,¹⁴⁴ although it focuses specifically on employees who have been emotionally and psychologically injured – traumatized – by workplace harassment. The type of injury addressed by this approach goes well beyond "being offended" or "being treated rudely" by supervisors or

140. See Greene, *supra* note 9, at 4 (noting that 2010 produced a record number of complaints of workplace discrimination to the EEOC).

141. See e.g. Gary Namie & Ruth Namie, *Workplace Bullying: How to Address America's Silent Epidemic*, 8 EMP. RTS. & EMP. POL'Y J. 315 (2004) ("Workplace bullying is repeated interpersonal mistreatment that is sufficiently severe as to harm a targeted person's health or economic status. Further it is driven by the perpetrator's need to control others while undermining legitimate business interests. Bullying keeps work from getting done."); see also Michael Chaplin, *Workplace Bullying: The Problem and the Cure*, 12 U. PA. J. BUS. L. 437, 439–40 (2010) (noting that "[t]he Workplace Bullying Institute, in cooperation with Zogby International, released a comprehensive survey measuring the prevalence of workplace bullying in the United States . . . [and that] [t]hirty-seven percent of American workers, approximately 54,000,000 workers have been bullied at work, and forty-nine percent of workers have been affected by workplace bullying, either through direct contact with the bully or by witnessing one or more bullying acts") (internal citations omitted) (alterations added).

142. Chaplin, *supra* note 141, at 440 (citing Pamela Lutgen-Sandvik et al., *Burned by Bullying in the American Workplace: Prevalence, Perception, Degree and Impact*, 44 J. MGMT. STUD. 835, 845 (2007)) (internal citations omitted).

143. David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status-blind Hostile Work Environment Protection*, 88 GEO. L. J. 475, 483 (2000) (citing Gary Namie & Ruth Namie, *BULLYPROOF YOURSELF AT WORK* 69 (1999) [hereinafter Yamada, *Phenomenon*]; Harvey A. Hornstein, *BRUTAL BOSSES AND THEIR PREY* 74 (1996)).

144. Carter, *supra* note 11; Chew & Kelley, *supra* note 14.

fellow employees. The *shared responsibility* approach, a basic framework for many aspects of employer–employee relations, is designed primarily to benefit those employees who have experienced psychological impairment or race–based traumatic stress. And while the approach outlined in this article is not focused on statutory remedies, it is also consistent with that of Chaplin, David Yamada, and the Workplace Bullying Institute, who have proposed model state legislation that is narrowly crafted to serve specific, serious incidents of bullying.¹⁴⁵

This Article seeks to advance the argument for applying tort law to cases involving employees from underrepresented groups who are subject to harassment in the workplace, building on the work of Martha Chamallas and Regina Austin who also advocate that tort law be applied to such cases.¹⁴⁶ An early argument for revising tort law to address harassment on a more universal basis was proposed by Austin in her 1988 article, *Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress*.¹⁴⁷ The article was prescient in identifying multidimensional harassment as a major problem that tort law should target.¹⁴⁸ The comprehensive approach to workplace racial harassment proposed in this article includes more than a simple recommendation to permit lawsuits in tort and broader application of tort remedies; the principles and logic of tort law (e.g. duty, injury, causation, affirmative defenses) can inform the policy aspects of this proposal as well.¹⁴⁹

145. See David C. Yamada, *Workplace Bullying and American Employment Law: A Ten-year Progress Report and Assessment*, 32 COMP. LAB. L. & POL'Y J. 251, 280–84 (2010) (proposing The Healthy Workplace Bill).

146. Chamallas, *supra* note 96, at 2170. Chamallas notes that Regina Austin “described how the law imposed few penalties on supervisors who routinely intimidated and ridiculed workers under their control, provided only that they refrained from doing so in transparently racial or sexual terms. She maintained that because class oppression was not included among Title VII’s prohibited bases, supervisory ‘[m]istreatment that would never be tolerated if it were undertaken openly in the name of white supremacy or male patriarchy is readily justified by the privilege of status, class, or color of collar.’” *Id.* (alteration in original).

147. 41 STAN. L. REV. 1, 5 (1988).

148. *Id.* at 4. Austin was mainly concerned with abuse suffered by low-income workers that disproportionately affected racial and ethnic minorities. *Id.* at 3.

149. See *infra* Section VI.

II. CURRENT APPROACHES AND REMEDIES FOR RACE-BASED TRAUMATIC STRESS, AND THEIR DEFICITS: A BRIEF OVERVIEW

A. The EEOC's Capacity Challenges

The U.S. Equal Employment Opportunity Commission (EEOC) is the federal agency at the forefront of ensuring that allegations of workplace discrimination and harassment are fully and fairly addressed. The agency has diminished over the past decade in its capacity to address racial discrimination and harassment, as well as the variety of other complaints it is charged to review. According to its annual report issued in November 2010, “EEOC staffing levels fell 25% during the Bush administration to a near-historic low of 2,176 employees in 2008. At the same time, the workload has steadily increased. In fiscal year 2010, the agency received 99,922 charges of alleged workplace discrimination, a record high.”¹⁵⁰ While the agency has been adding employees more recently, it has not returned to its previous level of lawyers and staff.¹⁵¹

B. Racial Harassment not Adequately Addressed by Sexual Harassment Remedies

A significant challenge in advancing claims for racial harassment is that they are often viewed through the lens of *sexual* harassment law, particularly complaints and resultant lawsuits under Title VII – even though Title VII was enacted to rectify *racial* discrimination. The last-minute inclusion of gender discrimination was reported as a desperate attempt to defeat the proposed legislation.¹⁵² According to Patricia Chew, the lack of a distinctive

150. Greene, *supra* note 9, at 4.

151. *Id.*; see also EQUAL EMP'T OPPORTUNITY COMM'N, FY 2009 PERFORMANCE AND ACCOUNTABILITY REPORT, 6 (2009), available at <http://www.eeoc.gov/eeoc/plan/upload/2009par.pdf> (“Fiscal Year 2009 was a time for the EEOC to regroup and rebuild. During the previous eight years of flat funding and hiring freezes, the Commission’s staff had declined by nearly 25 percent. This severely hindered its ability to carry out its critical enforcement functions. However, this past year, as a result of increased appropriations, the EEOC was able to begin replenishing its depleted ranks. During FY 2009, the agency set out to hire an additional 125 investigators, 22 trial attorneys, 50 support staff, 10 paralegals and five expert statisticians and labor economists to support the agency’s systemic enforcement and litigation programs. By the end of FY 2009, the Commission had brought on board 155 net new hires.”).

152. See Pat K. Chew, *Freeing Racial Harassment from the Sexual Harassment Model*, 85 OR. L. REV. 615, 616 (2006) (emphasis added). Pat Chew also notes that “[a]n extensive and impressive array of other scholars continued to develop the legal and public policy issues

jurisprudential model for racial harassment has not prompted jurists or others to propose one.¹⁵³ Instead, judges simply apply the legal principles developed in the context of sexual harassment to complaints of racial harassment. It appears as though judges view the jurisprudential model for workplace harassment as monolithic, and that the monolithic model should be the one designed for sexual harassment.¹⁵⁴ Chew goes on to speculate on why there is a disparity in the success rates of sexual harassment versus racial harassment cases, and concludes with the assertion that “[t]he reality is that individuals of different races perceive discrimination and harassment differently, and there is no reason to think that judges would be any different.”¹⁵⁵

Legal remedies have been available for decades to women and men who have been harassed, or subject to hostile environments based on their sex, particularly following the landmark Supreme Court ruling in *Meritor Sav. Bank v. Vinson*.¹⁵⁶ The law in this area, while still being refined, is soundly established, and has been accepted, if not embraced, as an industry standard by all but the most ill-informed or rogue businesses and organizations.¹⁵⁷ Effective remedies for employees suffering from racism, racial harassment, or race-based traumatic stress and related injuries, on the other hand, have been conspicuously limited or have proven to be ineffective when actually sought and tested in the legal system.¹⁵⁸

of sexual harassment, thus further establishing sexual harassment as the paradigm for harassment in the workplace,” and that “a line of important Supreme Court cases began drawing the jurisprudential principles for harassment law in the context of sexual harassment disputes, beginning with *Meritor* [*Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986)] and continuing with the *Harris* [*Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993)], *Oncale* [*Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998)], *Ellerth* [*Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998)]; and *Faragher* [*Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)] cases.” *Id.* at 617 (alterations and emphasis added).

153. *Id.* at 618

154. *Id.*

155. *Id.* at 633 (footnote omitted). Indeed, in research of her own reported in 2006, Pat Chew (and her co-author Robert Kelley) provide extensive data that suggest a clear overall bias in the [federal] judicial system against plaintiffs, particularly male members of racial minorities, bringing causes of action for racial harassment; see Chew & Kelley, *supra* note 14, at 65.

156. 477 U.S. 57, 70–73 (1986).

157. The authors recognize that while the successful application of Civil Rights laws, most notably Title VII, to workplace sexual harassment cases has been well-documented; the application of other areas of law including tort law principles and the tort of emotional distress, to cases involving either sexual harassment or racial harassment has been met with skepticism by the courts and has rarely been successful.

158. See *infra* Section IV(A)(2).

A review of recent state and federal claims based on injuries resulting from racial discrimination or racial harassment reveals that employees – with the exception in rare instances of those injured by overt, repeated and egregious racist/hostile acts in the workplace – have had little success in receiving redress or compensation for their injuries.¹⁵⁹ With disturbingly few exceptions, plaintiffs in cases involving alleged injuries from racism, particularly workplace racial harassment,¹⁶⁰ have had little success in progressing past the summary judgment or pre-trial motion to dismiss stages.¹⁶¹ Indeed, in an extensive study of racial and sexual harassment cases discussed by Patricia Chew, the plaintiffs' success rate in racial harassment cases was less than half that of plaintiffs in sexual harassment cases (21.5% versus 48.2% success rate, respectively).¹⁶² In racial harassment cases, significant gender differences were not reported in plaintiffs' success rates; all plaintiffs, regardless of their gender, lost in approximately 80% of cases.¹⁶³

Even lawyers and law firms are not free from racial harassment in the workplace. In discussing a study of African American attorneys' perceptions of racial harassment in their firms, Chew cites the data compiled by the study's author, Aravinda Nadimpalli Reeves, which revealed that African American attorneys are subject to racial harassment in their organizations more frequently than they would like to admit.¹⁶⁴

C. EEOC Developments and Recent Cases

There is evidence that the federal government is taking the reality of racial harassment seriously and achieving meaningful results

159. Chew, *supra* note 152, at 629.

160. This includes repeated but more subtle forms of racism often referred to as “micro-aggressions” or sporadic acts of racism,

161. Chew & Kelley, *supra* note 14, at 98–99.

162. See Chew, *supra* note 152, at 629.

163. *Id.* at 630.

164. *Id.* at 637 (“Respondents reported that their experiences are ‘a rare incident on the racial radar screen,’ but their interviews in the aggregate reveal a prevalence of racialized comments. As other social scientists have found, there appears to be a tendency for minorities to downplay racial incidents in their workplace.”) (internal citations omitted); see also Austin, *supra* note 147, at 1–2 (“It is generally assumed that employers and employees alike agree that some amount of [abuse] is perfectly natural, necessary, and defensible prerogative of superior rank. It assures obedience to command . . . [T]here is little reason for workers to take undue umbrage at the treatment they receive at work.” And noting with a tone of sarcasm that “[t]he pain, insults, and indignities they suffer at the hands of employers and supervisors should be met with acquiescence and endurance. That’s life.”).

in cases it has pursued. In February 2010, the EEOC sued Pinnacle Amusements for racial harassment.¹⁶⁵ The case involved charges of a violation of federal law by Pinnacle for allegedly subjecting black employees to a racially hostile work environment. According to the EEOC complaint, African American employees were repeatedly subjected to derogatory racial comments, slurs including the N-word, and “jokes;” including by the company owner.¹⁶⁶ The plaintiff’s complaints were ignored or dismissed, and the harassment continued.¹⁶⁷ In announcing this lawsuit, David Lopez, General Counsel of the EEOC, stated that “[n]o one should have to endure degrading racial harassment in order to earn a living . . . The EEOC is committed to ensuring that all employees have the opportunity to put in an honest day’s work free from discrimination.”¹⁶⁸ Also in February 2010, a settlement was reached in a racial harassment suit against Big Lots, Inc.¹⁶⁹ The agency alleged that Big Lots violated Title VII of the Civil Rights Act of 1964 when it subjected a black maintenance mechanic and other black employees to race harassment and discrimination at its Rancho Cucamonga, Calif., distribution center.¹⁷⁰ Specifically, the EEOC alleged that an immediate supervisor and co-workers, all Hispanic, made racially derogatory jokes, comments, slurs and epithets, including the use of the words “n—r” and “monkey.”¹⁷¹ Despite learning of the harassment, the company took no steps to prevent or correct it.¹⁷² “Working in a job that they valued highly, the employees in this case rightfully expected to earn a living free of discrimination,” said Anna Park, regional attorney of the EEOC’s Los Angeles District Office. “They should not have had to endure harassment or discrimination based on their race. The EEOC

165. Press Release, Equal Emp’t Opportunity Comm’n, EEOC Sues Pinnacle Amusements for Racial Harassment (Feb. 22, 2010), *available at* <http://www.eeoc.gov/eeoc/newsroom/release/2-22-10.cfm>.

166. *Id.*

167. *Id.*

168. Press Release, Equal Emp’t Opportunity Comm’n, \$10 Million Consent Decree Ends Racial Harassment Case against YRC/Roadway Express (Sept. 15, 2010), *available at* <http://www1.eeoc.gov/eeoc/newsroom/release/9-15-10b.cfm?renderforprint=1>. In comments cited in the press release, the EEOC’s General Counsel also noted several significant cases that the agency had resolved recently, including suits against home appliance manufacturer Whirlpool (\$1 million), and national grocery chain Albertson’s (\$8.9 million). *Id.*

169. Press Release, Equal Emp’t Opportunity Comm’n, Big Lots to Pay \$400,000 for Race Harassment (Feb. 16, 2010), *available at* <http://www.eeoc.gov/eeoc/newsroom/release/2-16-10.cfm> (“The EEOC originally filed suit against Big Lots in September 2008 in the U.S. District Court.”).

170. *Id.*

171. *Id.*

172. *Id.*

will continue to take all steps necessary to ensure that employees at all workplaces are respected and free from harassment, discrimination and retaliation.”¹⁷³ As such, it appears that the EEOC is beginning to take racial harassment more seriously.

Aggrieved employees pay the greater price for racial harassment in the employment setting, nonetheless, employers would also benefit from a clearer understanding of the costs of workplace harassment,¹⁷⁴ as well as the benefits of policies and practices to prevent such behavior among their employees, particularly their supervisors.¹⁷⁵

III. EMPLOYMENT LAW: WORKPLACE HARASSMENT AND DISCRIMINATION LAW

A. Overview

Harassment in the workplace, whether based on race or sex, constitutes employment discrimination under Title VII of the Civil Rights Act¹⁷⁶ and other federal law.¹⁷⁷ Harassment is defined with

173. *Id.*

174. See INTERNATIONAL FINANCE CORPORATION, WORLD BANK GROUP, NON-DISCRIMINATION AND EQUAL OPPORTUNITY 14 (2006), available at [http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p_NonDiscrimination/\\$FILE/NonDiscrimination.pdf](http://www.ifc.org/ifcext/enviro.nsf/AttachmentsByTitle/p_NonDiscrimination/$FILE/NonDiscrimination.pdf). (outlining five specific and serious problems that organizations could face if bullying and harassment are unchecked or badly handled: “poor morale and poor employee relations; loss of respect for managers and supervisors, absenteeism and resignations, damage to company reputation, and court cases and awards of damages”).

175. *Harassment*, EQUAL EMP’T OPPORTUNITY COMM’N, <http://www.eeoc.gov/laws/practices/harassment.cfm> (“Employers are encouraged [by the EEOC] to take appropriate steps to prevent and correct unlawful harassment. They should clearly communicate to employees that unwelcome harassing conduct will not be tolerated. They can do this by establishing an effective complaint or grievance process, providing anti-harassment training to their managers and employees, and taking immediate and appropriate action when an employee complains. Employers should strive to create an environment in which employees feel free to raise concerns and are confident that those concerns will be addressed.”)(alteration added).

176. 42 U.S.C. § 2000e et seq. (2011).

177. *Harassment*, *supra* note 175 (“Harassment is a form of employment discrimination that violates Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, (ADEA), and the Americans with Disabilities Act of 1990, (ADA)”; see also Informal Letter from Equal Emp’t Opportunity Comm’n to undisclosed recipient regarding EEOC’s Harassment Policy (Sept. 26, 2003), available at http://www.eeoc.gov/eeoc/foia/letters/2003/harassment_policy.html (“The policy defines ‘harassment’ as ‘verbal or physical conduct that denigrates or shows hostility or aversion toward an individual, and that has the purpose or effect . . .’ We note that unlawful harassment does not necessarily denigrate or show hostility toward the target. For instance, sexual harassment could consist of repeated, unwelcome requests for a date. Therefore, we

great specificity in federal law, in terms of the conduct itself as well as its severity and pervasiveness.¹⁷⁸ While an employer may take action based on company policy against employees who make an isolated comment about a fellow employee based on their race, to pursue legal action for racial discrimination or harassment, the aggrieved employee will need to meet a higher standard.¹⁷⁹ The conduct required to rise to the level of harassment is specified by The United States Equal Opportunity Employment Commission (EEOC).¹⁸⁰

The federal courts, including the U.S. Supreme Court, have provided extensive interpretation of these civil rights laws, as related to sexual and racial harassment, for nearly three decades.¹⁸¹ Even as the federal courts have adjudicated an estimated 1,250 cases of racial harassment during that time – many of which were also reviewed by the EEOC – the EEOC still recognizes prevention as “the best tool to eliminate racial harassment in the workplace.”¹⁸² The EEOC

recommend that harassment be defined more broadly as ‘verbal or physical conduct based on race, color, sex, national origin, religion, age, disability, or retaliation, and that has the purpose or effect . . .’).

178. *Harassment*, *supra* note 175 (“Harassment is unwelcome conduct that is based on race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information. Harassment becomes unlawful where 1) enduring the offensive conduct becomes a condition of continued employment, or 2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive. Anti-discrimination laws also prohibit harassment against individuals in retaliation for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or lawsuit under these laws; or opposing employment practices that they reasonably believe discriminate against individuals, in violation of these laws.”).

179. *Id.* (“Petty slights, annoyances, and isolated incidents (unless extremely serious) will not rise to the level of illegality. To be unlawful, the conduct must create a work environment that would be intimidating, hostile, or offensive to reasonable people.”).

180. *Id.* (“Offensive conduct may include, but is not limited to, offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance. Harassment can occur in a variety of circumstances, including, but not limited to, the following: The harasser can be the victim’s supervisor, a supervisor in another area, an agent of the employer, a co-worker, or a non-employee; the victim does not have to be the person harassed, but can be anyone affected by the offensive conduct; unlawful harassment may occur without economic injury to, or discharge of, the victim.”).

181. *Burlington Indus., v. Ellerth*, 524 U.S. 742 (1998); *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986); *Rogers v. Equal Emp’t Opportunity Comm’n*, 454, F.2d 254 (5th Cir. 1971), *cert denied* 406 U.S. 957 (1972). *Rogers* and its impact on subsequent racial harassment law are discussed at length by Chew & Kelley, *supra* note 14, at 55–56.

182. *Harassment*, *supra* note 175 (“Employers are encouraged [by the EEOC] to take appropriate steps to prevent and correct unlawful harassment. They should clearly communicate to employees that unwelcome harassing conduct will not be tolerated.”) (alteration added). Indeed, the “*shared responsibility*” approach advocated in this article is fully consistent with the EEOC’s advice to employees. *Id.*

encourages employees to report harassment.¹⁸³ Supervisors and employers can be held liable for harassment, as can non-supervisory employees and non-employees in circumstances within their control or knowledge taking into account the entire set of circumstances and record of the alleged harassment.¹⁸⁴

Employers can violate Title VII in a number of ways, including deviating from their personnel policies in ways that result in discrimination, as well as through engaging in, or allowing employees to engage in, racial harassment. Specifically, according to the EEOC, “[a]n employer’s deviation from an applicable personnel policy, or a past practice, can support an inference of a discriminatory motive. Conversely, acting in conformance with a consistently applied nondiscriminatory policy or practice would suggest there is no such motive.”¹⁸⁵

Harassment on the basis of race and/or color violates Title VII. Ethnic slurs, racial “jokes,” offensive or derogatory comments, or other verbal or physical conduct based on an individual’s race/color constitutes unlawful harassment if the conduct creates an intimidating, hostile, or offensive working environment, or interferes with the individual’s work performance.¹⁸⁶

The table below outlines the major areas of law from which an employee-plaintiff may draw to state a cause of action in either federal or state courts (or both). Common means to seeking redress for plaintiffs include the federal laws as well as State anti-discrimination

183. *Id.* (“Employees are encouraged to inform the harasser directly that the conduct is unwelcome and must stop. Employees should also report harassment to management at an early stage to prevent its escalation.”)

184. *Id.* (“The employer is automatically liable for harassment by a supervisor that results in a negative employment action such as termination, failure to promote or hire, and loss of wages. If the supervisor’s harassment results in a hostile work environment, the employer can avoid liability only if it can prove that: 1) it reasonably tried to prevent and promptly correct the harassing behavior; and 2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer . . . The employer will be liable for harassment by non-supervisory employees or non-employees over whom it has control (e.g., independent contractors or customers on the premises), if it knew, or should have known about the harassment and failed to take prompt and appropriate corrective action . . . When investigating allegations of harassment, the EEOC looks at the entire record: including the nature of the conduct, and the context in which the alleged incidents occurred. A determination of whether harassment is severe or pervasive enough to be illegal is made on a case-by-case basis.”)

185. See EEOC COMPLIANCE MANUAL (2006), available at <http://www.eeoc.gov/policy/docs/race-color.html>; See also *Workplace Diversity Policies*, *supra* note 93.

186. See *Facts About Race/Color Discrimination*, EQUAL EMP’T OPPORTUNITY COMM’N, <http://www.eeoc.gov/eeoc/publications/fs-race.cfm> (last visited Apr. 2, 2012).

laws; these are shown in Table 1. While tort and contract law are also possible options for legal redress, these have either not been often attempted and/or have been even less effective than claims pursued under federal anti-discrimination laws.¹⁸⁷

TABLE 1

FEDERAL LAW	STATE LAW	PROCEDURAL ISSUES
Title VII	State anti-discrimination laws	Proper order for filing claims should be determined:
42 U.S.C. § 1981	Worker's Compensation laws	[internal/company policy, administrative –
42 U.S.C. § 1983	Tort Law (IIED, NIED)	state/federal, agencies; lawsuit]
	Contract Law (express, implied)	Preemption: check to see if state law applies to redress to worker's compensation claims, and/or discrimination law suits filed in state court.

On the broader issue of workplace bullying, which could include race-based harassment, Jordan Kaplan explained that there is not yet a “workplace bullying tort” in the United States,¹⁸⁸ and all thirteen states which have considered a Healthy Workplace Bill designed to punish workplace bullies and the employers who tolerate or encourage them, have failed in their attempts to pass such legislation.¹⁸⁹ Kaplan noted, however, that “[d]espite the lack of a workplace bullying tort in the United States, the Indiana Supreme Court recently allowed testimony on workplace bullying in *Raess v. Doescher*,” specifically suggesting in dicta that bullying could be part of a cause of action for intentional infliction of emotional distress.¹⁹⁰ The paucity of viable paths of redress for workplace bullying pointed out by Kaplan mirrors the limited paths for targets of racial harassment

187. See Chew & Kelley, *supra* note 14, at 79.

188. Jordan F. Kaplan, Comment: *Help is on the Way: A Recent Case Sheds Light on Workplace Bullying*, 47 HOUS. L. REV. 141, 143 (2010).

189. *Id.*

190. *Id.* at 143–44; see also *Raess v. Doescher*, 883 N.E. 2d 790, 796–97 (Ind. 2008).

who may experience psychological and emotional injury such as race-based traumatic stress in the workplace.¹⁹¹

B. Federal Law: Title VII, Section 1981 and Section 1983

1. The Law and Its Application to Racial Harassment and Discrimination Claims

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees in hiring, compensation and terms of employment,¹⁹² and provides that employers shall not “limit, segregate, or classify his employees or applicants for 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 race, color, religion, sex, or national origin.”¹⁹³ Title VII covers all private employers, state and local governments, and education institutions that employ 15 or more individuals. These laws also cover private and public employment agencies, labor organizations, and joint labor management committees controlling apprenticeship and training.¹⁹⁴

Title VII does not preempt state law,¹⁹⁵ which allows employees who believe they have been discriminated against (or harassed) because of their race to pursue claims in tort. Although tort (i.e., injury) claims for alleged employment discrimination are not the norm, they have been pursued, albeit with very limited results.¹⁹⁶

191. The authors of this article recognize the difficulty in employee–plaintiffs bringing a cause of action for workplace bullying, and note in Section IV that the victims of *race-based traumatic stress* have had similarly dismal results in pursuing claims of IIED, as well as limited success in advancing Title VII claims past the summary judgment stage.

192. 42 U.S.C. § 2000e–2 (2006).

193. *Id.* at § 2000e–2(a)(1).

194. See Equal Emp’t Opportunity Comm’n, *Federal Laws Prohibiting Job Discrimination Questions and Answers*, <http://www.eeoc.gov/facts/qanda.html>.

195. See 42 U.S.C. § 2000e–7. (“Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.”).

196. See generally *Cheeseman v. Baxter Healthcare Corp.*, No. 08–4814, 2009 WL 1351676 (D. N.J. May 13, 2009); See also *Bradshaw v. School Bd. of Broward Cnty.*, 483 F.3d 1205, 1210–11 (11th Cir. 2007). (“Bradshaw also invokes the Title VII anti-preemption provision, 42 U.S.C. § 2000e–7 [quoted *supra* note 153][.] Bradshaw claims that by holding that Fla. Stat. § 768.28(5) limits her Florida CRA award to nothing in light of the \$300,000 Title VII award, we would deem Title VII to relieve the School Board of liability under the Florida CRA. (She could alternatively argue that Florida itself has “deemed” Title VII to relieve it of liability by adopting § 768.28(5)). The argument continues: because Title VII may not, under 42 U.S.C. § 2000e–7, be deemed to provide such relief, we must invalidate the

Some cases involving egregious harassment have managed to get past the summary judgment stage.¹⁹⁷ The path to redress for the potential plaintiff can be complex and even risky, given the labyrinth of choices to be faced in terms of venue and choice of claim.¹⁹⁸

Plaintiffs claiming a hostile work environment must file a charge with the EEOC within 180 days after the alleged unlawful employment practice occurred. The Supreme Court in *Nat'l R.R. Passenger Corp. v. Morgan*¹⁹⁹ was asked to consider whether and under what circumstances a Title VII plaintiff may file suit on events that fall outside the statutory period.²⁰⁰ The Court held that:

[T]he statute precludes recovery for discrete acts of discrimination or retaliation that occur outside the statutory time period [and the court also held that] consideration of the entire scope of a hostile work environment claim, including behavior alleged outside the statutory time period, is permissible for the purposes of assessing liability, so long as any act contributing to that hostile environment takes place within the statutory time period. The application of equitable doctrines, however, may either limit or toll

Florida sovereign immunity provisions that have the effect of reducing the potential Florida CRA recovery by the amount of the parallel Title VII recovery in this case. The argument is clever but wrong, because our conclusion does not require us to interpret Title VII at all. Like 42 U.S.C. § 2000h-4, section 2000e-7 is an anti-preemption provision that allows states latitude in the design of their own antidiscrimination law. *See Cal. Fed. Sav. & Loan v. Guerra*, 479 U.S. 272, 281 (1987) (describing §2000e-7 as 'indicat[ing] that state laws will be pre-empted only if they actually conflict with federal law'); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 101 (1983) (describing § 2000e-7 as 'expressly preserv[ing] nonconflicting state laws'); *Malabed v. N. Slope Borough*, 335 F.3d 864, 870-71 (9th Cir. 2003); *Coal. for Econ. Equity v. Wilson*, 122 F.3d 692, 710 (9th Cir. 1997); *Shehadeh v. Chesapeake & Potomac Tel. Co. of Md.*, 595 F.2d 711, 723 n.60 (D.C. Cir. 1978). Title VII will not be 'deemed' (that is, construed) to prevent states from imposing liability in any way they see fit, so long as the states do not interfere with Title VII by requiring or permitting acts that Title VII would forbid. In the present case, Florida does not want to impose liability for compensatory damages beyond Title VII's cap. We therefore do not deem Title VII to limit Bradshaw's state law recovery; the relevant state law itself limits the recovery. Bradshaw's argument posits a nonexistent remedy, then uses 11Title VII to invalidate the actual law that fails to grant her that remedy. It is pure bootstrapping.") (1st and 3d alterations added) (2d and 4th alterations in original).

197. *See Austin, supra* note 147, at 11 n.45.

198. *See Taylor, supra* note 10, at 430, 478; *see also Wright, supra* note 10, at §4471.3.

199. 536 U.S. 101 (2002).

200. *Id.* at 105.

the time period within which an employee must file a charge.²⁰¹

In *Rogers v. EEOC*, perhaps the first federal court case involving a claim of racial (in this case ethnic) harassment, the court held that Title VII was to be applied broadly to carry out Congress's intent to eliminate discrimination.²⁰² A number of other cases demonstrated the difficulty of filing a successful claim or lawsuit²⁰³ as well as the necessity of alleging more than broad assertions of a "hostile work environment." In *Swierkiewicz v. Sorema*,²⁰⁴ the Court held that:

[A] complaint in an employment discrimination lawsuit need not allege specific facts establishing a prima facie case of discrimination . . . While a plaintiff is not charged with pleading facts sufficient to prove her case, as an evidentiary matter, in her complaint, a plaintiff is required to allege facts that support a claim for relief. The words "hostile work environment" are not talismanic, for they are but a legal conclusion; it is the alleged facts supporting those words, construed liberally, which are the proper focus at the motion to dismiss stage.²⁰⁵

Specifically addressing the issue of potential vicarious liability, courts have also held that employers may be vicariously liable for the actions of their managers and supervisors that constitute harassment in

201. *Id.* (alteration added). The Court held that as long as one act falls within the statutory period, acts of discrimination or retaliation that are related to that act may also be considered in determining whether a hostile workplace environment exists. *See id.*

202. *Rogers v. Equal Emp't Opportunity Comm'n*, 454 F.2d 234, 238 (1971) ("We must be acutely conscious of the fact that Title VII of the Civil Rights Act of 1964 should be accorded a liberal interpretation in order to effectuate the purpose of Congress to eliminate the inconvenience, unfairness, and humiliation of ethnic discrimination.") (internal citations omitted).

203. *See also infra* Section IV(E) (drawing from the work of Carter, Forsyth, Chew and Kelley, and others that elaborate on the challenges of filing a successful racial discrimination or harassment case in the employment setting).

204. 534 U.S. 506 (2002).

205. *Bass v. E.I. DuPont de Nemours & Co.*, 324 F.3d 761, 764–65 (4th Cir. 2003) (citing *Swierkiewicz v. Sorema*, 534 U.S. 506 510–11 (2009) (emphasis in original) (alteration added); *see also* *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.") (alteration in original)).

the workplace.²⁰⁶ *Herrera v. Lufkin Indus., Inc.*²⁰⁷ involved a plaintiff who brought claims under Title VII and state tort law (IIED). In overruling the district court's grant of summary judgment for defendant, the appeals court noted that:

To survive summary judgment on a claim alleging a racially hostile work environment, [plaintiff] "must show that a rational jury could find that 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," and that the victim "was targeted for harassment because of [his] . . . race . . . or national origin."²⁰⁸

In this case, plaintiff presented evidence that the workplace was pervasively discriminatory. "[He] presented evidence of several discrete incidents of racial harassment occurring during the four years that [his manager] oversaw Lufkin's Casper service center while [plaintiff] worked there . . . [The manager] would refer to Herrera as 'the Mexican,' or 'the fucking Mexican,' whenever he would speak to

206. *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 775 (1998) ("[A]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee."); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (same). If the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment, the employer is liable and has no affirmative defense. *Id.* at 807–808. However, "[w]hen no tangible employment action is taken, the defending employer may raise an affirmative defense to liability or damages . . . [t]he defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an anti-harassment policy with a complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense." *Id.*

207. 474 F.3d 675 (10th Cir. 2007).

208. *Id.* at 680 (quoting *Sandoval v. City of Boulder*, 388 F.3d 1312, 1326–27 (10th Cir. 2004)) (1st alteration added). While the appellate court in *Herrera* overruled the district court's summary judgment decision for the Defendant on the Title VII hostile environment claim, *id.* at 680, the appellate court affirmed the grant of summary judgment for the defendant on the intentional infliction of emotional distress claim. *Id.* at 687.

Herrera's supervisor."²⁰⁹ Regarding summary judgment, the court held that Herrera

[E]stablished a genuinely disputed issue of fact as to the pervasiveness of the racially-charged hostility in his work environment sufficient to be entitled to have a jury decide the issue . . . In cases involving state-law claims, a federal court applies the substantive law of the state, but applies federal procedural law.²¹⁰

Looking at federal procedural law, Rule 35(a) of the Federal Rules of Civil Procedure provides that,

[W]hen the mental or physical condition . . . of a party . . . is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made.²¹¹

Unfortunately for the plaintiff in *Herrera*, he did not respond to the request by defendant for dates he would be available for an independent medical examination (IME), and when he responded to the second request, the deadline for the IME had passed. This is another illustration of the complexities and challenges inherent in advancing successful hostile environment claims.

209. *Id.* at 680–81 (alterations added).

210. *Id.* at 683 (alteration added). The federal court of appeals, applying Wyoming tort law standards, drew the distinction between the severity of harm necessary for a valid Title VII claim and a claim for IIED, noting that the harm necessary to be shown in the tort claim to be much higher, stating that “When the Wyoming Supreme Court first adopted a cause of action for the intentional infliction of emotional distress, it recognized that ‘[p]arties opposing the cause of action for intentional infliction of emotional distress typically contend that its adoption will flood the courts with fraudulent claims and create potentially unlimited liability for every type of mental disturbance. While these problems are not to be dismissed lightly, they can certainly be solved without rejecting the action entirely.’” *Id.* at 685–86 (citing *Leithead v. Am Colloid Co.*, 721 P.2d 1059, 1065 (Wyo. 1986) (alteration in original)). The court further noted that “‘the degree of severity of conduct and harm to the plaintiff required under hostile work environment and discrimination analyses is notably lower than that required under [IIED].’ In effect, the courts have said that conduct that is actionable under an employment discrimination theory often does not rise to the level of [IIED].” *Id.* at 688 (quoting *Yamada*, *supra* note 143, at 503) (alterations added).

211. *Id.* at 688–89 (alteration added).

Similarly, in *Smith v. City of Phila.*,²¹² a case involving an African American correctional officer who sued for race discrimination under Title VII, and alleging IIED, NIED, and deprivation of his First Amendment rights (a § 1983) claim, the federal district court upheld a summary judgment for the individual defendants noting that “[i]ndividuals cannot be held liable under Title VII, 42 U.S.C. §. 2000 et seq. (1994).”²¹³ The *Smith* court, like the court in *Herrera*, noted the limited possibilities for success with an IIED claim, i.e. that success would be extremely rare.²¹⁴ Plaintiff’s NIED claim was dismissed as no physical injury was alleged.²¹⁵

While Title VII prohibits discrimination in employment in a broader range of cases, i.e. those based on race, color, national origin, sex, and religion,²¹⁶ in matters of discrimination in the employment setting on the basis of race, Section 1981 may have broader application as it covers all discrimination in all contracts, including employment contracts – even those of small employers.²¹⁷ Section 1981 has a longer statute of limitations²¹⁸ and does not have a statutory cap on damages.²¹⁹ Research conducted by Chew and Kelley noted that plaintiffs who filed claims of racial discrimination and harassment under § 1981 had a better chance of getting past the summary judgment/motion to dismiss stage or pursuing a successful claim.²²⁰

An action for discrimination based on race can also be brought under Title 20 of the United States Code § 1981. This section of the United States Code provides an alternative remedy to Title VII; a wholly independent cause of action for a prospective plaintiff to consider.²²¹ “In fact,” notes Derrick Bell, author of the seminal text

212. No. Civ.A. 98–CV–3338, 1998 WL 966025 (E.D. Pa Nov. 10, 1998).

213. *Id.* at *1.

214. *Id.* (quoting *Cox v. Keystone Carbon Co.*, 861 F.2d 390, 395 (3d Cir. 1988) (alteration in original) (“[I]t is extremely rare to find conduct that will rise to the level of outrageousness necessary to provide a basis for recovery for the tort of intentional infliction of emotional distress.”); *Smith*, 1998 WL 966025, at *1 (quoting *Andrews v. City of Phila.*, 895 F.2d 1469, 1487 (3d Cir. 1990)) (“[T]he only instances in which courts applying Pennsylvania law have found conduct outrageous in the employment context is where an employer engaged in both sexual harassment . . . [and] retaliation for turning down sexual propositions.”).

215. *Smith*, 1998 WL 966025, at *2; but see RESTATEMENT (THIRD) OF TORTS § 4 cmt. d (2010).

216. *Id.* at § 2000 et. seq.

217. *Id.* at § 1981(a).

218. 28 U.S.C. § 1658(a) (2011).

219. 42 U.S.C. § 1981a(b)(4) (2011).

220. See Chew & Kelley, *supra* note 14, at 93.

221. Bell, *supra* note 99, at 766. (“The Civil Rights Act of 1870, as codified at 42 U.S.C. §1981, provides that all persons shall have certain equal rights, including the right ‘to make and enforce contracts.’ As interpreted by the Supreme Court, §1981 applies to both private and

Race, Racism and American Law, “most race discrimination complaints contain both Title VII and Section 1981 counts, perhaps to deal with the possibility that the coverage of one may be broader than the other.”²²²

Proof of the same elements as actions brought under Title VII are required for an action for racial harassment brought under Section 1981. To state a claim based on a racially hostile work environment under § 1981, a plaintiff must allege that: “(1) she was subjected to unwelcome harassment; (2) the harassment was based on her race; (3) the harassment was sufficiently severe or pervasive as to alter the conditions of her employment and to create an abusive atmosphere; and (4) there is some basis for imposing employer liability.”²²³

The racial harassment alleged must be “severe and pervasive as to alter the terms and conditions of the plaintiff’s [employee’s] employment and create an abusive working environment.”²²⁴ The law does not establish ‘a general civility code’ nor does it “prohibit all verbal or physical harassment in the workplace.”²²⁵ In *Springs v. Mayer–Brown*, the employee–plaintiff was not able to demonstrate

public discrimination, thereby preserving ‘the right to contract for employment...’ That Title VII and §1981 are separate, distinct, and independent was confirmed by the Supreme Court in *Johnson v. Railway Express Agency* [421 U.S. 454 (1975)]. In holding that the filing of a claim with the EEOC pursuant to Title VII does not toll the statute of limitations under § 1981, the Court noted that Congress clearly indicated its approval of the two statutes as separate sources of relief for victims of employment discrimination. Clearly, Title VII was not intended to deprive black workers of other remedies for employment discrimination, such as § 1981. Nor was it intended that plaintiffs be required to complete Title VII’s filing procedures with the EEOC before bringing an action under § 1981 in federal district court. Thus, the Court in *Johnson* established § 1981 as a viable tool in employment discrimination litigation strategy.” (internal footnotes omitted).

222. Bell, *supra* note 99 at 766 n.16.

223. *Springs v. Mayer–Brown LLP*, No. 3:09cv352, 2010 U.S. Dist. LEXIS 57554, at *13 (W.D. N.C. June 9, 2010). Additionally, the *Springs* court noted that to “show that the harassment was based on race, a plaintiff ‘must show that ‘but for’ her race . . . , she would not have been the victim of the alleged discrimination.’ In determining whether the working environment is sufficiently hostile or abusive, the Court must ‘look 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.’” *Id.* at 13–14 (internal citations omitted); see also *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993) (determining whether an actionable hostile environment claim exists requires an examination of 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”).

224. *Springs v. Mayer–Brown, LLP*, No. 3:09CV352–MR–DSC, 2009 U.S. Dist. LEXIS 97081, at *10 (W.D. N.C. Oct. 20, 2009) (alteration added).

225. *Id.* (citing *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 80 (1998)).

that the discrimination she experienced was “severe and pervasive” based on apparent differential treatment alone.²²⁶

In the case of *Campbell v. Rock Tenn Co.*,²²⁷ the plaintiff, an African American lesbian woman who was a machine operator for a manufacturer of paper products, alleged that she was subject to racial and sexual harassment over a period of years that constituted a hostile work environment and resulted in her experiencing emotional distress. Among other indignities, the plaintiff was told that the reason others in the workplace did not get along with her was: “[n]umber one, you’re black. Number two, you’re a woman. That’s why the guys do not like you.”²²⁸ Plaintiff’s co-worker also stated that, “[i]f I had it my way, I would get rid of all women and minorities.”²²⁹ Another co-worker referred to blacks as “jigaboos” in her presence.²³⁰ The plaintiff reported that the comments and workplace environment made her sick and that she felt unsafe in the workplace.

In August of 2005, the plaintiff filed a charge of discrimination with the St. Paul Department of Human Rights.²³¹ Her charge referred to three 2005 incidents. On May 11, 2006, the Department issued a finding of probable cause.²³² Subsequently, Campbell brought a lawsuit in federal court, claiming that she was entitled to recover under both 42 U.S.C. § 1983 and the Minnesota Constitution. The defendant company stated and the plaintiff’s counsel acknowledged that defendant was not a government entity; as such, it was held to not be acting under color of state law. And because Rock Tenn is a private actor employer, the claim under § 1983 was not allowed, and

226. See *Springs*, 2009 U.S. Dist. LEXIS 97081, at *10–11. (“At most, Plaintiff complains that she was assigned to an office away from her peers, refused ‘customary’ clerical, paralegal and associate assistance, not offered needed training, excluded from client lunches and other outreach, and not allowed to work from home or to participate in Mayer Brown’s pro bono efforts as she had been promised. At the outset, the Court notes that Plaintiff has not alleged that non–African–American associates were treated more favorably regarding these matters. As such, Plaintiff fails to plead a prima facie case of racial discrimination.”); see also *Skipper v. Giant Food Inc.*, 68 Fed. App’x 393 (4th Cir. 2003) (holding that an employer could not be liable for racial discrimination or disparate treatment of African–American workers when workers failed to show that similarly situated co-workers not within the protected class were treated differently). *Springs*’ “naked assertion” of racial harassment devoid of ‘further factual enhancement’ is insufficient to survive a motion to dismiss.” *Springs*, 2009 U.S. Dist. LEXIS 97081, at *11 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

227. No. 06–CV–4272, 2008 WL 4951464 (D. Minn. Nov. 18, 2008).

228. *Id.* at *2.

229. *Id.*

230. *Id.* at *1.

231. *Id.* at *3.

232. *Id.*

defendant was granted a summary judgment.²³³ Plaintiff's claim under the Minnesota Constitution was met with a summary judgment for the same reason.²³⁴ Finally, the plaintiff claimed that her employer discriminated against her based on her race and sex, in violation of Title VII, the Minnesota Human Rights Act (MHRA),²³⁵ and 42 U.S.C. § 1981. In its ruling, the court critiqued the plaintiff's complaint as being unclear, and summary judgment was granted to the defendant employer on all counts.²³⁶

Plaintiffs and their counsel should take note of the *Campbell* court's admonitions, as these appear to be common deficits in racial harassment complaints – they are not clear, and/or include counts and legal theories that counsel should know do not apply.²³⁷ The *Campbell* court noted that a plaintiff could show a violation of these statutes in the absence of any tangible adverse employment action if there is

233. No. 06–CV–4272, 2008 WL at *5.

234. *Id.* (citing *State v. Wicklund*, 589 N.W.2d 793, 801 (Minn. 1999)).

235. MINN. STAT. ANN. §§ 363A.01–41 (2011). The plaintiff did not allege discrimination based on sexual orientation, nor did she allege retaliation. *Campbell*, 2008 WL 4951464 at *7.

236. *Campbell*, 2008 WL 4951464, at *5. The court held that “[t]he complaint claims plaintiff is entitled to recover under both 42 U.S.C. § 1983 and the Minnesota Constitution. Defendant states, and at oral argument plaintiff's counsel acknowledged, defendant is not a government entity. As such, it is not acting under color of state law. Because defendant is a private actor, there can be no claim under § 1983. Defendant is entitled to summary judgment on count 2. For the same reason, plaintiff has no valid Minnesota constitutional claims. Plaintiff acknowledges – as she must – defendant is not a state actor. ‘The Minnesota Constitution does not accord affirmative rights to citizens against each other; its provisions are triggered only by state action.’ Accordingly, defendant is entitled to summary judgment on this count, as well.” *Id.* (quoting *Wicklund*, 589 N.W.2d at 801). The court went on to state that “Title VII mandates filing an administrative charge within 300 days of an allegedly discriminatory event. 42 U.S.C. § 2000e–5(e)(1). For the MHRA, the limitations period is one year. Minn. Stat. § 363A.28 subd. 3 (2006). Racial harassment claims under § 1981 are subject to a four year limitations period. See *Jones v. R. R. Donnelley & Sons Co.*, 541 U.S. 369, 383, 124 S. Ct. 1836, 158 L. Ed. 2d 645 (2004); 28 U.S.C. § 1658. Plaintiff filed her administrative charge August 31, 2005. This may bar some of plaintiff's claims, absent waiver, estoppel or a continuing violation – none of which has been alleged. As the Court grants summary judgment, it need not resolve limitations questions. A timely charge is not jurisdictional. *Gordon v. Shafer Contracting Co.*, 469 F.3d 1191, 1194 (8th Cir. 2006).” *Campbell*, 2008 WL 4951464 at *5 n.5. Speaking to the complaint, the court noted “[t]he Court explicitly finds plaintiff's complaint to be considerably less than a model of clarity. Giving the document a very generous reading, the Court discerns claims under 42 U.S.C. §§ 1981 and 1983, Title VII of the Civil Rights Act of 1964 (“Title VII”), the Minnesota Constitution, the Minnesota Human Rights Act, Minn. Stat. §363A.01–41 (“MHRA”), as well as state tort claims of negligent supervision, negligent and intentional infliction of emotional distress, and defamation. The Court finds defendant is entitled to summary judgment on each claim.” *Id.*

237. One is left to wonder whether, with a more carefully and narrowly drawn complaint, the plaintiff may have prevailed, or at least crossed the summary judgment threshold in her case.

evidence of a hostile work environment. Each statute applied a common standard to establish such a claim.²³⁸

A hostile work environment exists 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.”²³⁹ The *Campbell* court outlined the basic provisions of § 1981: “[t]o establish a prima facie case of hostile work environment, a plaintiff must show (1) she is a member of a protected group; (2) she was subject to unwelcome harassment sufficiently severe or pervasive as to affect a term, condition or privilege of employment; and (3) a causal nexus between the two.”²⁴⁰

As with Title VII, only “severe or pervasive” harassment is actionable.²⁴¹ A court adjudicating a 1981 claim “therefore, must consider the totality of the circumstances, including whether the conduct was ‘frequent and severe; whether it was physically threatening or humiliating, as opposed to merely an offensive utterance; and whether it unreasonably interfered with the employee’s work performance.’”²⁴² The court in *Campbell* noted that “[i]t is well established that isolated incidents of harassment, unless extremely serious, do not rise to this level.”²⁴³

When an employee alleges harassment by co-workers, a different standard applies, and the agency or court must determine whether the employer had knowledge of the harassment and whether they took corrective action.²⁴⁴ Still other standards apply if the harasser is a supervisor. In that case, the employer may be vicariously liable for the actions of its supervisors, “unless [the employer] can establish that it ‘exercised reasonable care to prevent and promptly correct any harassing behavior,’ and plaintiff ‘unreasonably failed to take advantage of the preventive or corrective opportunities’” the employer provided.²⁴⁵ This is the so-called “*Ellerth-Faragher*

238. *Campbell*, 2008 WL 4951464, at *6; see *Ross v. Kansas City Power & Light Co.*, 293 F.3d 1041, 1050 (8th Cir. 2002) (Title VII and Section 1981); *Hervey v. County of Koochiching*, 527 F.3d 711, 719 (8th Cir. 2008) (Title VII and MHRRA).

239. *Gordon*, 469 F.3d at 1194 (internal citation omitted).

240. *Campbell*, 2008 WL 4951464, at *6; see *Gordon*, 469 F.3d at 1194–95.

241. *Campbell*, 2008 WL 4951464, at *7 (citing *Gordon*, 469 F.3d at 1195).

242. *Campbell*, 2008 WL 4951464, at *7 (quoting *Brenneman v. Famous Dave's of Am., Inc.*, 507 F.3d 1139, 1143 (8th Cir. 2007)).

243. *Campbell*, 2008 WL 4951464, at *7 (citing *Brenneman*, 507 F.3d at 1143).

244. *Campbell*, 2008 WL 4951464, at *7 (citing *Gordon*, 469 F.3d at 1195).

245. *Campbell*, 2008 WL 4951464, at *7 (citing *Gordon*, 469 F.3d at 1195 (citing *Burlington Indus. Inc. v. Ellerth*, 524 U.S. 742, 765 (1998))). “The employer may assert this

affirmative defense” that can be invoked by employers. The *Ellerth-Faragher*²⁴⁶ defense can be difficult for an employee–plaintiff to overcome at the pretrial stage, as the existence of a company policy prohibiting harassment combined with a reasonable response by the employer to an employee’s complaint of harassment can constitute a fulfillment of legal obligation by the employer.

Even though plaintiff was subjected to acts of harassment, the court in *Campbell* noted that “[t]hrough all of this, plaintiff knew of defendant’s sexual harassment policy, and had used it successfully in the past, yet did not report any of these incidents to supervisors.”²⁴⁷ The failure of the plaintiff’s case in *Campbell* illustrates four practical hurdles that must be cleared in order to advance a successful claim (or at least get to a trial on the merits):

1. The plaintiff must establish that acts or events of “harassment” be directed at her/him because of her/his membership in a protected class such as race or gender,
2. The plaintiff must establish that the acts/events were severe or pervasive in themselves, and
3. The plaintiff must establish that the acts/events occurred in a relatively limited timeframe²⁴⁸
4. The plaintiff must establish that the defendant company did not have a sexual or racial

affirmative defense only where, as here, ‘no tangible employment action’ occurs.” *Campbell*, 2008 WL 4951464, at *7 (citing *Gordon*, 469 F.3d at 1195).

246. This affirmative defense refers two leading Supreme Court cases on sexual harassment, *Ellerth* (Burlington Indus., Inc., v. Ellerth, 524 U.S. 742 (1998)); and *Faragher* (*Faragher v. City of Boca Raton*, 524 U.S. 775 (1998)); see *supra* note 170.

247. *Campbell*, 2008 WL 4951464, at *7 (emphasis added). The *Campbell* court also spoke to the issue of the severity and timing of the alleged acts/events of harassment, noting that even if the acts in question were based on race and sex, they were neither severe nor pervasive, nor did they constitute a hostile work environment, “spread as they were over more than half-a-decade.” *Id.* These acts included an incident in April, 2003, in which “one co-worker made the comment about the Oprah Winfrey show,” another “sometime in 2004 or 2005, [when] another coworker suggested plaintiff’s co-workers had difficulty getting along with her because she was black and female,” on “unspecified dates [when] plaintiff found adult magazines in her machine,” and “[i]n 2006, [when] a co-worker repeatedly told her, “[g]ive me my prick.” *Id.* (alterations added).

248. While the *Campbell* court did not state a minimum requirement for proximity in time of acts/events of harassment, they did note that acts “spread over half-a-decade” were too diffuse in time to warrant them being “severe or pervasive.” *Id.*

harassment policy, or if the defendant did, that the plaintiff attempted to use it to no effect.

This set of legal hurdles illustrates the challenging nature of filing a successful harassment claim, and provides guidance to plaintiffs and their counsel on how a successful claim might be advanced through the appropriate administrative and legal systems. Plaintiffs may find some hope in knowing that while the odds of advancing a successful claim are stacked against them, success in the Title VII context is possible.²⁴⁹

The cases that follow in this section, however, illustrate that plaintiffs can sometimes be successful with particularly clear and egregious fact patterns demonstrating racial harassment in the workplace. For example, in *Carson v. Giant Food, Inc.*,²⁵⁰ a case involving a § 1981 claim, among other allegations of discrimination by an employer, the court noted that “[d]irectors or managers can be held personally liable when they ‘intentionally cause a corporation to infringe on the rights secured by section 1981.’”²⁵¹ Referring to the burden of proof in discrimination cases, the *Carson* court noted that:

Once a plaintiff establishes a prima facie case of discrimination, the burden shifts to the defendant to produce evidence that the plaintiff was suspended for a legitimate, nondiscriminatory reason “If the employer meets this burden, the presumption of discrimination is eliminated, and the plaintiff bears the burden of proving by a preponderance of the evidence that the employer’s nondiscriminatory reasons are pre-textual and that the adverse employment action was actually taken because of the employee’s race or national origin.”²⁵²

249. This article argues that plaintiffs advancing claims of racial harassment have had limited success in the Title VII context, the avenue of redress should not be limited to a federal statutory approach. Remedies under state law, including in tort, should be not only permissible in theory but viable in fact.

250. 187 F. Supp. 2d 462 (D. Md. 2002).

251. *Id.* at 483 (quoting *Tillman v. Wheaton–Haven Recreation Ass’n, Inc.*, 517 F.2d 1141, 1145 (4th Cir. 1975)).

252. *Carson*, 187 F. Supp. 2d at 485 (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000) (quoting *Obi v. Anne Arundel Cnty.*, 142 F. Supp. 2d 655, 660 (D. Md. 2001)).

*Betts v. Costco Wholesale Corp.*²⁵³ involved plaintiffs who sued their former employer alleging they were terminated because they were black and that they were subjected to a racially hostile work environment.²⁵⁴ The court noted that the appeal for review of a summary judgment motion in diversity cases must apply the standard of review used by the courts of the state whose substantive law the court governs.²⁵⁵ The plaintiffs alleged that their manager made comments such as he felt like he was working on a “plantation,” a reference to the many black employees on this site; he referred to plaintiff as a “black widow spider,” and called her “so black and ugly that he would never have her work up front,” and “berate[d] her to the point of tears.”²⁵⁶ The court noted that employer–defendant had thus been put on notice of a hostile work environment.²⁵⁷

In elaborating on the scope of harassing acts that could be actionable, the *Betts* court noted that “[t]his court’s case law therefore makes it clear that the fact finder may consider similar acts of harassment of which a plaintiff becomes aware during the course of his or her employment, even if the harassing acts were directed at others or occurred outside of the plaintiff’s presence.”²⁵⁸ Regarding plaintiff’s claim for IIED, the ruling of summary judgment in favor of the defendant was upheld.²⁵⁹ The *Betts* court cited, in contrast, *Moore v. KUKA Welding Sys. & Robot Corp.*, 171 F.3d 1073 (6th Cir. 1999). The plaintiff in *Moore* “testified that he was ‘angry’ and ‘upset’ about the jokes and slurs” he had suffered during his employment in a racially hostile work environment [and] testified that “‘he just couldn’t take it anymore.’”²⁶⁰ But he also proffered further evidence of distress beyond this sparse testimony. In particular, he “‘complained to his supervisors and started looking for a new job,’ suffered through ‘a fairly steady stream of racial jokes and slurs during his employment,’

253. 558 F.3d 461 (6th Cir. 2009).

254. *Id.* at 464.

255. *Id.* at 466 (citing *Kuezens v. Pascal Co.*, 448 F.3d 349, 360 (6th Cir. 2006)).

256. *Id.* at 464–65 (alteration added).

257. *Id.* at 471.

258. *Id.* at 469 (quoting *Hawkins v. Anheuser–Busch, Inc.*, 517 F.3d 321, 336 (6th Cir. 2008)) (alteration in original). In affirming the district court’s decision to decline defendant Costco’s motion for summary judgment the 6th Circuit held that “Given that the question of whether the challenged conduct was severe or pervasive is ‘quintessentially a question of fact’ . . . a jury could reasonably find in favor of the employees on this issue.” *Id.* at 470 (quoting *Jordan v. City of Cleveland*, 464 F.3d 584, 597 (6th Cir. 2006)).

259. *Betts*, 558 F.3d at 473.

260. *Id.* at 477.

and was ‘intentionally isolated from co-workers in retaliation for his filing an EEOC complaint.’²⁶¹

Courts have noted that the standards for a hostile work environment claim under Title VII, § 1981, and § 1983 are generally the same.²⁶² These standards require harm that exceeds merely having a difficult or aggressive boss; “a pervasively toxic environment, necessarily affecting the terms and conditions under which one is employed” is required.²⁶³ Plaintiffs bringing such claims must also clearly show that the harassment was in fact racially motivated.²⁶⁴ Just as “merely an offensive utterance” will not constitute actionable harassment,²⁶⁵ a series of acts spread over a number of years will also not be actionable – particularly where they cannot be shown clearly to be based on the plaintiff’s being in a particular group (protected class) —according to the court in *Campbell*.²⁶⁶

261. *Moore*, 171 F.3d at 1082–83 (alteration added). The court noted that the plaintiff quit his job largely “because he was tired of the racism and isolation.” *Id.* at 1078.

262. *See Westbrook v. City University of New York*, 591 F. Supp. 2d 207 (E.D. N.Y. 2008) (citing *Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62, 69 (2d Cir. 2000)). In *Westbrook*, the plaintiff sued defendant university alleging race discrimination, retaliation, and a racially hostile work environment under Title VII, § 1981, § 1983, and the New York State Human Rights Law (NYSHRL, N.Y. Exec. Law §§ 296 et. seq. (2011)). Defendants were granted summary judgment on all of plaintiff–employee’s claims; *see also Booker v. Budget Rent–A–Car Systems*, 17 F. Supp. 2d 735 (M.D. Tenn. 1998) – Plaintiff alleged race discrimination under Title VII, and § 1981, and the court held that “Both Title VII and Sec. 1981 claims are governed by the same proof structure.” *Id.* at 742 (citing *Patterson v. McLean Credit Union*, 491 U.S. 164, 186–87(1989)).

263. *Westbrook*, 591 F. Supp. 2d at 233 (quoting *Meder v. City of New York*, No. 05 CV 919, 2007 WL 1231626, at *5 (E.D. N.Y. Apr. 27, 2007)).

264. *See Bolden v. PRC Inc.*, 43 F.3d 545 (10th Cir. 1994), in which the court noted that “The evidence reveals that [plaintiff] was treated very poorly at his job by his coworkers. He was met with hostility by many of his coworkers. He worked with a group of people who had very different sensibilities about humor, which Mr. Bolden did not share. He had been the target of ridicule for a long time, and he was made unhappy by this work environment. However, plaintiff has failed to meet his burden of proof by demonstrating the ‘harassment’ was racially motivated. The workshop was a hostile environment; however, the record does not show it was a racially hostile environment.” *Id.* at 555. Plaintiff’s claim of racial harassment survived summary judgment, and was deemed to be a question of fact in this case. Likewise, the court held that a whether the harassment was “severe and pervasive” was a question of fact. Plaintiff lost in his claim of discrimination for not receiving a promotion, but claims of racial harassment and discrimination survived summary judgment regarding the decision to demote him.

265. *See Rogers v. Equal Emp’t Opportunity Comm’n*, 454 F.2d 234, 238 (1971).

266. Here again, the Court found that the plaintiff had failed to establish a prima facie case. While she belongs to a protected group, the court noted that she failed to establish the remaining elements, and that the defendant was entitled to the *Ellerth–Faragher* affirmative defense. The court in *Campbell* noted that “...not all incidents of alleged harassment show a connection to plaintiff’s race or gender. For example, coworker comments dating from 2001 and 2002 address only plaintiff’s sexual orientation. Other incidents – such as [a] remark that plaintiff had to return to work because she was ‘hungry,’ . . . nitpicking, [a] false report and

Claims for harassment or discrimination under § 1981²⁶⁷ are generally analyzed using the same standards as claims brought under Title VII.²⁶⁸ In addition to protecting employees who are discriminated against by employers who know that those employees are members of a protected class, Section 1981 also protects employees who are *perceived* to be members of such a class.²⁶⁹

The case of *Lopez-Galvan v. Men's Wearhouse*²⁷⁰ involved a suit brought by a male native of the Dominican Republic who was employed by the Men's Wearhouse, a national chain of clothing stores.²⁷¹ Lopez-Galvan alleged that he had been harassed in the workplace because of his race and national origin.²⁷² He also claimed that he had been constructively discharged, and filed a claim under § 1981, as well as a tort claim for negligent infliction of emotional distress (NIED). The plaintiff also alleged that his employer violated Title VII and the public policy of North Carolina for subjecting him to adverse treatment in his workplace.²⁷³ Among other incidents, the court noted that the plaintiff was "[locked] in the store while Smith [, the assistant manager,] went to the bank to make deposits."²⁷⁴ The plaintiff claimed that this negative treatment amounted to "constructive discharge" from his employment. He further noted that he was referred to as "black" on two occasions, and claimed that this was due to the fact that others perceived him as being of a particular

shouting, and [a fellow employee's] request to punch him in – lack any obvious connection to plaintiff's membership in any protected class." *Campbell v. Rock Tenn. Co.*, No. 06-CV-4272, 2008 WL 4951464, at *7 (D. Minn. Nov. 18, 2008) (alterations added); *see also Lopez-Galvan v. Men's Warehouse*, No. 3:06cv537, 2008 U.S. Dist. LEXIS 53456 (W.D. N.C. July 10, 2008) ("While recognizing the highly offensive nature of such a remark, the Fourth Circuit has rejected arguments that the use of such a racial slur on one singular occasion is sufficient to constitute a change in the terms and conditions of employment." *Id.* at *27 (citing *Shields v. Fed. Express Corp.*, 120 Fed. App'x 956, 961 (4th Cir. 2005)).

267. 42 U.S.C. § 1981, et. seq.

268. *Lopez-Galvan*, 2008 U.S. Dist. LEXIS 53456, at *24 (citing *Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 184 (4th Cir. 2001)).

269. *Lopez-Galvan*, 2008 U.S. Dist. LEXIS 53456, at *24 (citing *Salem v. City of Pontiac School Dist.*, No. 81-1508, 1985 WL 12820, at *1 (6th Cir. Jan. 11, 1988)). "Accordingly," the court in *Lopez-Galvan* noted, "Plaintiff's claim that he was perceived to be black may be cognizable under section 1981 separate from the absence of a claim under Title VII." *Lopez-Galvan*, 2008 U.S. Dist. LEXIS 53456, at *24. The court noted that the plaintiff's forecast of a hostile work environment based on his "perceived race" was insufficient to sustain a § 1981 claim. *Id.*

270. 2008 U.S. Dist. LEXIS 53456.

271. *Id.* at *4—*5.

272. *Id.* at *1.

273. *Id.*

274. *Id.* at *8 (alterations added). The plaintiff testified that "one time I showed up at work and they jailed me there. They had me all handcuffed and everything, chained." *Id.*

race, and that was their motivation for such statements and treatment. The court disallowed the claims of “perceived” racial harassment and constructive discharge, citing insufficient facts alleged by the plaintiff.²⁷⁵

The *Lopez–Galvan* court referred to one other specific occasion of perceived harassment stated in the plaintiff’s case, involving the store manager who used a racial epithet. The plaintiff testified that when he complained about his work schedule, the manager replied, “[w]hy don’t you tell the manager? You’re being a baby, baby – oh nigger, nigger.”²⁷⁶ The plaintiff’s wife complained to the district manager about her husband (the plaintiff) being harassed at work. While the plaintiff complained to the manager about his schedule, he did not mention the racial epithets to the district manager.²⁷⁷

275. *Id.* at *25–26 (“The Plaintiff cites to only two examples of racially related incidents in support of his claim. First, the Plaintiff has presented a forecast of evidence that he was referred to as being black on two occasions. While such evidence may support the Plaintiff’s contention that he was perceived to be black, merely being referred to as belonging to a certain race does not rise to the level of demonstrating racial animus. The reference to Plaintiff’s race could have completely innocuous and made under innocent circumstances, and without more facts regarding these incidents, such evidence fails to create an issue as to whether the Plaintiff’s adverse treatment was motivated by a discriminatory bias.”).

276. 2008 U.S. Dist. LEXIS 53456 at *15.

277. *Id.* at *15. The court in this case attempted to put this incident into perspective. “While the use of racial epithets is abhorrent and certainly nothing that is or should be condoned, this one isolated incident does not constitute a sufficient forecast of evidence that the Plaintiff was deliberately subjected to intolerable working conditions due to his perceived race.” *Id.* at *26. The *Lopez–Galvan* court noted several other rulings in which isolated racial epithets were dismissed as not rising to the level of harassment: “‘Mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee would not sufficiently alter the terms and conditions of employment to violate Title VII.’ Nor is this one isolated incident of racial animosity sufficient to show that the racial harassment that the Plaintiff allegedly suffered was so ‘severe or pervasive [as] to alter the conditions of employment and create an abusive atmosphere....’ As the Supreme Court has noted, ‘simple teasing, off–hand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the ‘terms and conditions of employment.’” *Id.* at 26–27 (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 787–8 (1998); *E.E.O.C. v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 313 (4th Cir. 2008)) (internal citations omitted) (alteration in original).

The court went to great lengths to condemn the use of the epithet while ruling that it did not warrant legal redress: “‘Perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as ‘nigger’ by a supervisor in the presence of his subordinates.’ *Spriggs*, 242 F.3d at 185 (finding ‘frequent and highly repugnant’ racial slurs were sufficient severe and pervasive as to create racially hostile environment) (internal quotation marks omitted). While recognizing the highly offensive nature of such a remark, the Fourth Circuit has rejected arguments that the use of such a racial slur on one singular occasion is sufficient to constitute a change in the terms and conditions of employment. *See Shields v. Fed. Express Corp.*, 120 Fed. App’x 956, 961 (4th Cir. 2005). This is all the more true where the Plaintiff specifically denies being a member of the racial minority toward whom such epithet would be directed. Because the Plaintiff has failed to present a forecast of evidence that he was subjected to

In dismissing Lopez–Galvan’s claim for negligent infliction of emotional distress (NIED), the court began by noting the elements that must be proven for such a claim to be successful:

- (1) The defendant negligently engaged in conduct, and
- (2) It was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress (often referred to as ‘mental anguish’), and
- (3) The conduct did in fact cause the plaintiff severe emotional distress.²⁷⁸

The court noted that the defendant, Men’s Wearhouse, did not challenge Lopez–Galvan’s assertion that he suffered from severe emotional distress. They agreed with the defendant, however, that the facts did not support that the plaintiff’s injuries were either reasonably foreseeable or caused by defendant’s negligence.²⁷⁹

In summary, in the cases discussed in this section, as well as the commentary and cases cited in the law review articles, plaintiffs and their counsel have been provided guidance by the courts on how to file potentially successful claims for racial discrimination and harassment in the workplace. The fact remains, however, that the avenues available to employees seeking redress for harassment – resulting in psychological and emotional injuries even as severe as RBTS—are limited and less than effective in achieving redress for these aggrieved plaintiffs.

Plaintiffs face significant choices in determining whether to file discrimination or harassment complaints with the EEOC while simultaneously bringing successful actions for harassment in state courts. This complexity stems from that fact that in addition to taking

harassment sufficiently severe or pervasive to create a racially hostile work environment, the Plaintiff’s harassment and constructive discharge claims based upon his ‘perceived race’ must be dismissed.” *Lopez–Galvan*, 2008 U.S. Dist. LEXIS 53456, at *27–28.

278. *Id.* at *37 (quoting *Johnson v. Ruark Obstetrics and Gynecology Associates*, 395 S.E.2d 85, 97 (N.C. 1990). “The North Carolina Supreme Court has defined ‘severe emotional distress’ in this context as ‘any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so.’” *Lopez–Galvan*, 2008 U.S. Dist. LEXIS 53456, at *37–8 (quoting *Johnson*, 395 S.E.2d 85, 97)).

279. “In the present case,” the court stated, “the forecast of evidence presented by the Plaintiff does not support an inference sufficient for a reasonable jury to find that the Plaintiff’s emotional distress was a reasonably foreseeable result of any negligence on the part of the Defendant or its employees.” *Lopez–Galvan*, 2008 U.S. Dist. LEXIS 53456, at *38.

the federal route (i.e. through the EEOC), plaintiffs in many states may also seek recovery in state law. The majority of states have their own antidiscrimination statutes that can be the basis of a claim,²⁸⁰ and the choice of whether to seek redress under both federal and state law may depend not only on the facts of a particular case,²⁸¹ but also whether the state in question in fact has such a statute.²⁸¹ The next section elaborates on these complex procedural choices and related challenges.

C. State Worker's Compensation and Possible Preemption of Tort Claims for Emotional Distress

To add another level of complexity in attempting to advance claims for racial harassment—particularly on the basis of intentional (or negligent) infliction of emotional distress (IIED or NIED)—plaintiffs and their counsel also need to keep in mind that such claims may be precluded by state worker's compensation law or by state antidiscrimination law.²⁸²

For example, in *Jackson v. Lehigh Valley Physician's Grp.*, a Pennsylvania case brought in federal district court,²⁸³ the court

280. Some state antidiscrimination statutes expand the categories of protected groups. These states vary immensely in terms of the remedies available for violations of their particular state antidiscrimination statutes. For example, some state antidiscrimination statutes cap the amount of compensatory and punitive damages recoverable in an employment discrimination case along the lines of Title VII. Other state statutes do not allow for the recovery of compensatory or punitive damages at all. Some state statutes permit the recovery of compensatory damages but disallow the recovery of punitive damages. Conversely, other state statutes allow prevailing plaintiffs to recover both compensatory and punitive damages. Jarod S. Gonzalez, *State Antidiscrimination Statutes and Implied Preemption of Common Law Torts: Valuing the Common Law*, 59 S.C. L. REV. 115, 116–17 (2007) (internal citations omitted).

281. *Id.* Gonzalez further notes that “As a practical matter, unless an aggrieved employment discrimination plaintiff is in a state that has an antidiscrimination statute that allows for a full recovery of compensatory and punitive damages without legislative restriction, it only makes sense in a case of egregious discrimination for a plaintiff to consider suing the employer for violating the state’s common law. For example, almost all state jurisdictions recognize a cause of action for intentional infliction of emotional distress. Egregious employment discrimination in the form of sexual or racial harassment can potentially satisfy the elements of an intentional infliction of emotional distress claim. If such elements are satisfied, the aggrieved plaintiff may generally recover the full panoply of compensatory and punitive damages that are *available at common law*. In addition, some states also recognize common law ‘public policy’ claims for employment discrimination which provide traditional tort remedies. Assault, battery, and negligent employment tort claims could also potentially apply to allegations of supervisory harassment based on race or sex, claims which also provide traditional tort remedies.” *Id.* at 117–18 (internal citations omitted).

282. Gonzalez, *supra* note 280, at 116–18.

283. *Jackson v. Lehigh Physician's Grp.*, No. 08–3043, 2009 WL 229756, at *1 (E.D. PA. Jan. 30, 2009).

determined that the plaintiff's claim for intentional infliction of emotional distress (IIED) based on excessive and unfair reprimands and discipline, failure to respond seriously to a complaint, omission from a workplace photo brochure, and termination, fell outside the "personal animus exception"²⁸⁴ to the state's workers compensation law. A specific allegation that was allowed to proceed under a tort claim in *Jackson* involved a fellow employee's personal physical attack on plaintiff.²⁸⁵

In a separate case involving racial harassment, the court held that the plaintiff's IIED claim was barred by the Pennsylvania Worker's Compensation Act because the alleged harassment was done by the defendant's employees while they were on the job.²⁸⁶ Outside of the sexual harassment context, Pennsylvania courts appear most likely to find that workplace conduct falls within the personal animus exception when the conduct involves physical violence, harm, or threats thereof.²⁸⁷ According to the *Jackson* court,

These cases demonstrate that the alleged motivation behind the offending act must be individualized, not just aimed at every member of a particular class. To fit within the [personal animus] exception, the third party's or fellow employee's act must have been motivated by his animosity against the injured employee. If the third party would have attacked a different person in the

284. *Id.* at *6. "The statute recognizes a limited exception, known as the 'personal animus' or 'third party attack' exception, which permits claims for 'employee injuries caused by the intentional conduct of third parties for reasons personal to the tortfeasor and not directed against him as an employee or because of his employment.'" *Id.* at *6 (citing *McInerney v. Moyer Lumber & Hardware, Inc.*, 244 F. Supp. 2d 393, 400 (E.D. Pa. 2002) (quoting *Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 160 (3d Cir. 1999)).

285. *Jackson*, 2009 WL 229756, at *11.

286. *See id.* at *8 (citing *Ahmed v. Lowe's Company Inc.*, No. 06-4798, 2008 U.S. Dist. LEXIS 58568, at *23-24 (E.D. Pa. July 31, 2008); *Hettler v. Zany Brainy, Inc.*, No. 99-3879, 2000 U.S. Dist. LEXIS 14537, at *13 (E.D. Pa. Sept. 26, 2000) (For an act to fall within the personal animus exception, the *Jackson* court noted that it cannot be one which would be "expected in the workplace.").

287. For instance, the court noted, in *Price v. Phila. Elec. Co.*, 790 F. Supp. 97, 100 (E.D. Pa. 1992), plaintiff's co-workers allegedly used racial epithets around plaintiff, physically threatened plaintiff, and deliberately discussed deer hunting and killing deer in plaintiff's presence, knowing of his aversion to the topic. *Id.* Following such a discussion, plaintiff found a deer's head tied to the hood of his car. *Id.* The court found that plaintiff's allegations of racial harassment by his co-workers were not barred by the Workers' Compensation Act, stating that "it cannot be said that the conduct alleged clearly was not a result of personal animosity of fellow employees toward [plaintiff]." *Id.* (alteration added).

same position as the injured employee, the attack falls outside the [personal animus] exception.²⁸⁸

There have been similar preemption rulings by other state courts, including for claims of negligent infliction of emotional distress (NIED) and negligent retention of an employee,²⁸⁹ and for intentional infliction of emotional distress.²⁹⁰

In one of these cases, *Wilson*, even though the court dismissed the plaintiff's claim against his employer the court allowed an IIED claim against individual managers to proceed, stating that a civil rights claim may be filed against an employer and does not prohibit the filing of an IIED claim against offending individuals against whom no civil rights claim could have been filed.²⁹¹ The plaintiff's IIED claim in *Wilson* was based on allegations stated in his deposition that he was subjected to racist remarks nearly every day of his employment.²⁹² Examples cited by the plaintiff included the store's managers telling him that "a black man was hung in his hometown a couple of years earlier," and in response to Wilson's question as to why, the manager stated that "they didn't need a reason."²⁹³ Another manager said to Wilson in front of (the manager's) young daughter and Wilson that "if you bring one of those home with you, I'll kill you."²⁹⁴ The comment was allegedly made in the break room in front of several employees who all laughed.²⁹⁵

288. *Jackson*, 2009 WL 229756, at *8 (citing *Price*, 790 F. Supp. at 100 (internal citations omitted)) (alterations in original).

289. 116 P.3d 719 (Haw. 2005).

290. 75 S.W.3d 229, 239 (Ky. Ct. App. 2001) (citing *Messick v. Toyota Motor Mfr., Ky., Inc.*, 45 F. Supp. 2d 578, 582 (E.D. Ky. 1999)); No. 98-5074, 1999 WL 83934 (E.D. Pa. 1999). "Plaintiff asserted claims against her former employer for a racially motivated and retaliatory discharge under Title VII, for racial discrimination under 42 U.S.C. § 1981, and for [IIED]." *Id.* at *1. Defendant's motion to dismiss [an amended complaint] was granted. Defendant contended (successfully) that "emotional distress claims are barred by the Pennsylvania Workmen's Compensation Act (WCA). The WCA is the exclusive source of an employer's liability for covered injuries . . . The statute, however, excludes from coverage an injury intentionally caused by a third party motivated by factors personal to the victim. . . Courts have generally held that claims for [IIED] resulting from employment discrimination are barred by the WCA . . . A claim for [NIED] is clearly outside the third-party intentional attack exclusion and is barred by the WCA." *Id.* at *2 (citing *Hicks v. Arthur*, 843 F. Supp. 949, 958 (E.D. Pa. 1994); *Matczak v. Frankford Candy and Chocolate Co.*, 136 F.3d 933, 940 (3d Cir. 1997)) (alterations added).

291. *Wilson*, 75 S.W.3d at 239.

292. *Id.* at 230.

293. *Id.* at 237.

294. *Id.*

295. *Id.* at 237.

The *Wilson* court concluded that the trial court erred in holding that the plaintiff's IIED claim was not sufficient to survive the appellee's summary judgment motion, specifically stating that: "[i]f such conduct occurred, we believe a jury could find such conduct to be intentional, outrageous, and intolerable. As stated in comment h of the Restatement, if reasonable minds may differ as to whether the alleged conduct was sufficiently extreme and outrageous so as to result in liability, then the matter is subject to determination by a jury."²⁹⁶ In a similar case, *Hampton*, the court also allowed a narrow exception to the bar to IIED claims for workplace harassment, noting that "[The Pennsylvania Worker's Compensation Statute], however, excludes from coverage an injury intentionally caused by a third party motivated by factors personal to the victim."²⁹⁷

Jarod Gonzalez in his article *State Antidiscrimination Statutes and Implied Preemption of Common Law Torts: Valuing the Common Law* has argued, as we do, that employees who have been discriminated against or harassed because of their race should be able to bring a claim for recovery under tort law; he notes that the specific cause of action could be for IIED, assault and battery, and negligent employment.²⁹⁸ The common law can be a critical resource for employment discrimination complainants. Title VII does not stand in the way of a complainant utilizing state common law to pursue a recovery against the complainant's employer, but whether state statutory law stands in the way of the common law is an entirely different story – this issue is typically anything but clear.²⁹⁹ In cases where employee–plaintiffs have suffered race–based traumatic stress, a cause of action in tort where permitted under state law could allow for recovery for compensatory as well as punitive damages.³⁰⁰ Other advantages of pursuing claims in tort include providing for recovery from employers that have a small number of employees (and are thus not subject to Title VII), and a longer time period in which to bring a

296. *Id.* at 238.

297. *Hampton*, 1999 WL 83934, at *2.

298. *Gonzalez, supra* note 280, at 117–18 (“As a practical matter, unless an aggrieved employment discrimination plaintiff is in a state that has an antidiscrimination statute that allows for a full recovery of compensatory and punitive damages without legislative restriction, it only makes sense in a case of egregious discrimination for a plaintiff to consider suing the employer for violating the state's common law. For example, almost all state jurisdictions recognize a cause of action for intentional infliction of emotional distress. Egregious employment discrimination in the form of sexual or racial harassment can potentially satisfy the elements of an intentional infliction of emotional distress claim.”) (internal citations omitted).

299. *Id.* at 119–20.

300. *Id.* at 117.

claim (typically one to two years in tort, versus as little as 180 days to file under a state anti-discrimination statute such as Texas).³⁰¹

Bringing a cause of action in tort would facilitate justice for plaintiffs suffering from RBTS, as it would allow for a full recovery of compensatory and punitive damages, which would be appropriate for egregious discrimination.³⁰² In jurisdictions with state antidiscrimination statutes that are silent on the preemption question, Gonzalez's article suggests that the aggrieved plaintiff should be able to pursue an intentional infliction of emotional distress claim in egregious cases of racial or sexual harassment. And if the claim is established, the plaintiff should be able to seek recovery from a range of traditional common law remedies.³⁰³

D. Clearing the Summary Judgment Hurdle – Successes, Failures, Mixed Results

While the plaintiff in *Wilson* cleared the initial summary judgment hurdle for some of the allegations, many lawsuits for racial harassment do not make it past that stage. Even a cursory reading of the allegations in *Wilson* would indicate that he experienced conduct that was "extreme and outrageous" as required to meet that standard in the Restatement.³⁰⁴ The outcome for plaintiffs in other cases was not as clear or favorable. In *Smith v. Davidson Transit Org.*,³⁰⁵ for example, the plaintiff's common law tort claim for retaliatory discharge was dismissed as it "[amounted] to nothing more than a 'bare assertion' with no supporting facts to show entitlement to relief" under *Twombly*.³⁰⁶ Yet, plaintiff's claim for a racially hostile work environment under Title VII survived summary judgment.³⁰⁷

301. *Id.* at 118–19.

302. *Id.* at 117.

303. *Id.* at 145.

304. *Wilson v. Lowe's Home Ctr.*, 75 S.W.2d 229, 238 (Ky. Ct. App. 2001).

305. No. 3:08–0271, 2008 WL 4722652 (M.D. Tenn. Oct. 23, 2008).

306. 550 U.S. 544 (2007).

307. *Smith*, 2008 WL 4722652, at *9 ("The ultimate conclusion as to whether a work environment is racially hostile is based on a subjective and objective evaluation of whether a reasonable person would find it 'hostile and abusive' and whether the plaintiff actually found it so. Here, the plaintiff's allegations, taken as true, do show that, as an African-American, she was subject to repeated, unwelcome, negative comments about African-Americans, such that it is more than speculative that an offensive and hostile work environment was created. DTO's response generally fails to address the plaintiff's allegations of a repeated pattern of racial slurs and racially insensitive conduct in the workplace. (Docket No. 69 at 8.) . . . Further, the plaintiff has also alleged that she and other members of her protected class were treated less favorably in terms of their working conditions while performing rider counts than similarly

The often-cited case of *Harris v. Forklift Sys., Inc.* set a standard for courts in determining whether a workplace environment is hostile: courts are to look at the totality of the circumstances, and consider the frequency and severity of the harassing conduct, whether the conduct is physically threatening or humiliating, and whether it unreasonably interferes with the plaintiff's work performance.³⁰⁸

Similarly, *Carter v. New Venture Gear*³⁰⁹ sets a high standard for surviving a summary judgment motion.³¹⁰ The *Carter* court noted that the first element of a hostile work environment claim has both an objective and subjective component,³¹¹ and that a hostile work environment claim may be based on one incident, but that incident must seemingly border on the horrific.³¹² In *Carter*,³¹³ the plaintiff's

situated employees who were not in the plaintiff's protected class (African-American and/or female) . . . this aspect of the plaintiff's Title VII claim will depend on whether she can show that she was treated less favorably than a similarly situated employee outside of her protected class, not whether she was 'singled out.' With these allegations and underlying factual support, the plaintiff has established that her Title VII claim should not be dismissed." *Id.* at *9-*10 (citing *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 (1998); *Leadbetter v. Gilley*, 385 F.3d 683, 691 (6th Cir. 2004)); *see also* *Pa. State Police v. Suders*, 542 U.S. 129, 147 (2004) (a sexual harassment (hostile environment) case in which the Supreme Court held that in order for plaintiff to prevail on a constructive discharge claim it was necessary to prove that working conditions were so intolerable that a reasonable person would have felt compelled to resign.).

308. *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993). To constitute a hostile work environment, the environment must be both subjectively and objectively offensive. *See also* a series of related cases cited in *Adams v. High Purity Sys., Inc.*, No. 1:09cv354, 2009 WL 2391939 (E.D. Va. July 2, 2009), including: *Equal Emp't Opportunity Comm'n v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 315 (4th Cir. 2008) (citing *Montano v. INOVA Healthcare Servs.*, No. 1:08cv565, 2008 U.S. Dist. LEXIS 93042, at *9 (E.D. Va. Nov. 12, 1998) (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 788, (1988)). ("Simple teasing, offhand comments and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the terms and conditions of employment."). "The Supreme Court imposed this high standard to filter out 'the ordinary tribulations of the workplace, such as the sporadic use of abusive language' so that Title VII does not become a 'general civility code.'" *Adams*, 2009 WL 2391939, at *4 (quoting *Montano*, 2008 U.S. Dist. LEXIS 93042, at *3)).

309. 310 Fed. App'x 454 (2d Cir. 2009).

310. *Id.* at 457 (quoting *Mack v. Otis Elevator Co.*, 326 F.3d 116, 122 (2d Cir. 2003) ("To survive a motion for summary judgment on a racial harassment claim relating to a hostile work environment, a plaintiff must demonstrate: '(1) that the workplace was permeated with discriminatory intimidation that was sufficiently severe or pervasive to alter the conditions of his or her work environment, and (2) that a specific basis exists for imputing the conduct that created the hostile environment to the employer.'"))

311. *Carter v. New Venture Gear*, 310 Fed. App'x 454, 457-58 (2d Cir. 2009). "[T]he misconduct must be severe or pervasive enough to create an objectively hostile or abusive work environment, and the victim must also subjectively perceive that environment to be abusive." *Id.* (citing *Terry v. Ashcroft*, 336 F.3d 128, 148 (2d Cir. 2003)) (alteration added).

312. *New Venture Gear*, 310 Fed. App'x at 458 ("we require that the incident constitute an 'intolerable alteration' of the plaintiff's working conditions, so as to substantially interfere

claim that her employer had created a hostile work environment by allowing racially-related incidents, including her receipt of a note from co-workers she found that said “get out, we do not want you here,” did not survive summary judgment. The court concluded that the plaintiff’s hostile work environment claim failed because the conduct was too isolated, infrequent, and did not demonstrate unreasonable interference in her ability to work, nor did the court find any reason to believe such conduct was necessarily due to her race. Thus, Carter failed to satisfy her burden of showing an objectively hostile work environment.³¹⁴

To survive a motion for summary judgment on a racial harassment claim relating to hostile environment, the court in *Carter* held that a plaintiff must demonstrate: “(1) that the workplace was permeated with discriminatory intimidation that was sufficiently severe or pervasive to alter the conditions of his or her work environment, and (2) that a specific basis exists for imputing the conduct that created the hostile environment to the employer.”³¹⁵ Courts have set the bar quite high for claimants; normally a single incident of racial harassment, however egregious, will not suffice.³¹⁶

The height of this bar was illustrated in the case of *Adams v. High Purity Sys.*,³¹⁷ which involved behavior on the part of a supervisor that appeared to be egregiously discriminatory and harassing toward a subordinate, but for which the court did not provide relief. *Adams* is an unusual and complex case involving a white employee who alleged racial harassment under Title VII.³¹⁸ The acts of harassment alleged by the plaintiff Adams in this case included the foreman wearing a “Free the Jena 6” T-shirt,³¹⁹ and commenting to

with or impair his ability to do his job.” *Id.* at 458 (citing *Mathirampuzha v. Potter*, 548 F.3d 70, 79 (2d Cir. 2008) (citation omitted)).

313. 310 Fed. App’x 454.

314. *Id.* at 458.

315. *Id.* at 457 (citing *Mack*, 326 F.3d at 122 (internal quotation marks and brackets omitted)).

316. “A hostile work environment claim may be based on one incident, but ‘we require that the incident constitute an ‘intolerable alteration’ of the plaintiff’s working conditions, so as to substantially interfere with or impair his ability to do his job.’” *New Venture Gear*, 310 Fed. App’x at 458 (citing *Mathirampuzha*, 548 F.3d at 79 (citation omitted)).

317. No. 1:09cv354, 2009 WL 2391939 (E.D. Va. July 2, 2009).

318. There were eleven counts to the plaintiff’s claim, including IIED and NIED, against his employer for the actions of an African American foreman. The district court granted summary judgment for the defendant company and the court of appeals affirmed, in an opinion that is instructive on a number of fronts. *See Adams v. High Purity, Systems, Inc.*, 382 Fed. App’x 269 (4th Cir. 2010).

319. *Adams*, 2009 WL 2391939, at *1. For background on the Jena 6, an incident involving the alleged beating by black students on a white classmate in a town in Louisiana,

Adams about “paying his white ass back.”³²⁰ These did not rise to the level of creating a hostile work environment.³²¹ Nor did these acts constitute intentional infliction of emotional distress³²² or negligent infliction of emotional distress³²³ even though the plaintiff became violently sick when confronted with the foreman wearing the Jena 6 t-shirt, and subsequently took (unauthorized) medical leave. Even though the plaintiff was fired for taking this medical leave, his claim for retaliation under § 1981 also failed.³²⁴

Commenting on the track record for plaintiffs in racial harassment cases, Patricia Chew notes that

see the New York Times summary and related resources and stories. The N.Y. Times summarized the incident this way: “An incident involving a tree, a school, two nooses and six African-American high school students has made the small town of Jena, La., the focal point of some of the largest civil rights protests in years, including a gathering that drew more than 10,000 people on Sept. 20, 2007. The protest concerned the so-called Jena Six, six black students who were charged with attempted murder in the beating of a white classmate in December 2006. Civil rights advocates, who have called the punishment of the arrested youths disproportionate, say the case has raised the questions of how much race still plays a part in the workings of the legal system in the South. Maria Newman, *Jena, La.*, N.Y. TIMES (Sept. 24, 2007), “<http://topics.nytimes.com/top/news/national/usstateterritoriesandpossessions/louisiana/jena/index.html>.”

320. *Adams*, 2009 WL 2391939, at *4.

321. *Id.* “To state a claim for hostile work environment, a plaintiff must allege that: 1) he was subjected to unwelcome harassment; 2) the harassment was because of his race/color; 3) the harassment was sufficiently severe or pervasive to alter the terms and conditions of plaintiff’s employment and create an abusive atmosphere; and 4) there is a basis to impose liability on the employer.” *Id.* (citing *Causey v. Balog*, 162 F.3d 795, 801 (4th Cir. 1998) (Title VII); *Jordan v. Alternative Res. Corp.*, 458 F.3d 332, 344 (4th Cir. 2006) (§ 1981 principles are same as those for Title VII)).

322. The court noted that the plaintiff’s IIED claim failed because Plaintiff’s allegations “are insufficient to show outrageous conduct on either Defendants’ part. Conduct is ‘outrageous or intolerable’ if it is ‘so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.’” *Adams*, 2009 WL 2391939, at *9 (citing *Russo v. White*, 400 S.E.2d 160, 162 (Va. 1991)).

323. “There must be a ‘clear and unbroken chain of causal connection’ between the negligence, the emotional disturbance, and the physical injury. To succeed on a negligent infliction of emotional distress claim, a plaintiff must allege ‘clear and convincing evidence of symptoms or manifestations of *physical injury*, not merely an underlying emotional disturbance.” *Adams*, 2009 WL 2391939, at *9 (citing *Delk v. Columbia/HCA Healthcare Corp.*, 523 S.E.2d 826, 834 (Va. 2000); *Myseros v. Sissler*, 387 S.E.2d 463, 464 (Va. 1990) (internal citations omitted)) (emphasis in original).

324. “To state a claim for retaliation, a plaintiff must allege facts showing that: 1) he engaged in protected activity; 2) he suffered an adverse action; and 3) there is a causal connection between the protected activity and the adverse employment action.” *Adams*, 2009 WL 2391939, at *6 (citing *Peters v. Jenney*, 327 F.3d 307, 320 (4th Cir. 2003) (Title VII)); *see Alternative Res. Corp.*, 458 F.3d at 344 (Section 1981 standard is the same as Title VII)).

[I]n [these] cases, plaintiffs have a higher success rate when they claim blatant race-linked verbal and physical harassment than when they claim more contextual and subtle harassment. For instance, plaintiffs are successful in 33.3% of their cases when they report harassers' use of ostensibly race-linked objects such as nooses, white robes, and pointed hats – compared to an average plaintiffs' win rate of 21.5% Perhaps what is most striking is that plaintiffs still lose two-thirds of the time in those cases.³²⁵

The current Title VII and § 1981 frameworks appear to provide plaintiffs avenues (albeit limited) for redress when the racism is direct, outrageous, and obnoxious. But these frameworks are not sufficient to provide aggrieved plaintiffs redress against individual co-employees or supervisors whose harassment results in these plaintiffs experiencing Race Based Traumatic Stress.³²⁶ Additional causes of action and paths to redress should be made available to aggrieved, traumatized plaintiffs. These include the application of tort law, as outlined in the section that follows.

E. Developing More Effective Employment Law and Policy

A challenge to employees and employers, as well as legal counsel and judges, is developing a shared understanding of what constitutes racial harassment in the workplace. The generally accepted standard is that the harassment must be “severe or pervasive” to be actionable.³²⁷ While this article does not advocate for a new harassment standard, a new approach to interpreting the meaning and application of “severe” and “pervasive” in cases involving psychological injury or impairment or race-based traumatic stress is warranted.

Heather Kleinschmidt has explored the “severe and pervasive” standard in depth and points out inconsistencies between its application in racial harassment versus sexual harassment claims.³²⁸

325. Chew, *supra* note 152, at 631 (internal footnotes omitted) (alterations added).

326. See generally Carter, *Race-Based Traumatic Stress*, *supra* note 12; see also Carter, *Recognizing and Assessing Race-Based Traumatic Stress*, *supra* note 12.

327. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 68 (1986).

328. Heather Kleinschmidt, Note, *Reconsidering Severe or Pervasive: Aligning the Standard in Sexual Harassment and Racial Harassment Causes of Action*, 80 IND. L. J. 1119, 1123 (2005). Kleinschmidt relates that the Supreme Court affirmed that the analogy between

Following the *Meritor* case,³²⁹ she notes, courts have not been consistently been applying the severe or pervasive test prescribed by the Supreme Court, but have applied a severe and pervasive standard in cases involving sexual harassment. Even as courts have applied an inconsistent, if not “lower,” standard to racial harassment cases, according to Kleinschmidt,³³⁰ plaintiffs in racial harassment cases have had little success in advancing their claims.³³¹

Patricia Chew correctly recommends an approach not based on, or in reaction to, sexual harassment jurisprudence, but one that is specifically applicable to racial harassment.³³² Chew goes on to raise key questions that could aid in a more effective jurisprudence for racial harassment, as distinct from, although in some ways similar to sexual harassment:

To what extent should the elements of a racial harassment claim be reinterpreted? To what extent are the elements of a sexual harassment claim ever

racial harassment and sexual harassment was proper, noting that “[i]n *National Railroad Passenger Corp. v. Morgan*, [536 U.S. 101 (2002)] the Court decided its first case of racial harassment. The African-American plaintiff alleged that since the time of his hiring, he had been subject to consistent harassment, which included utterances of racial epithets by managers, refusals to allow him to participate in an apprenticeship program, and numerous ‘written counselings’ for absenteeism. [*Id.* at 106 n.1]. The Court resolved the case using the continuing violation theory for Title VII claims. [*See id.* at 122]. When making its decision, the Court stated that hostile work environment racial harassment and sexual harassment claims are reviewed under the same standard. [*Id.* at 116 n.10]. The Court applied the ‘severe or pervasive’ standard it developed for sexual harassment cases involving hostile work environments to this racial harassment case. [*See id.*.” *Id.* at 1123 (alterations added).

329. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

330. Kleinschmidt, *supra* note 328, at 1139. (“The direction that the courts take in deciding what standards to use could have implications for open questions of law in future harassment cases. If courts continue to treat sexual and racial harassment differently when deciding whether conduct creates a hostile working environment, courts might move away from the analogy between sexual and racial harassment when deciding open questions of law. Courts might be less likely to import standards of one type of harassment to the other type of harassment, making decisions less predictable. However, if courts align the severe or pervasive standard, they might also be likely to continue the analogy to open issues of law. This would lead to consistency and predictability for all involved in Title VII litigation.”).

331. *See Chew & Kelley*, *supra* note 14, at 91 (noting the long odds faced by plaintiffs in racial harassment suits). Consistency in application of the “severe”/“pervasive” standard for sexual and racial harassment cases is warranted, as is an interpretation of these standards that would permit a greater percentage of claims of racial harassment and discrimination to be heard on their merits.

332. *See Chew*, *supra* note 152, at 641 (“While research comparing racial harassment with sexual harassment is still in its early stages, tentative observations indicate significant dissimilarities between the two. While much attention has been appropriately been focused on sexual harassment, it is now time to develop a jurisprudential model specifically for racial harassment that is cognizant of its distinct attributes and complexity.”).

appropriate to a racial harassment claim? As the legal community begins to puzzle through these major jurisprudential issues, two relevant issues discussed in the concluding remarks of this Article should be considered. Neither issue is easily resolved, but it is critical that the legal community addresses both.³³³

The status and state of mind of the target of racial harassment, while sometimes considered by the courts, has not been appropriately considered or applied to effect remedies or redress for such plaintiffs. This is an instance in which a “reasonable victim” or target standard could be applied in cases of alleged racial (or sexual) harassment.³³⁴ A similar standard could be applied to targets of racial harassment in determining whether their injuries are compensable under either statutory or case law.

IV. APPLYING TORT LAW—MORE EFFECTIVELY RESPONDING TO RACIAL HARASSMENT

A. Tort Law – Intentional Infliction of Emotional Distress (IIED), Direct and Vicarious Liability

The concept that harassment, specifically sexual harassment, is best resolved in the legal sense through tort law is not new. Indeed, it

333. *Id.* Chew concludes her article by noting “[a]s employees, employers, judges, and juries consider the viability of a racial harassment complaint, this Article argues that they should not feel bound to the sexual harassment model. They should instead affirmatively question the appropriateness of analogizing one form of harassment to another. In order to fulfill the goals of Title VII, they should carefully consider the nuances of racial harassment, rather than rotely assuming that harassing behavior in the workplace is monolithic.” *Id.* at 647. The approach proposed in the present article seeks to address these questions as well.

334. See Kamla Alexander, Note, *A Modest Proposal: The “Reasonable Victim” Standard and Alaska Employers’ Affirmative Defense to Vicarious Liability for Sexual Harassment*, 17 ALASKA L. REV. 297, 318 (2000). (“In the Alaska Supreme Court’s inevitable determinations whether to apply the ‘reasonable victim’ standard and whether to allow Alaska employers to claim the Ellerth/Faragher affirmative defense, the court should follow the path of VECO: Alaska’s anti-discrimination law ‘is intended to be more broadly interpreted than federal law to further the goal of eradication of discrimination.’ Applying the ‘reasonable victim’ standard not only helps plaintiffs, but also helps the justice system as a whole by defeating societal stereotypes perpetuated by the application of the ‘reasonable person’ standard . . . By allowing defendant employers to claim an affirmative defense to the sexual harassment claims of their employees, the court would help protect cautious, law-abiding employers from frivolous claims. The second prong of the defense would require employees to report sexually harassing conduct to their employers promptly, and at the same time, require employers to eliminate harassing conduct in the workplace swiftly or risk discipline in court.”) (internal citations omitted).

was suggested by Mark McLaughlin Hager in 1998, who forcefully argued that it is superior to discrimination law as an anti-harassment weapon.³³⁵ Martha Chamallas and Jennifer Wiggins observed that race has also deeply impacted the assignment of responsibility and resultant legal outcomes. They argue that tort law can be informative in a variety of fundamental constructs, and can apply to racial harassment and discrimination as well.³³⁶

Even earlier, Dennis Duffy, in arguing against the “tortification” of labor and employment law, stated that while “[i]t is the rare case in which the corporate employer actually orders the outrageous acts, has advance knowledge of them, or desires them to take place . . . the typical employer is guilty, if at all, of *simply allowing* such actions to take place.”³³⁷ Duffy argues that tort liability

335. See generally Mark M. Hager, *Harassment as a Tort: Why Title VII Hostile Environment Liability Should be Curtailed*, 30 CONN. L. REV. 375 (1998); contra Dennis P. Duffy, *Intentional Infliction of Emotional Distress and Employment at Will: The Case Against ‘Tortification’ of Labor and Employment Law*, 74 B.U. L. REV. 387. “Few anti-harassment lawyers, activists, and theoreticians,” Hager states, “have questioned [the] discrimination paradigm. But that is what I mean to do here. I will suggest that discrimination law as an anti-harassment weapon is morally and legally confused, dubious in its effectiveness, and deeply troubling in its unintended consequences. I will suggest that tort law is superior on all of these counts. My point in a nutshell is that harassment should be met with tort suits against actual perpetrators.” Hager, *supra*, at 376 (alteration added). Even Duffy would seem to allow for personal liability for fellow employees [e.g. of an employee alleging harassment] “...if their conduct or motives are purely personal, and if their conduct rises to the level of outrageousness. However, the employer itself, should not be liable unless it condoned or approved of the acts of the offending employee or manager. Duffy, *supra*, at 333. This article advocates for employer vicarious liability in cases of harassment resulting in RBTS, if the employer knew or should have known of the harassing behavior of its employees and that behavior resulted in serious injury such as RBTS.

336. CHAMALLAS & WRIGGINS, *supra* note 104. It is our contention that race also matters in everyday judgments of cause and effect and assessments of responsibility for injury. In our white-dominated society, the lingering cognitive association of blackness with inferiority and with the lack of value can distort legal judgments, devaluing and sometimes erasing the pain and suffering of people of color . . .

As they operate in institutional contexts, common forms of cognitive bias – particularly habits of thought that make it harder to imagine different outcomes – can affect expectations about what is normal and reasonable and therefore ultimately impact legal liability. . . [W]e regard tort law as a particularly appropriate site for investigating differing “common sense” understandings of such fundamental constructs as dignity, reasonableness, cause, and injury. *Id.* at 7–8 (alteration added); see also *infra* Section V(B) and discussion of the tort of intentional infliction of emotional distress. The proposal in this article also includes tort law as an appropriate legal strategy in cases of RBTS, and as a body of law that informs the “*Shared Responsibility*” approach. See *infra* Section VI.

337. Duffy, *supra* note 335, at 420 (emphasis added). In acknowledging that there were cases in which an employer could (or should) be held vicariously liable for the acts of their supervisory employees, Duffy cited *Bushell v. Dean*, 781 S.W. 2d 652 (Tex. Ct. App. 1989), a case in which “...the court upheld the jury’s finding that the conduct of the supervisor was extreme and outrageous because it was tantamount to sexual harassment, and ... Although it is

does have a place in the process for employees to seek redress for racial harassment in the workplace. Specifically, she argues that employers should be liable in instances where intentional infliction of emotional distress perpetrated by acts of supervisors or fellow employees is apparent. Liability should also accrue when employers knew or should have known that such acts would be perpetrated that could result in psychological or emotional injury to the employee.³³⁸ Likewise, Jennifer Fox Swain, analyzing employment torts in an ABA paper notes that: “[s]ome of the most often utilized torts in employment litigation, and the ones which [are addressed in this paper] are intentional infliction of emotional distress, defamation (libel and slander), intentional interference with employment contracts, invasions of privacy, assault and battery, and negligent hiring, training and retention.”³³⁹

B. Cases Involving Claims for IIED, NIED, and Related Federal Law Violations

Advancing a claim in tort for harassment or discrimination in the workplace is a challenging proposition for plaintiffs who allege that they have suffered injury as a result of behavior by co-workers

clear that [the supervisor] was acting for purely personal motives (his desire to have an affair...), the court found that the employer was liable for the supervisor’s conduct even absent proof of ratification because he was acting within his general authority as a supervisor.” *Id.* at 421 n.153 (alteration added).

338. The approach proposed in this article is also consistent with Duffy’s assertion that “Courts should allow employers defending intentional infliction of emotional distress claims to avoid or limit liability if they have established a complaint or appeal procedure reasonably calculated to encourage employees to come forward and complain to higher management. If management takes prompt remedial action, or if the employee does not take advantage of the complaint procedure, employer responsibility should be diminished or eliminated entirely,” *Id.* at 420–21 (footnote omitted).

339. Jennifer F. Swain, *Employment Torts*, 2006 A.B.A. SEC. LAB. & EMP. L., EMP. RTS. & RESP. COMM. 1 (alteration added). Swain notes that “To establish a cause of action for intentional infliction of emotional distress, a plaintiff must show: (1) extreme and outrageous conduct; (2) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (3) a causal connection between the conduct and injury; and (4) severe emotional distress. *Id.* [(citing RESTATEMENT (SECOND) OF TORTS § 46 (1965))]; [s]ee also Frank B. Harty & Thomas W. Foley, *Employment Torts: Emerging Areas of Liability*, 39 Drake L. Rev. 3, 41 (1989) [(footnotes omitted)]. In most jurisdictions, the complained of conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as intolerable in a civilized community. RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965); see *Soti v. Lowe’s Home Centers Inc.*, [906 So.2d 916, 919] (Ala. 2005) [(internal citations omitted)]; *Ford v. Revlon, Inc.*, 734 P.2d 580[, 585] (Ariz. 1987). Further, the distress inflicted must be so severe that no reasonable man could be expected to endure it. RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1965).” *Id.* at 2 (alterations added).

and/or supervisors and managers. To state a claim for IIED, for example, a plaintiff must show that the defendant's conduct was "extreme and outrageous." One court summarized a common view of this standard in stating that "[e]xtreme and outrageous conduct' is an amorphous phrase that escapes precise definition."³⁴⁰ In *Dean v. Ford Motor Credit Co.*, the United States Court of Appeals for the Fifth Circuit stated that:

Liability [for outrageous conduct] has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community Generally the case is one in which a recitation of the facts to an average member of the community would lead him to exclaim "Outrageous."³⁴¹

Plaintiffs are often not successful in advancing their complaints because they have not presented facts sufficient to demonstrate extreme and outrageous behavior, or even because they have not named specific defendants.³⁴² In other cases involving alleged

340. CHAMALLAS & WRIGGINS, *supra* note 104, at 78, note that, "Many courts have even hesitated to declare the 'severe or pervasive' harassment required to prove a hostile environment claim under civil rights statutes as sufficient to meet the threshold tort requirement of 'extreme and outrageous' conduct." *Id.*

341. *Wilson v. Monarch Paper Co.*, 939 F.2d 1138, 1142–43 (5th Cir. 1991) (quoting *Dean v. Ford Motor Credit Co.*, 885 F.2d 300, 306 (5th Cir. 1989) (citing RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965))) (alterations added); *see also* *Watson v. Dixon*, 502 S.E.2d 15 (N.C. Ct. App. 1998), "A claim for [IIED] exists 'when a defendant's 'conduct exceeds all bounds usually tolerated by decent society and the conduct causes mental distress of a very serious kind.'" *Id.* at 19 (citing *Stanback v. Stanback*, 254 S.E.2d 61, 622 (1979) (quoting WILLIAM PROSSER, THE LAW OF TORTS 56 (4th ed. 1971) (alteration added); *see also* JOHN L. DIAMOND ET AL., UNDERSTANDING TORTS 23 (4th ed. 2010), "[IIED] exists when the defendant, by extreme and outrageous conduct, intentionally or recklessly causes the victim severe mental distress. Most states no longer require that the victim suffer physical manifestations of the mental stress." (alterations added); *but see* *Nelson v. Metro-North Commuter R.R.*, 235 F.3d 101, 106 (2000) – Employee sued railroad under Federal Employer's Liability Act (FELA), alleging NIED because railroad allowed a co-employee into area of a train station where employee worked after employee had reported coemployee for sexual harassment. District court granted defendant's motion for SJ, and Court of Appeals affirmed – because the plaintiff failed to prove that she was placed in immediate risk of physical harm, although the quantum of evidence of negligence required in FELA cases was significantly lower than in ordinary tort cases. (internal citations omitted).

342. *Gooden v. Dep't of Corr.*, 2007 Conn. Super. LEXIS 3073, at *Overview (Conn. Super. Ct. Nov. 13, 2007) (suit against a STATE entity) – "Count Four (NIED) failed because [the plaintiff] (1) named no individual defendants, (2) he identified no statute by which the

employer racial discrimination, plaintiff's cases have resulted in summary judgment against them for a combination of procedural and statutory limitations. Such limitations could include bars to remedies covered under state law, for example, NIED claims in Hawaii that have exclusive remedies in worker's compensation statutes.³⁴³

To establish a *prima facie* case of IIED, a plaintiff must show (1) extreme and outrageous conduct on the part of the defendant which (2) either intentionally or recklessly (3) causes the plaintiff severe emotional distress.³⁴⁴ In *Kassem v. Wash. Hosp. Ctr.*,³⁴⁵ the United States Court of Appeals for the D.C. Circuit set the bar quite high for the specific facts required to establish a viable IIED claim, following the *Larjani*³⁴⁶ framework. In *Kassem*, the plaintiff was fired from his

State waived sovereign immunity; and (3) he did not claim a violation of constitutionally protected rights or that the State acted in excess of its statutory authority." (alteration added).

343. *McClane v. Delta Airlines, Inc.*, 116 P.3d 719 (Haw. 2005)— [summary stmt] On appeal, the court found that the trial court properly dismissed the claims of race discrimination . . . because the allegations on which the claims were based were barred by either the employee's failure to exhaust administrative remedies or the statute of limitations; and properly dismissed the claims of negligent retention and NIED because those claims were barred by the exclusive remedy provision of the Hawaii WC statutes (HAW. REV. STAT. § 386–5 (1993)); and properly dismissed the claim of IIED because, as a matter of law, the conduct alleged was not sufficiently outrageous to support a claim for IIED.

344. See *Larjani v. Georgetown University*, 791 A.2d 41, 43 (D.C. 2002) (citing *Howard University v. Best*, 484 A.2d 958, 985 (D.C. 1984) (quoting *Sere v. Group Hospitalization, Inc.* 443 A.2d 33, 37 (D.C. 1982))). "The conduct must be 'so outrageous in character, and so extreme in degree, as to utterly go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" *Larjani*, 791 A.2d at 43 (citing *Homan v. Goval*, 711 A.2d 812, 818 (D.C. 1998) (quoting *Dreiza v. Vaccaro*, 650 A.2d 1308, 1312 n.10 (D.C. 1984))). That case involved neither racial nor sexual harassment, but provides a helpful illustration of the standard for stating a successful IIED claim. Plaintiff was harassed by co-workers who used loud noise devices placed outside her office door, for a period of nine months, to harass her. Plaintiff suffered physical and emotional injuries, and defendants refused to take any corrective action. The Court of appeals reversed the trial court's granting of a motion to dismiss to the defendants, and remanded for further proceedings. *Id.* at 45; see also *Kassem v. Washington Hosp. Center*, 513 F.3d 251, 255 (D.C. Cir. 2008) (quoting *King v. Kidd*, 640 A.2d 656, 677–78 (D.C. 1983)) ("supervisor's participation in retaliating against an employee who had complained of sexual harassment supported an IIED claim because such conduct 'cannot be considered merely an instance of typical 'employer–employee conflicts.'").

345. 513 F.3d 251.

346. *Id.* at 255. "To establish a cause of action for intentional infliction of emotional distress, a plaintiff must show: (1) extreme and outrageous conduct; (2) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (3) a causal connection between the conduct and injury; and (4) severe emotional distress. . . . It is well established that criticism of an employee's job performance, abrasive interrogations, unjustified reprimands, opposition to unemployment benefits, excessive supervision, or negative evaluations alone do not constitute outrageous conduct on the part of the employer. Swain, *supra* note 339, at 2 (citing RESTATEMENT (SECOND) OF TORTS § 46; Barber, v.

position and had a false charge, that he violated company policy and the law, filed against him by his employer; the defendant–employer did so knowing that the charge would harm plaintiff’s future employment prospects and also to avoid regulatory action against the hospital. Given these allegations, the court held that the plaintiff’s claim could not be dismissed at the pleading stage.³⁴⁷ *Kassem* illustrates just how egregious employer behavior may have to be, and how high the bar is for plaintiffs to clear, to move beyond a potential summary judgment against their claims.

Just as plaintiffs have difficulties in making an IIED claim, plaintiffs have many challenges to successfully assert a *negligent* infliction of emotional distress case. Such challenges can be seen in *Snyder v. Med. Serv. Corp., of E. Wash.*³⁴⁸ In that case, the plaintiff sued for wrongful discharge and NIED, among other claims. The Supreme Court of Washington affirmed the court of appeals ruling for the defendant – even though the state’s Industrial Insurance Act did not bar the employee’s claim – because the supervisor’s conduct did not support a claim for emotional distress for several reasons: there was no evidence that the employer was aware of the employee’s susceptibility to emotional problems, the employee’s termination was lawful, and the employer did not violate the law against discrimination by failing to grant the employee’s request for a new supervisor.³⁴⁹ The Washington Supreme Court noted that mental distress is a fact of life, and that courts cannot guarantee a stress–free workplace.³⁵⁰

While we agree with the *Snyder* court that “mental distress is a fact of life,” an employee should be guaranteed redress for fellow employee/employer race–based actions that result in traumatic stress to that employee.³⁵¹ While workplace disputes are best resolved by the employer, when the employer is non–responsive or fails to effectively prevent and respond to their employee’s or supervisor’s harassing

Whirlpool Corp., 34 F.3d 1268 (4th Cir. 1994); *Spence v. Maryland Casualty Co.*, 995 F.2d 1147 (2d Cir. 1993); *Brown v. Freedman Baking Co.*, 810 F.2d 6 (1st Cir. 1987)).

347. *Kassem*, 513 F.3d at 257.

348. 35 P.3d 1158 (Wash. 2001).

349. See generally *id.*

350. *Id.* at 1165 (citing *Bishop v. State*, 889 P.2d 959, 963 (Wash. App. 1995)). The court noted that, “[A] defendant’s obligation to refrain from particular conduct is owed only to those who are *foreseeably* endangered by the conduct, and only with respect to those risks or hazards whose likelihood make the conduct unreasonably dangerous The utility of permitting employers to handle workplace disputes outweighs the risk of harm to employees who may exhibit symptoms of emotional distress as a result.” *Snyder*, 35 P.3d at 1164–65 (internal citations omitted) (emphasis in original) (alteration added).

351. *Id.* at 1164.

conduct, the aggrieved employee should be able to seek meaningful redress in the courts.

An example in which a plaintiff was successful in advancing a tort claim is *Clifton v. Mass. Bay Transp. Auth.*³⁵² This case involved an employer that failed to stop ongoing racial harassment, and the court awarded plaintiff compensatory and punitive damages for emotional distress, and for defendant's violation of Massachusetts law (G.L. c. 151B, §§4(1) and (4)). On appeal, the Massachusetts Supreme Court awarded a new trial [on issues of damages only], yet it still noted that "the evidence at trial demonstrated a pattern of egregious racial harassment and retaliation, perpetrated on the plaintiff (who is African-American) by both supervisors and coworkers throughout nine years of his employment . . . at the MBTA."³⁵³ "The plaintiff initially complained about the derogatory and unlawful conduct to his immediate supervisors, but they did nothing to stop it."³⁵⁴ The issue of continued harassment bolstered the plaintiff's case in *Clifton*, even in the face of newly-established federal standards applying Title VII.³⁵⁵

Regarding claims of NIED specifically, in a case involving a Title VII claim by an African-American female plaintiff for unlawful discrimination based on race, national origin and age, 42 U.S.C. § 1983, and Connecticut discrimination law, the federal district court allowed the NIED claim to proceed, as the plaintiff had been constructively discharged. Absent discharge, the court would not have

352. 839 N.E.2d 314 (Mass. 2005).

353. *Id.* at 316. Workplace behavior encountered by plaintiff included ". . . [a foreman] . . . and others shot bottle rockets at him. . . set water boobytraps that would fall on him when he opened his office door, and painted 'fag bait' and 'Sanford and Son' on his locker. When the plaintiff complained to his supervisor . . . [the supervisor] called the plaintiff a 'rat.' The supervisor himself soon joined in the harassment, calling the plaintiff 'Roxbury Mayor,' 'fucking banana,' and 'Sanford,' and referring to the plaintiff and another black employee as 'ding and dong.'" *Id.* ". . . The plaintiff became aware of several instances of discriminatory conduct, including the use of racist epithets such as 'nigger' and 'colored boy' directed toward other MBTA employees who also were African-American." *Id.* at 317.

354. *Id.* at 317.

355. *Clifton*, 839 N.E.2d at 317. "At the time of the trial, the court in *Clifton* noted that the United States Court of Appeals for the First Circuit, interpreting Title VII, had adopted the so-called 'revelatory' standard for applying the continuing violation doctrine, which barred a plaintiff from asserting unlawful conduct beyond the limitation period if the plaintiff was, or should have been, aware of the existence of unlawful discrimination during the 'untimely' period. *Id.* at 320 (citing *Provencher v. CVS Pharmacy Div. of Melville Corp.*, 145 F.3d 5, 14 (1st Cir.1998); "In our view, the Federal standard 'fail[ed] to recognize fully that an employee who suffers from recurring acts of abusive . . . conduct that, over time, rise to the level of a hostile work environment, may be unable to appreciate the true character and enormity of the discriminatory environment until after it has continued for an appreciable length of time.'" *Clifton*, 839 N.E.2d at 320 (quoting *Cuddy v. Stop & Shop Supermarket Co.*, 750 N.E.2d 928, 941 (Mass. 2001)) (alteration in original).

allowed this claim to proceed.³⁵⁶ The *Grey* court noted that the alleged conduct was not sufficiently unreasonable to support an NIED claim, however, and that the firing of an employee, even though wrongfully motivated, does not constitute socially intolerable behavior. NIED arises in the employment context, said the court, only where it is based on unreasonable conduct of the defendant in the termination process.³⁵⁷

*C. Vicarious Liability and Respondeat Superior*³⁵⁸

Under the theory of respondeat superior, an employer may be held vicariously liable for an employee's intentional torts (including intentional infliction of emotional distress) if the employee was acting within the scope of his employment when he committed the tort. However, as with many employment torts, the allegedly tortuous conduct cited in claims for intentional infliction of emotional distress is frequently outside the scope of the offending employee's employment.³⁵⁹

If employees act outside the scope of employment, employers may also be held vicariously liable for the harassing behavior of their employees if they "ratify" the behavior, although this liability may not extend to punitive damages against the employer. To establish ratification, a plaintiff must prove that "the employer (1) had actual knowledge of the tortuous conduct of the offending employee and that

356. *Grey v. City of Norwalk*, 304 F. Supp. 2d 314, 332 (D. Conn. 2004) (citing *Perodeau v. City of Hartford*, 792 A.2d 752, 768 (Conn. 2002)). The court reasoned that, "[e]mployees who fear lawsuits by fellow employees may be less competitive with each other, may promote the interests of their employer less vigorously, may refrain from reporting the improper or even illegal conduct of fellow employees, may be less frank in performance evaluations, and may make employment decisions such as demotions, promotions, and transfers on the basis of fear of suit rather than business needs and desires. All of this conduct would contribute to a less vigorous and less productive workplace." *Grey*, 304 F. Supp. 2d at 332 (citing *Perodeau*, 792 A.2d at 769)) (alteration added). The authors beg to differ, and would assert that employees who are permitted by their employers to harass each other to the point of causing traumatic stress would be more likely to "contribute to a less vigorous and less productive workplace" than if legitimate lawsuits were allowed to be brought in such cases to redress this behavior and reduce the likelihood of its reoccurrence.

357. *Grey*, 304 F. Supp. 2d at 333 (citing *Parsons v. United Technologies Corp.*, 700 A.2d 655, 667 (Conn. 1997)) (internal citations omitted).

358. See RESTATEMENT (THIRD) OF AGENCY § 2.04 (2006) ("An employer is subject to liability for torts committed by employees while acting within the scope of their employment.")

359. *Swain*, *supra* note 339, at 3 (citing *Busby v. Truswal Sys. Co.*, 551 So.2d 322, 327 (Ala. 1989)). "Plaintiffs may nonetheless hold employers liable for intentional infliction of emotional distress where it can be demonstrated that the employer adopted or ratified the tortuous conduct of its supervisory employees." *Id.* at 3.

the tortuous conduct was directed at and visited upon the complaining employee; (2) that based upon this knowledge, the employer knew, or should have known, that such conduct constituted [a tort] and/or a continuing tort; and (3) that the employer failed to take 'adequate' steps to remedy the situation."³⁶⁰

In *Watson v. Dixon*,³⁶¹ for example, the plaintiff (Watson) was subjected to sexual harassment by co-workers in the medical center where they worked. The harassment included "cruel practical jokes . . . obscene comments and behavior of a sexual nature, which then escalated into unwanted touching of her person, until finally culminating in veiled threats to her personal safety . . . [It] continued virtually unchecked for some seven or eight months . . . [and] several of her co-workers testified that Watson appeared emotionally upset while at work."³⁶² Eventually Watson had a nervous breakdown, and brought a lawsuit for assault, negligent hiring, negligent retention, and IIED – alleging that Duke University "ratified" this behavior.³⁶³

Alan O. Sykes, writing on the boundaries and economics of vicarious liability, notes that vicarious liability will not apply if an agent (employee) acts out of personal ill will. Rather, the employee must act out of a purpose to serve the employer.³⁶⁴ Recent case law, however, reflects a more flexible approach. One California court, for example, upheld the imposition of vicarious liability against a building subcontractor for his drunken employee's assault of two employees of the general contractor. "The court reasoned that the tort resulted from the tortfeasor's *perception* of his rights as an employee."³⁶⁵ Employers will want to keep this in mind as they train and supervise their new and current employees, particularly management staff, who may perceive it as a "right" to engage in behavior that is harassing and traumatizing to their supervisees or fellow employees. Clear policy statements and

360. *Potts v. BE & K Constr. Co.*, 604 So.2d 398, 400 (Ala. 1992).

361. 502 S.E.2d 15, 15 (N.C. Ct. App. 1998).

362. *Id.* at 20.

363. *Id.* at 17–18, 20. The *Watson* court held that "Duke's liability is based solely on a jury determination that Duke ratified the actions of its employee, Bobby Dixon. Accordingly, the jury award of punitive damages against Duke for \$500,000, in excess of punitive damages against Dixon, cannot stand. We therefore, reverse the judgment of the trial court as to the punitive damage award, as being contrary to law, and remand the matter to the trial court for a trial on the issue of punitive damages against defendants." *Id.* at 21–22.

364. Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563, 589 (1988) (emphasis added) (footnote omitted).

365. *Id.* Sykes also suggests that "Intrinsically stressful occupations, for example, may precipitate intentional torts. In such cases, the business enterprise 'causes' the tort even though the employee's tortious behavior may evince a purely personal motivation." *Id.* at 588–89.

swift follow through by employers who become aware of such behavior will reduce the likelihood of successful claims for emotional distress – and more importantly prevent or mitigate such distress to their employees.³⁶⁶

A racial harassment case decided in the Fifth Circuit, *Walker v. Thompson*,³⁶⁷ exemplifies the high standard of proof some courts require before allowing a jury to determine whether the defendant has engaged in outrageous conduct. In that case, the employer's investigation purportedly revealed no racial harassment or discrimination whatsoever. The investigating supervisor reached this conclusion even though he testified that the offending supervisor was reprimanded for saying to the plaintiff that "her grandmother rubbed a black child's head for good luck," and that the supervisor had been informed that she should not have said to Walker that Brazilian nuts were called "nigger toes."³⁶⁸ The court in *Walker* held that based on the alleged facts, the employer failed to demonstrate as a matter of law that they "exercised reasonable care to prevent and correct promptly [the] harassing behavior."³⁶⁹

The barriers to an intentional infliction of emotional distress (IIED) claim for racial harassment are formidable and are not overcome by a showing of racist comments directed at the plaintiff, even repeatedly, according to the Fifth Circuit ruling in *Walker*.³⁷⁰ In

366. See EQUAL EMP'T OPPORTUNITY COMM'N, PUB. NO. 915.002, ENFORCEMENT GUIDANCE ON VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS (1999), available at <http://www.eeoc.gov/policy/docs/harassment.html>.

367. 214 F.3d 615, 615 (5th Cir. 2000). The company's anti-harassment policy statement in *Walker* read as follows: 'It is the policy of the company not to discriminate in recruitment, hiring, compensation, promotion or any other condition of employment on the basis of race, color, national origin, religion, sex, age, physical or mental handicaps, marital status, pregnancy or parenthood.' *Id.* at 627 n.14. The company's handbook "instructs employees who believe they have been subject to sexual harassment to notify management immediately." The handbook also has a section regarding employee complaints in general, instructing the employee to contact his immediate supervisor regarding the problem, and in the event that the problem is not resolved, the employee should inform the appropriate manager." *Id.* at 627 n.15.

368. *Id.* at 627.

369. *Id.* (internal quotation marks omitted).

370. *Walker*, 214 F.3d 615 at 616, 619. a case which involved plaintiff's claim for racial discrimination. The trial court granted summary judgment to the defendant on the claims of retaliation and IIED among other claims, and vacated the summary judgment determination with respect to the hostile environment claim. The Plaintiff was an African-American woman; Thompson, a defendant, was her supervisor. The Comments made to the Plaintiff by her supervisor included telling the Plaintiff that "her grandmother would rub a little black boy's head for good luck, much like the slave masters did to slaves," that she "did not look like she swung from the trees," and that "I thought you looked like one of my grandmother's slaves." Another manager told the Plaintiff that "he would send her back to Africa with her family if

Walker, the Circuit Court of Appeals ruled for defendants on plaintiff's IIED claim, citing the Restatement 2nd of Torts: "Insults, indignities, threats, annoyances, or petty oppressions, without more, do not rise to the level of [IIED]." ³⁷¹ Further, the court pointed out the affirmative defenses available to the employer-defendant, citing the rulings in the landmark workplace harassment cases of *Ellerth* and *Faragher*. ³⁷² The court in *Walker* did note, however, that it was "not persuaded that the appellees have shown as a matter of law that they exercised reasonable care in correcting the racially harassing behavior," ³⁷³ and vacated the summary judgment granted to defendant at trial on this claim. ³⁷⁴

Shuler v. Regency House of Wallingford, Inc., ³⁷⁵ involved an Africa American female nurse who was subjected to racial harassment by a co-worker. After reporting the incidents to her supervisor, plaintiff believed she was retaliated against by being reassigned to different work during which she suffered a physical injury as well. Plaintiff Shuler sued for negligent supervision based on supervisor's failure to prevent co-worker's harassment, and supervisor's-supervisor for failing to prevent retaliation. Defendant moved to dismiss, and motions were granted as to all claims except promissory estoppel with the court ruling that plaintiff "may be able to prove that representations reasonably induced [plaintiff] to continue reporting

she was not careful;" he made this threat once and again several months later. In Walker's presence, a fellow employee stated that "her husband wanted to hang [her son's tennis] shoes from his rear view mirror 'like those niggers.'" *Id.* at 619-20 (alteration added). An internal company investigation of these incidents found no harassment. The Plaintiff subsequently filed a complaint with the EEOC. The Plaintiff subsequently resigned from her job, and filed suit for discrimination in state court, which was removed to federal court - claims under Title VII, § 1981, and IIED. *Id.* at 622-24.

371. *Walker*, 214 F.3d 615, 628 (citation omitted).

372. *See Walker*, 214 F.3d 615, 626 (stating "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee.... [h]owever when no tangible employment action has been shown, and employer is entitled to raise an affirmative defense to such claim. The two elements of this affirmative defense are: '(a) that the employer exercised reasonable care to prevent and correct promptly any racially harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.'" (citations omitted) (quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998))).

373. *Walker*, 214 F.3d 615, 630.

374. *Id.* at 627.

375. No. 3:05CV480 (RNC), 2006 WL 118383, at *1 (D. Conn. Jan. 13, 2006).

discrimination, and that she did so to her detriment.”³⁷⁶ Plaintiff’s claim for IIED did not survive a motion to dismiss.³⁷⁷ The plaintiff in *McLean v. Patten Cmty., Inc.*³⁷⁸ fared better by relying on North Carolina law. McLean, an African American female employee brought a claim for racial discrimination under Section 1981, as well as North Carolina law – public policy prohibiting discrimination, and negligent retention and supervision (involving a sales manager at the company); this claim survived summary judgment.³⁷⁹

As the above cases indicate, plaintiffs face especially difficult challenges in bringing harassment lawsuits based on intentional infliction of emotional distress. Cases alleging negligent infliction of emotional distress, although logical and defensible, face even stiffer challenges as noted in the section that follows.

*D. Negligent Infliction of Emotional Distress (NIED) and Restatement (Third) of Torts*³⁸⁰

The focus of this section is on NIED because it has a potentially broader legal sweep and may begin to be more accepted by courts. In addition, some commentators have indicated that the burden of proving NIED would be less onerous than showing both an emotional distress injury and intent to do so on the part of the defendant.³⁸¹

376. *Shuler*, 2006 WL 118383, at *3.; see also *supra* note 66, regarding corporate and organizational diversity statements – arguably implied promises to employees that they will be provided a respectful work environment.

377. *Shuler*, 2006 WL 118383 at *4.

378. 332 F.3d 714 (4th Cir. 2003).

379. *Id.* at 721. “While Mrs. McLean was employed at Patten, she, and at least some of the other female employees were subjected to all manner of propositions, indignities, and insults based on race or sex, or both . . . [these included allegations of the manager] joking about wanting to have sex with a black woman. As time went on the female employees were called bitches, whores, sluts, brats, etc. The black employees were referred to as niggers.” *Id.* at 716 (alteration added). After these employees complained to management, their supervisor stated that “he wanted Mrs. McLean fired, and . . . told [an employee] to make it hard on her so she would quit.” *Id.* (alteration added). Applying sexual harassment principles to the racial harassment in this case, the court held that “[j]ust as we have held and hold in this case that a North Carolina state cause of action for wrongful discharge is stated by a claim that an employee is separated from employment because of her sex when the cause of separation is her refusal of sexual favors to her supervisor, then, when the record indicates, as it does in this case, that her separation may have been caused because of her race, we are of the opinion and hold that she has stated a cause of action under the state law of [N.C.] under § 143-422.2.” *Id.* at 721 (alteration added).

380. See generally 44 WAKE FOREST L. REV. 877 (2009).

381. See CIVIL JURY INSTRUCTIONS, § 3.12-2 (2008), available at <http://www.jud.state.ct.us/JI/Civil/part3/3.12-2.htm>. (stating “There are three elements that the

The tort of negligent infliction of emotional distress (NIED) has three elements that the plaintiff must prove: “1) the defendant engaged in conduct that the defendant should have realized involved an unreasonable risk of causing emotional distress and that that distress, if it were caused, might result in illness or bodily injury; 2) that the conduct caused emotional distress to the plaintiff; and 3) the distress was of such a nature as might result in illness or bodily harm.”³⁸² A plaintiff must also show that “(1) the defendant’s conduct is negligent and (2) such conduct caused mental disturbance accompanied by physical injury, illness, or other physical consequences.”³⁸³

Cases in state courts have attempted to balance the validity of NIED claims against existing remedies under state law, particularly through worker’s compensation (WC) statutes. The applicability of WC statutes can vary from state to state, but some such statutes may require a showing of physical contact to plaintiff by defendant, going beyond even racist and degrading verbal comments. Plaintiffs bringing such claims need to show that these statutes do not specifically bar tort claims for IIED.³⁸⁴ In *Chea*,³⁸⁵ the Plaintiffs claimed symptoms arising from a co-worker’s verbal and physical assault and from verbal taunts,

plaintiff must prove for a finding of [NIED]: 1) the defendant engaged in conduct that the defendant should have realized involved an unreasonable risk of causing emotional distress and that that distress, if it were caused, might result in illness or bodily injury; 2) that the conduct caused emotional distress to the plaintiff; and 3) the distress was of such a nature as might result in illness or bodily harm “If you find that the plaintiff has proved all of the elements of [NIED], you will find for the plaintiff and award damages on this count as I will describe in the ‘damages’ section of these instructions.”)

382. CIVIL JURY INSTRUCTIONS, § 3.12–2 (2008) available at, <http://www.jud.state.ct.us/JI/Civil/part3/3.12–2.htm>.

383. *McNight v. Madison Parish Sch. Bd.*, No. 07–0030, 2009 U.S. Dist. LEXIS 42654, at *22–*23 (W.D. La. May 20, 2009) (citing *Moresi v. State*, 567 So.2d 1081, 1095 (La. 1990)).

384. See, e.g., *Chea v. Men’s Wearhouse, Inc.*, 932 P.2d 1261, 1264–66 (Wash. Ct. App. 1997). *Chea* involved a claim for NIED for physical and verbal racial harassment. *Id.* at 1262–63. The court held that “[NIED] is a cognizable claim in the workplace when it does not arise solely from racial remarks and does not result from an employer’s disciplinary acts or personality a dispute. . . . [An NIED] claim can exist in an employment context. We have recognized the claim arising in that context when it was not covered under the [Industrial Insurance Act’s (IIA)] exclusivity provisions and the dominant feature of the negligence claim was the emotional injury. We recognize that an employer must be accorded latitude in making decisions regarding employee discipline. This does not mean, however, that an employer cannot be held responsible when its negligent acts injure an employee, and such acts are not in the nature of employee discipline and do not give rise to a cognizable IIA claim. . . . The IIA does not compensate for [NIED] claims arising from workplace harassment, including verbal harassment or discrimination, so such claims are not barred by the IIA exclusivity provisions.” *Id.* at 1262, 1264–66 (footnotes omitted).

385. 932 P.2d 1261, 1261 (Wash. Ct. App. 1997).

which the state's Dept. of Labor and Industries "determined not to be an injury or occupational disease and, therefore, not compensable, [were] not barred by the IIA exclusivity provisions."³⁸⁶

1. *Claims for Physical Harm under Section Four of the Restatement Third of Torts*

The emotional and psychological harm caused to employees, and the resultant harms to the workplace, and losses to the employer caused by race-based impairment or RBTS can be physical, emotional or both.³⁸⁷ The drafts of the Restatement (Third) of Torts proposes that the gap between these two types of harms be narrowed or closed, and that emotional harm be recognized as "stand alone." Thus, plaintiff-employees should be able to recover damages for emotional harm without showing accompanying or related physical harm.³⁸⁸ Some courts have expanded recovery for emotional harm, requiring some "physical manifestation," which was thought to provide an objective standard to distinguish valid from invalid claims." This approach has been rejected in the Third Restatement.³⁸⁹

In discussing the recommended updates to the Restatement, Oscar Gray argues that the bright line distinction between "physical" and "emotional" injury is less useful than exploring the distinction between "mere feelings" and "injury."³⁹⁰ Gray's view is consistent

386. *Id.* at 1266.

387. *See* Carter, *supra* note 11, at 88.

388. *See* RESTATEMENT (THIRD) OF TORTS § 4 cmt. d (2010) ("Since [Restatement (Second) of Torts], courts have liberalized the rules for recovery for stand-alone emotional harm. Some of this liberalization has occurred by recognizing a claim for negligent infliction of emotional distress; Chapter 8 of this Restatement reflects those developments. However, other courts liberalized recovery for emotional harm by characterizing psychic or emotional harm as bodily harm. . . .By explicitly providing for claims for negligently inflicted emotional harm in Chapter 8, this Restatement does not adopt that approach and indeed rejects it.")

389. *Id.*

390. Oscar S. Gray, *Commentary*, 44 WAKE FOREST L. REV. 1193, 1193 (2009). In advocating for a de-emphasis between injuries that are physical and those that are emotional, Gray posits that, "[m]ore significant than differences in specific outcomes, however, is the difference in tone that becomes possible with a de-emphasis on distinctions between 'physical' and 'emotional,' with a recognition of all illnesses as aspects of bodily harm, and with the substitution of medical diagnoses of psychiatric disorders to define freestanding compensable conditions, in place of the vagaries of judicial or jury understandings about the meaning of the word 'severe' in the term 'severe emotional disturbance.'" *Id.* at 1195; *see also* Martha Chamallas, *Unpacking Emotional Distress: Sexual Exploitation, Reproductive Harm, and Fundamental Rights*, 44 WAKE FOREST L. REV. 1109, 1113 (2009) (arguing that "Section 46(b) of the *Restatement (Third)* authorizes liability if the conduct producing the distress 'occurs in the course of specified categories of activities, undertakings, or relationships in which negligent conduct is especially likely to cause serious emotional disturbance.' The section thus anticipates a prioritizing of contexts and types of cases. Significantly, however, the *Restatement (Third)* does not express an opinion as to which

with that of the authors, as well as those who have demonstrated through exhaustive empirical research that there are serious negative health and mental health effects related to racism and racial harassment.³⁹¹ These effects, which could be categorized as “injuries” in the tort context, are well-documented and comprise an array of somatic as well as psycho-somatic impacts on the targets of racial discrimination and racial harassment.³⁹²

A recent Kentucky case brought in federal court offered a viable avenue for an intentional infliction of emotional distress (IIED) claim, although the *negligent* infliction of emotional distress (NIED) claim which arose from the same set of workplace incidents was dismissed. In *Laporte v. Harbert Int'l.*,³⁹³ the court noted that the, “[p]laintiff’s complaint does not allege any physical contact or injury, slight or otherwise, which would support his claim for mental suffering. Accordingly, his claims for [NIED] are dismissed as to both B.L. Harbert, [his ()] and Stewart, [his supervisor].”³⁹⁴ The plaintiff’s claim against his supervisor for IIED survived summary judgment, however, as “Plaintiff alleges a pattern of discrimination and harassment, including racial and derogatory comments from Stewart, which was ‘so pervasive’ as to disrupt Plaintiff’s work conditions and cause him severe distress. Plaintiff also alleges that he suffered embarrassment and humiliation. The Court finds that this is enough to survive a motion to dismiss.”³⁹⁵ The *LaPorte* court also stipulated that plaintiff could recover punitive damages if he was successful on his IIED claim.³⁹⁶

Gregory C. Keating, in his seminal and provocative piece entitled *Is Negligent Infliction of Emotional Distress a Freestanding Tort?*,³⁹⁷ suggests a framework for understanding negligent infliction of emotional distress (NIED) grounded in proximate cause rather than duty – these being two of the four basic elements of negligence (breach and injury are the other two). Keating states that, for

specific activities, undertakings, or relationships give rise to liability, providing only that they be of a kind likely to produce serious emotional injury. The crucial work of identifying specific contexts is left to future courts.”)(footnotes omitted).

391. See *supra* Part II.A.

392. See Carter, *supra* note 11, at 30–31, 62, 92–93.

393. No. 5:09-CV-219, 2010 U.S. Dist. LEXIS 37761, at *1, *1 (W.D. Ky. Apr. 16, 2010).

394. *Id.* at *12.

395. *Id.* at *10–11.

396. *Id.* at * 13 (citing *Burgess v. Taylor*, 44 S.W.3d 806, 814 (Ky. Ct. App. 2001)).

397. Gregory C. Keating, *Is Negligent Infliction of Emotional Distress A Freestanding Tort?*, 44 WAKE FOREST L. REV. 1131, 1131(2009).

“plaintiffs who have preexisting relationships with the parties whose negligence inflicts emotional injury on them . . . [a] duty exists independent of the law of torts.”³⁹⁸ This “pre-existing relationship,” for purposes of our discussion is the employer–employee relationship. Keating argues against a “general duty not to inflict reasonably avoidable emotional distress” as being legally dead-on-arrival. He advocates, rather, for abandoning “the attempt to conceptualize NIED cases as duty cases and in reconceptualizing NIED as a doctrine of proximate cause—not duty.”³⁹⁹ By doing so, NIED cases would “focus on the victim’s [i.e. employee’s] harm and its relation to the defendant’s [i.e. employer’s] already established wrongdoing.”⁴⁰⁰ Essentially, Keating’s approach would be to “ask courts to decide whether liability for a breach of an existing duty ought to extend to the emotional harm at hand.”⁴⁰¹

Keating, Gray, and other commentators who offer commentary on the Restatement and its application to NIED cases are understandably concerned about a potential “floodgates” argument if the focus were on creating a broad, general duty of care to not inflict reasonably foreseeable emotional distress. This “floodgates” concern seems to have been the basis of recent cases involving plaintiffs suing employers for negligent infliction of emotional distress. In referring to *Dillon v. Legg*, a landmark NIED case involving bystander trauma, Keating notes that the focus should not be on duty owed, but on whether the liability for breach of that duty should apply only in cases of those who suffer severe emotional harm.⁴⁰² The question is one of proximate cause.⁴⁰³ The focus should be on the harm suffered by the plaintiff and whether defendant’s liability extends to that harm via breach of duty, rather than a focus on the existence and character of the defendant’s duty.⁴⁰⁴

In cases where employee–plaintiffs have suffered race–based traumatic stress, courts should focus more attention on the plaintiff’s injury than they have to date. At the same time, there should be recognition that employers need clear guidance on when they may be liable for RBTS caused by the employer directly, or through its managers or supervisors – in which case vicarious liability may arise.

398. *Id.* at 1157.

399. *Id.* at 1156.

400. *Id.* at 1157.

401. *Id.*

402. *Id.*

403. Keating, *supra* note 397 at 1159.

404. *Id.*

The next section outlines a framework that should be helpful in informing and guiding both employers and employees, as well as administrative and judicial bodies that must decide the merits of RBTS claims brought for racial harassment and discrimination.

V. A PROPOSED FRAMEWORK FOR PREVENTING AND RESPONDING TO WORKPLACE HARASSMENT AND DISCRIMINATION: EMPLOYER LIABILITY, AND *SHARED RESPONSIBILITY*

*There has been an increased sensitivity to the problem of defining and compensating employees for emotional distress on the job. Given the initial reluctance of legislatures to respond to this issue, and the absence of common law contract theories to provide protection to employees from arbitrary actions, application of ephemeral tort theories such as intentional infliction of emotional distress represented a seemingly cost-free way to address the problem of workplace abuse. However, with the increasing array of legislative and common law protections against such abuse, the utility of such a tort as an instrument of industrial justice is questionable at best. Further, the false promise of such theories may serve to undermine, not enhance, the development of a coherent regulatory or legal regime designed to address the real needs of workers as we move into the twenty-first century.*⁴⁰⁵

A. Overview of the Framework: Law and Policy

Perhaps the “false promise” has in fact been an uneven application of Title VII law to plaintiffs in racial harassment suits,⁴⁰⁶ and it is now time to consider the application of tort law, as well, to limited and specific cases involving employee–plaintiffs who have experienced RBTS or other forms of emotional and psychological harm that results in functional impairment as a result of workplace harassment. This should be the case particularly where the employer has not exercised their responsibility to prevent, mitigate, and remedy such harassment.⁴⁰⁷ The problem may lie not only in how Title VII is applied to cases of harassment, but in the federal statute in itself which

405. Duffy, *supra* note 335, at 427.

406. See generally Chew & Kelley, *supra* note 14.

407. See Duffy, *supra* note 335, at 420.

provides an insufficient avenue to redress in racial and sexual harassment cases. This view is shared by Mark Hager:

Many critics of Title VII anti-harassment law have seen as flaws what they characterize as insufficient strength of, zeal in, and fidelity to the anti-discrimination paradigm. I have tried to suggest that much more serious problems flow from that paradigm itself. I have tried to suggest the best response to the sexual harasser – or any harasser – whose acts are egregious and injurious. Sue him.⁴⁰⁸

A comprehensive framework for and approach to workplace harassment and discrimination should address issues experienced by aggrieved employees; but it must also identify and address issues and challenges experienced by employers, and courts and judges. In essence, what is needed in relation to the employment setting – in addition to a change of hearts and minds of business and organization leaders, employers, supervisors, and fellow employees – is a legal framework and policy approach that affords aggrieved employees realistic avenues to redress demonstrable psychological and physical injury (i.e. trauma) that is based on their race. Such an approach must be legally sound and clearly articulated, and it must also be reasonable for a business or organization and its leadership and management to understand so they can adopt and operationalize measures to minimize employee trauma/injury and the potential resultant legal claims.

The approach – *Employer Liability and Shared Responsibility for Maintaining Minimal Workplace Standards Regarding Racism, Harassment, and Discrimination*—has both a legal basis and a practical emphasis. This framework is anchored organizational policies and practices, informed by tort law principles (i.e., intentional infliction of emotional distress, and negligent infliction of emotional distress; with the related concepts including duty, and injury). This framework also draws on, and is complementary to, established and evolving employment law (i.e. Title VII, § 1981) and the principles of contract law.⁴⁰⁹ Going beyond purely legal remedies, this framework includes, from the policy perspective, the adoption of both preventive and responsive practices by employers, with the backdrop of legal

408. Hager, *supra* note 335, at 439.

409. See *supra* Section IV.

remedies that afford clarity for employer and employee, and recourse for aggrieved employees.⁴¹⁰

Employers and employees alike should be aware that there has been growing agreement for over a decade among many scholars that broader “status-blind” protections should apply to all victims of “workplace bullying,” which is a form of harassment.⁴¹¹ Protections that are currently available only to employees who are members of a protected class. A symposium was held on this topic,⁴¹² and more recently a specific definition of the problem and how to address it has been developed.⁴¹³ The *Shared Responsibility* framework, while more focused than that espoused by scholars of workplace bullying, is complementary to workplace bullying scholarship because both seek to prevent and respond to emotional and psychological harm, specifically to employees who experience race-based trauma in the workplace.

A comprehensive framework and approach to workplace harassment and discrimination should also take into account the perspective shared by Martha Chamallas and Jennifer Wriggins, who argue that tort law concepts have a legitimate place in discrimination and harassment jurisprudence.⁴¹⁴ Part of the path to harassment-free workplaces includes a fresh review of the tenets of tort law and their applicability as viable deterrents to and redress for wrongs – specifically egregious wrongs that result in trauma to individuals – in the workplace. Such a review would be both timely and appropriate for legal scholars, as well as beneficial to practitioners and judges.

Bringing tort law to bear in a focused and thoughtful manner on a specific category of wrongs to supplement (rather than supplant)

410. This proposal is designed to prevent or minimize the likelihood of administrative claims as well as litigation for acts of racial harassment and discrimination in the workplace; with the goal of prevention being paramount. The United States Equal Employment Opportunity Commission places much emphasis on preventative measures. See *Harassment*, *supra* note 175.

411. See Yamada, *Phenomenon*, *supra* note 143, at 529–30.

412. See generally Suzy Fox & Lamont E. Stallworth, *Employee Perceptions of Internal Conflict Management Programs and ADR Processes for Preventing and Resolving Incidents of Workplace Bullying: Ethical Challenges for Decision-Makers in Organizations*, 8 EMP. RTS. & EMP. POL’Y J. 375 (2004).

413. See generally Chaplin, *supra* note 141; see also Lisa B. Bingham et al., *Dispute System Design and Justice in Employment Dispute Resolution: Mediation at the Workplace*, 14 HARV. NEGOT. L. REV. 1, 6 (2009) (arguing “...as a general matter, DSDs [Dispute System Designs] adopted by disputants through mutual negotiation and those adopted by third parties for the benefit of disputants are fairer than most one-party designs . . . [I]t is possible to create a fair one-party design if that design returns control over process and outcome to the disputant at the individual case level.”)

414. See CHAMALLAS & WRIGGINS, *supra* note 104, at 1–2.

the existing paths to legal redress, which include claims processes specified in Title VII and § 1981,⁴¹⁵ is part of the *Shared Responsibility* framework as well. Serious consideration of tort law in this context is included for two primary reasons: (1) the logic of doing so is compelling, and (2) the current methods for legal redress in matters of racial harassment resulting in trauma and other types of psychological harm, while occasionally effective, are simply inadequate as they have been applied.⁴¹⁶

All employees should have a right to a decent, civil, and professionally respectful (albeit imperfect and sometimes uncomfortable) workplace. Such a reasonable and respectful workplace environment should be guaranteed to employees under, and be redressable through, clear legal standards and meaningful causes of action. In discussing tort claims for workplace harassment, Martha Chamallas and Jennifer Wiggins advocate for courts using a “dignity-based standard . . . informed by civil rights law,” to replace an “honor-based standard” of outrageous conduct, in order to promote social equality.⁴¹⁷ The key question for courts, they propose, is “whether a defendant’s conduct should be classified as outrageous in part because it conforms to a pattern common to civil rights violations, creating the potential for cumulative harm for targeted victims and the continuation of persistent social inequalities.”⁴¹⁸ Unfortunately, they note that “[i]n line with the case-by-case approach to the intentional infliction tort, courts have not yet articulated a theory regulating the intersection of torts and civil rights, beyond noting the important public policies underlying civil rights laws.”⁴¹⁹

The *Shared Responsibility* framework would apply to business and organizational employers and their managers or supervisors directly to hold them responsible for harassment in the workplaces under their control. The framework could also apply to employers vicariously through their employees, whenever those employees are tacitly or expressly permitted to engage in harassment against fellow employees. While proving in a court of law a compensable loss for

415. 42 U.S.C. § 2000e; 42 U.S.C. § 1981.

416. See Chew & Kelley, *supra* note 14, at 90–91, noting that in more than four in five cases brought under Title VII for causes of action involving racial harassment, the plaintiffs were denied the opportunity to proceed with their cases on the merits.

417. CHAMALLAS & WIGGINS, *supra* note 104, at 84.

418. *Id.* at 84. The authors further posit “[w]ith respect to noneconomic damages for pain and suffering and other intangible losses, we analyze the disproportionate impact legislative caps on such damages have had on women and racial minorities and argue that noneconomic losses should be treated on a par with economic losses.” *Id.* at 11.

419. CHAMALLAS & WIGGINS, *supra* note 104, at 85.

emotional distress caused by intentional or negligent acts is a challenging proposition,⁴²⁰ a path to legal redress involving either or both, as the facts of the situation dictate, is warranted.

This framework is based in part on the approach taken in the Restatement (Third) of Torts,⁴²¹ and draws on the individual works of Oscar S. Gray and Gregory C. Keating⁴²² that were devoted to the new Restatement. The authors of this article are acutely aware, as are Keating and Gray, that courts will view with keen scrutiny claims that compensate plaintiffs for having hurt feelings, or holding employers accountable for a general duty to provide a stress-free workplace for employees, including employees of color.⁴²³ The *Shared Responsibility* framework is articulated with the goal of providing realistic strategies for employees (and their counsel as well), while clarifying for employers that this approach is consistent with their already-existing responsibility to provide a harassment-free, racial discrimination-free workplace, and with providing internal systems for preventing and responding to such conduct on the part of their employees, managers, and supervisors.⁴²⁴

Advocating that tort law be carefully applied to claims of racial harassment for individual plaintiffs – given that remedies already exist for protected classes of employees (including racial minorities) under Title VII – has been met with resistance.⁴²⁵ Nonetheless, the *Shared Responsibility* framework is a multi-faceted approach to prevention of and redress for psychological and emotional harm associated with race-based traumatic stress (RBTS), capable of being applied to the particular workplace situation and injury involved. The framework is based on traditional approaches to seeking redress (e.g. Title VII-based complaints and lawsuits), which could be integrated into a legal approach that respects established legal theory and litigation strategies, but is not limited by them.

420. See, e.g., *LaPorte v. B. L. Harbert Int'l, LLC*, No. 5:09-CV-219, 2010 WL 1542500, *4-*5 (W.D. Ky. Apr. 16, 2010); *Kassem v. Washington Hosp. Ctr.*, 513 F.3d 251, 255–57 (D.C. Cir. 2008); Part V.B.

421. RESTATEMENT (THIRD) OF TORTS § 46 (Supp. 2011).

422. See Gray, *supra* note 390; Keating, *supra* note 397.

423. The authors recognize and agree with the EEOC standards that, “Petty slights, annoyances, and isolated incidents (unless extremely serious) will not rise to the level of illegality. To be unlawful, the conduct must create a work environment that would be intimidating, hostile, or offensive to reasonable people.” See HARASSMENT, *supra* note 175.

424. See *supra* note 175.

425. See Chamallas, *supra* note 96, at 2171 (stating “there is still skepticism that tort law is so inherently individualistic and tied to outmoded gender ideologies that attempts to reshape it along civil rights lines are bound to be futile.”) (internal footnotes omitted).

A *Shared Responsibility* approach would go beyond traditional approaches as necessary, to address the uniqueness, complexity, and depth of race-based injuries now being experienced and documented in organizational and psychological research. The purpose of doing so is to foster workplace environments that are free of severe or pervasive racism, harassment, and/or discrimination, as well as race-based traumatic stress. Including tort law as a viable, albeit supplemental, means of employee redress would also serve as a deterrent to those employers and their supervisors who may be inclined to perpetrate or permit workplaces in which racial harassment can exist unchecked. Viable paths to redress are necessary for employees who have been so aggrieved, have been unsuccessful in pursuing internal employer complaint processes, and/or have filed a lawsuit and heretofore not had a legal theory and strategy adequate to advance their claims beyond the summary judgment stage.

B. The Premises of a Framework to Address Workplace Racial Harassment/Discrimination

The pronouncements that we have arrived at a “post-racial” period in America following the election of the current U.S. President are premature; racism and discrimination, and racial harassment are in fact still widespread in America, in various settings, including the workplace.⁴²⁶ This racism, discrimination and harassment, while sometimes blatant, is often more subtle in its manifestations in the workplace as reflected in implicit bias.⁴²⁷

In the workplace, racial harassment and discrimination are sometimes tacitly “approved” by the nonexistent or lax enforcement of company/organization policies on nondiscrimination, diversity, and equal opportunity – policies which one would expect employers of any size to have in place – explicitly in published policies, and implicitly through the acts of their managers and supervisors. Workplace racial discrimination and harassment, whether blatant or subtle, can result in real harm on the emotional and psychological level (i.e. race-based traumatic stress). This trauma has been well-documented in research and the current psychological literature, particularly regarding African Americans. It can have physical manifestations for the employee, and

426. Article Collections: Racial Harassment, N.Y. TIMES, <http://www.nytimes.com/keyword/racial-harassment?3>.

427. See Chew & Kelley, *supra* note 14, at 51–52.

can constitute a compensable injury, which can be confirmed by expert witnesses in an administrative proceeding or a court of law.⁴²⁸

The legal redress currently available to injured (i.e. traumatized) employees in practice, while in some cases effective, has been limited and inadequate to address the range and depth of the trauma or harm experienced by the employee–plaintiff. Oftentimes, the cause of action pursued by a plaintiff does not survive the pretrial motions stage, and ends in a summary judgment for the employer (defendants) or a dismissal of the lawsuit altogether.⁴²⁹ Those cases that do proceed to trial are required to demonstrate an extremely high level of discrimination or harassment – the “severe or pervasive” standard⁴³⁰ as actually applied in these cases, is often too high a hurdle for plaintiffs to meet; even plaintiffs who have been demonstrably injured and are suffering from race–based trauma.

Determination on whether to allow claims to proceed, or lawsuits to proceed beyond the summary judgment/motion to dismiss stage should be made in favor of the plaintiff, if the plaintiff can demonstrate that they have suffered a compensable emotional injury, i.e. RBTS.

The standard for recovery should be based primarily on an assessment of the employee’s injury (trauma) and whether the employer’s acts of discrimination and harassment were intentional (IIED) or negligent (NIED) in allowing discrimination and harassment that they knew or should have known about – and not only on whether the defendant’s acts were “outrageous” or “severe.”⁴³¹

Clarifying and if need be, establishing this legal framework and approach to legal redress would be of benefit to both employees (potential plaintiffs) – by providing more effective causes of action than federal civil rights statutes alone—and employers (potential defendants) – by making it clear that racial harassment in the workplace has serious consequences to the harassed and to the employer’s business. The actors in this comprehensive approach would include: Employers, Employees, and Courts and Judges, and

428. See Carter and Forsyth, *A Guide to the Forensic Assessment of Race-based Traumatic Stress Reactions*, *supra* note 8, at 28–29.

429. See *supra* Section IV(E).

430. See EQUAL EMP’T OPPORTUNITY COMM’N, SECTION 15: RACE & COLOR DISCRIMINATION (2006), available at <http://www.eeoc.gov/policy/docs/race-color.html>.

431. “The employer will be liable for harassment by non-supervisory employees or non-employees over whom it has control (e.g., independent contractors or customers on the premises), if it knew, or should have known about the harassment and failed to take prompt and appropriate corrective action.” See Equal Emp’t Opportunity Comm’n, *Harassment*, *supra* note 175.

Society. An overview of some of the key stakes and the roles for each category of actor are highlighted in the table below:

TABLE 2: COMPREHENSIVE FRAMEWORK FOR REVIEWING RACIAL HARASSMENT IN THE WORKPLACE

ACTORS	STAKES	ROLES	OTHER CONSIDERATIONS/ ACTIONS
Employers	Ability to attract and retain a diverse, healthy workforce Business/organizational success Employee productivity Reputation of organization Potential legal liability	Create, maintain, and develop a workplace environment that is productive, respectful, and engaging for employees Develop and implement clear policies, and educate supervisors and employees on these policies, as well as systems for employees to seek meaningful and timely redress for harassment and discrimination	Review the organizations' and leaders' written and spoken words, and more importantly their actions Ask: What do our policies, statements and actions say about our business's or organization's commitment to, and enforcement of, standards for a respectful workplace for all employees?
Employees	Employment and career prospects Physical and mental health Workplace productivity; desire to contribute to organization's success	Learn and understand employer expectations, rules, and policies; Promptly report incidents of discrimination or harassment to a supervisor or other appropriate person/office.	Expect a harassment-free workplace, but not one without some interpersonal conflict and stress. Understand that while one racist comment, for example, may not be legally actionable; it should still be reported to the supervisor or employer.

Courts and Judges	Ability to and perspective on, administering justice in a complex and developing area of the law Ability to clearly interpret and shape the law as needed and appropriate; in a manner fair to both employees and employers	Provide viable means of redress for employees who have experienced RBTS in the employment setting Allow aggrieved employees to make their cases on the merits, if they can demonstrate a prima facie case for an employer's racial harassment or discrimination.	Consider and become aware of your own biases in administering justice in cases of racial harassment – from pretrial motions, through fact-finding, and appeals. Review and learn from studies and data that speak to unintentional bias against plaintiffs of color
Society (the public interest)	A just and humane living and working environment in their country, state, locale Economic development, diversification, sustainability/productivity	Support employer efforts to create positive workplaces that are respectful of employees from all backgrounds, races, ethnicities.	Consider laws that support and provide means to enforce anti-discrimination and anti-harassment in the workplace: Should these be revised to be more effective?

For the proposed approach to effectively address workplace discrimination and harassment, as well as the resultant loss to employers, fellow employees, and society – the actors—must work in concert, to:

- (1) Develop a shared understanding of the problem and its broader context;
- (2) Provide clear preventive measures and viable methods of redress;
- (3) Apply the preventive measures robustly, and the methods of redress in a just manner; and
- (4) Evaluate results, update policies/laws, refine communications, and adjust actions accordingly.

C. Framework Specifics: Employer Liability and Shared Responsibility

Employer Liability and Shared Responsibility for Maintaining Minimal Workplace Standards Regarding Racism, Harassment, and Discrimination (herein the *Shared Responsibility* framework) involves the application of tort law principles (i.e. intentional infliction of emotional distress, negligent infliction of emotional distress) and also draws on established and evolving employment law (e.g. Title VII, § 1981) and contract law. Fundamentally, however, it is based in policies and practices that the employer and employee can jointly engage in, with the primary goal of countering and preventing harassment and discrimination. The legal framework should only be used if these internal, shared policy and practice efforts fail to remedy the injury and correct the situation.⁴³²

There is arguably an even greater need for having an appreciation for these evolving legal standards and approaches during difficult and uncertain economic times. Issues of workplace fairness and dignity are more likely to be at risk due to employees' reluctance to raise concerns – for fear of retaliation or losing their often less-than-secure jobs.⁴³³ The stress resulting from both psychological and physical trauma is a detriment to the employee and to her organization or business, but employee stress due to race-based trauma is avoidable through the exercise of *shared responsibility* on the part of employee and management. Conversely, when this trauma is not avoided, the consequences can include: lower productivity, higher incidence of error, increased health care claims, and increased workers' compensation claims.⁴³⁴

432. The authors recognize that it is the employee's right to seek legal redress at any time after they suffer a traumatic injury in the workplace. Nonetheless, to be most effective in the workplace itself as well as the legal realm, the authors believe that employees would do well to seek redress through company or organizational processes first – assuming that these processes are available and viable.

433. See *Thompson v. North American Stainless*, 131 S. Ct. 863 (2011), a case involving employer retaliation through the firing of an employee who brought a claim for sexual harassment against the company. The Supreme Court, in ruling for the petitioners, made it clear that such employer actions will not be tolerated: "Title VII provides that '[i]t shall be an unlawful employment practice for an employer to discriminate against any of his employees ... because he has made a charge' under Title VII. 42 U.S.C. § 2000e-3(a). The statute permits 'a person claiming to be aggrieved' to file a charge with the EEOC alleging that the employer committed an unlawful employment practice, and, if the EEOC declines to sue the employer, it permits a civil action to 'be brought ... by the person claiming to be aggrieved ... by the alleged unlawful employment practice.' § 2000e-5(b), (f)(1)." *Id.* at 867 (alteration in original).

434. See Carter and Forsyth, *supra* note 406.

The specific components of this *Shared Responsibility* proposal are outlined below, starting with (1) employer responsibility and potential liability, and moving to (2) employee responsibility and redress.

1. *Employer's Responsibility and Potential Liability*

- a. The employer is responsible for *having a policy against racial harassment* which is clearly communicated to employees, and which employees can use to bring internal complaints and seek redress for harassment.⁴³⁵
- b. The employer as a business/organization is directly, and through its managers and supervisors vicariously, responsible for *providing and maintaining a workplace environment free of severe or pervasive racism, and racial harassment or discrimination* that may result in the demonstrable injury of race-based traumatic stress (RBTS) to employees. In addition to potentially violating federal law, the employer may be legally liable in tort for failing to provide/maintain such a workplace environment if that failure is shown to be the proximate cause of the employee's injury.⁴³⁶
- c. The employer as a business/organization is directly, and through its managers and supervisors vicariously, responsible for *responding in a timely and effective fashion to incidents* (overt and subtle) of severe or pervasive racism, racial harassment, or discrimination that they are *aware of or should be aware of* (i.e., "knew or should have known") in the course of their business operations,

435. See generally *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998) (specifying guidelines); *Faragher v. Boca Raton*, 524 U.S. 77 (1998).

436. See Equal Emp't Opportunity Comm'n, *supra* note 175; see also *Staub v. Proctor Hosp.*, 131 S. Ct. 1186 (2011), a case involving a claim brought under Uniformed Services Employment and Reemployment Rights Act of 1994, 38 U. S. C. §4301 et seq., alleging anti-military (status) animus and discrimination. The Court held "that if a supervisor performs an act motivated by antimilitary animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA." *Id.* at 1190, 1194 (emphasis in original). "Needless to say, the employer would be liable only when the supervisor acts within the scope of his employment, or when the supervisor acts outside the scope of his employment and liability would be imputed to the employer under traditional agency principles." *Id.* at 1194 n.4 (citing *Ellerth*, 524 U. S. at 758).

particularly incidents that may result in RBTS to its employees. The employer may be legally liable for violating federal law, and could be liable in tort for failing to respond to racism, racial harassment, or discrimination if that failure is shown to be the proximate cause of the employee's injury.

- d. The employer as a business/organization is directly, and through its managers and supervisors vicariously, responsible for *responding in a timely and definitive fashion to incidents* (overt and subtle) of severe or pervasive racism, racial harassment, or discrimination that are *explicitly brought to the attention* of the employer or its managers and supervisors, through employees or managers/supervisors.
- e. The expectations and *shared responsibility* of the employer (and its managers/supervisors) and the employee, should be *clearly stated and published* in appropriate documents and media (e.g., employment policy manuals, collective bargaining agreements, employment contracts, company websites, recruiting materials).⁴³⁷

2. *Employee's Responsibility and Redress*

- a. The employee is *responsible for working with the employer*, its managers/supervisors, and their fellow employees, to maintain a workplace environment free of severe or pervasive racism, racial harassment or discrimination by acting in accordance with stated employer policies and standards, and established legal standards.
- b. The employee is *responsible for informing the employer*, or its managers/supervisors (or the appropriate reporting authority such as an equal opportunity office) in a timely fashion when they or their fellow employees experience or observe incidents or actions that constitute racial harassment or discrimination – both when they are severe or pervasive, and when the employee has reason to believe that they will become severe or pervasive – and may result in race-based traumatic stress.

437. For an excellent reference on developing workplace policy, see EEOC COMPLIANCE MANUAL, *supra* note 185.

- c. The employee is responsible for *familiarizing him/herself with the employer's complaint and dispute resolution policies*, and where appropriate and feasible (or required by contract) engaging in these internal processes before considering legal action against the employer for racism, racial harassment or discrimination that has resulted in race-based traumatic stress to the employee.⁴³⁸
- d. *If legal action is the aggrieved employee's only viable, or is the best recourse* to address the injury suffered, i.e. race-based traumatic stress, the employee has the responsibility to consider bringing a claim under existing federal or state law, and also to consider, when appropriate, a good faith action for Negligent Infliction of Emotional Distress (NIED) or Intentional Infliction of Emotional Distress (IIED) against the employer, unless such cause of action is expressly preempted by state law.⁴³⁹ This cause of action should be brought to redress the employee's injury (trauma), and to correct the destructive behavior in the employee's workplace. This will benefit the aggrieved employee and their fellow employees – and the employer and their stakeholders (including insurers, customers) as well.

D. A Legal and Policy Framework: Employee's Redress and Employer's Organizational and Management Practices

A framework for redress of employee race-based traumatic stress (RBTS) is outlined in this section. This framework can be flexed to address the particular facts and circumstances of a case. It is based on traditional approaches to seeking redress (e.g., through Title VII), and complements them as necessary with related causes of action (i.e., tort claim).

Race-based traumatic stress (RBTS) is a profound harm and detriment to the individuals and groups of employees who experience it.⁴⁴⁰ RBTS represents a real detriment to the business or organization itself in terms of human loss, reputation, and productivity. It injures both employee and employer in direct and demonstrable ways. The responsibility for eliminating or mitigating that harm rests with both employer and employee in a legal – and more importantly human and

438. See *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807–08.

439. See *supra* Section IV(D).

440. See *Carter and Forsyth*, *supra* note 8.

organizational – sense.⁴⁴¹ With this potential *mutual detriment* in mind, we propose, in addition to more robust legal remedies for aggrieved employees, a pathway to *mutual benefit*, through prevention and mitigation of this harm on the part of the employer. More importantly, this is an approach that should enhance the likelihood that workplaces will be more positive, respectful, and productive.

1. Employees – Seeking Redress Through Employer Processes and/or Legal Action

For legal and organizations reasons, employees who believe that they have been harassed or discriminated against should first report the incident(s) and seek redress through internal company processes.⁴⁴² Title VII claims are also subject to specific administrative procedures, prior to the employee bringing a lawsuit.⁴⁴³ Informal, internal procedures, that are properly structured, communicated to employees and managers, and implemented consistently and fairly are more likely to produce a desirable outcome for both employees at risk of harassment (and their fellow employees) and employers and their supervisors.⁴⁴⁴

If, after consideration of and attempts to use internal processes for redress, an aggrieved employee suffering from RBTS seeks to file a lawsuit, the precise course of legal action undertaken would be dependent on the specific situation and facts of the case, and could include one or more of the following causes of action:

Title VII, Section 1981: Using federal law for cases involving severe and pervasive harassment or discrimination by the employer.⁴⁴⁵

441. The authors believe that beginning with the premise that employers and employees have a “*shared responsibility*” for a respectful workplace is preferable to relying solely on an adversarial or legalistic approach focused on determining who is at fault if employees allege discrimination or harassment. The authors also believe that if employers ignore their responsibilities, that legal action for redress should not only be possible but may be necessary.

442. Indeed, cases including *Ellerth* and *Faragher* would serve to immunize the employer from employee complaints to the EEOC or state or federal court if the employer had a policy and the aggrieved employee did not seek redress through it. See *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807–08; see *HR Guide to the Internet: EEO: Harassment*, *supra* note 175.

443. See *supra* section IV(C).

444. See Society for Human Resource Management (SHRM) template for an anti-harassment policy, http://www.shrm.org/TemplatesTools/Samples/Policies/Pages/CMS_016849.aspx (last accessed Apr. 2, 2012).

445. See *supra* Section IV(C).

Intentional infliction of emotional distress (IIED):

Using state law; for cases involving extreme and outrageous behavior on the part of the employer, and/or their managers and supervisors, that is determined to be intentional.⁴⁴⁶

Negligent infliction of emotional distress (NIED):

Using state law; for cases where it can be demonstrated that the employer had a responsibility to prevent and respond to harassment, and where their action or inaction resulted in the employee's injury. A "knew or should have known" standard, coupled with a determination of the proximate cause of the employee's injury, could be employed in these situations.⁴⁴⁷

Breach of contract: Using state law; for cases where it can be demonstrated that the employer did not follow the language of a contract or agreement with the employee, including the implied contract comprising employee handbooks and manuals.⁴⁴⁸

For employee-plaintiffs pursuing the causes of action above, legal counsel should check to determine whether state law, such as workers' compensation statutes or state anti-discrimination statutes, would apply to preempt or limit causes of action such as tort claims, or the types of damages (e.g., punitive) that could be sought.⁴⁴⁹ Counsel should also be thoughtful about the timing and order of federal and state claims (if multiple claims are anticipated), given the complexity of court rulings on these procedural issues.⁴⁵⁰

446. See *supra* Section IV(D).

447. See *supra* Section IV(D).

448. See *Wooley v. Hoffman-La Roche, Inc.*, 491 A.2d 1257 (N.J. 1985) (noting that a policy manual is more than "an expression of the company's 'philosophy,' and that it could be 'contractually enforceable.>"). *Id.* at 1264-65 The New Jersey Supreme Court in this case went on to state that "[t]he mere fact of the manual's distribution suggests its importance." *Id.* at 1265; but see *Anderson v. Douglas & Lomason Co.*, 540 N.W.2d 277 (Iowa 1995), in which the Supreme Court of Iowa held that a well-written and placed disclaimer, stating that "[t]his Employee Handbook is not intended to create any contractual rights in favor of you or the Company . . ." was sufficiently clear as to protect the company from being contractually obligated to the employee-plaintiff to follow its policy on progressive discipline. *Id.* at 288-89; but see *Dillon v. Champion Jogbra, Inc.*, 819 A.2d 703 (Vt. 2002) holding that whether an employee manual with ambiguous language constitutes an implied contract is a question properly left to the jury. *Id.* at 707-08 (internal citations omitted).

449. See *supra* Section IV(D)

450. See reference to the "spider web" of procedural complexity, *supra* note 10.

2. *Employers: Practices To Prevent Employee Injury and Mitigate Legal Liability*

Employers should seek to create workplaces that meet not only the legal minimums, but that can be models of good (or even “best”) practices. The dimensions of this approach include:

•**Leadership** – commitment to a respectful workplace, as evidenced in organizational mission/values. Clear direction, role-modeling, and systems supported by the highest levels of the business or organization; best done through multiple media, strong, clear, and repeated statements – backed by action (e.g., timely and sensitive response to complaints).⁴⁵¹

•**Hiring** – carefully consider who is being hired, particularly for management or supervisory positions; ensure that these are individuals who will embrace the company policy and practices related to creating and maintaining a positive, nondiscriminatory, and welcoming workplace environment.⁴⁵²

•**Orientation and Training** – an introduction to, and setting expectations for a positive and respectful workplace culture for all employees. Include specifics on mutual expectations and responsibilities for employees, managers, the organization.⁴⁵³

•**Policies and Practices on Harassment** – including statements on racial, sexual, and other types of harassment. Responsive, timely processes for complaints and seeking redress internally – employer’s and employee’s roles. Clear, consistent, ongoing communication on these.⁴⁵⁴

451. See EQUAL EMP’T OPPORTUNITY COMM’N, BEST PRACTICES FOR EMPLOYERS AND HUMAN RESOURCES/EEO PROFESSIONALS (2011), <http://www.eeoc.gov/eeoc/initiatives/e-race/bestpractices-employers.cfm>.

452. *Id.*

453. See Workplace Harassment Training, Society for Human Resource Management (last accessed March 12, 2012), <http://www.elearning.shrm.org/workplaceharassment.aspx> which begins with the question: “[w]hat’s the price of a few off-color joke emails? Litigation and government oversight relating to workplace harassment are on the rise, and violators can pay a devastating price in terms of jury awards, settlements, and/or fines not to mention reputation, productivity and morale.” Video and online training are available via this website.

454. See EEOC Policy and Complaint Procedure, in EQUAL EMP’T OPPORTUNITY COMM’N, *supra* note 344. “It generally is necessary for employers to establish, publicize, and enforce anti-harassment policies and complaint procedures. As the Supreme Court stated, ‘Title VII is designed to encourage the creation of anti-harassment policies and effective grievance mechanisms.’ While the Court noted that this ‘is not necessary in every instance as a

•**Risk Management** – including an assessment of the organization’s reputational and financial risk issues. This should be an integral aspect of corporate vision and strategy.⁴⁵⁵

•**Diversity** – including a clear statement of the business/organization’s beliefs about diversity; the richness and realities of employee diversity (race, age, socioeconomic status, etc.), and its contributions to the workplace; diversity action strategies and plans.⁴⁵⁶ One legal commentator has espoused the efficacy of “corporate empathy” as a key element in monitoring the work environment.⁴⁵⁷

matter of law,’ failure to do so will make it difficult for an employer to prove that it exercised reasonable care to prevent and correct harassment. An employer should provide every employee with a copy of the policy and complaint procedure, and redistribute it periodically. The policy and complaint procedure should be written in a way that will be understood by all employees in the employer’s workforce. Other measures to ensure effective dissemination of the policy and complaint procedure include posting them in central locations and incorporating them into employee handbooks. If feasible, the employer should provide training to all employees to ensure that they understand their rights and responsibilities. An anti-harassment policy and complaint procedure should contain, at a minimum, the following elements:

A clear explanation of prohibited conduct;

Assurance that employees who make complaints of harassment or provide information related to such complaints will be protected against retaliation;

A clearly described complaint process that provides accessible avenues of complaint;

Assurance that the employer will protect the confidentiality of harassment complaints to the extent possible;

A complaint process that provides a prompt, thorough, and impartial investigation; and assurance that the employer will take immediate and appropriate corrective action when it determines that harassment has occurred.”*Id.* (citing *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 764 (1998)) (footnotes omitted).

455. Enterprise Risk Management is a comprehensive approach. See BEAUMONT VANCE & JOANNA MAKOMASKI, *ENTERPRISE RISK MANAGEMENT FOR DUMMIES* (2007); see also ERM Center of Excellence, RIMS, www.RIMS.org/ERM.

456. See, e.g., *UPS Code of Business Conduct*, UPS.COM (2011), http://www.ups.com/content/corp/code_conduct.html. (stating in part the expectation that their employees will be free from discriminatory harassment: “Prohibited harassment includes conduct that is intended to interfere or that has the effect of unreasonably interfering with a fellow employee’s work performance or creating an environment that is intimidating, hostile, or offensive to the individual.”) The statement goes on to reference the *UPS Professional Conduct and Anti-Harassment Policy* available from their human resources department. Employers and employees will want to note that these can be construed as implied contracts between employer and employee. *Id.* See Dillon, 819 A.2d at 707–08; see generally *Wooley v. Hoffman-LaRoche*, 491 A.2d 1257 (N.J. 1985).

457. Cheryl L. Wade, *Corporate Governance as Corporate Social Responsibility: Empathy and Race Discrimination*, 76 TUL. L. REV. 1461, 1470–71 (2002) (“Empathy, as used in this Essay, is defined as the ‘[i]dentification with and understanding of another’s situation, feelings, and motives.’ ‘Empathy . . . is more than an intellectual predisposition, or belief; it is a readiness to be engaged in the experience of others.’ ”Empathy has been variously described

•**Professional Development and Training** – continuing education, especially for managers and supervisors; providing resources, publications, and professional organization training and opportunities for networking on these issues.⁴⁵⁸

•**Best Practices** – incorporation of excellent workplace practices into hiring, policies, training. In addition to policies on non-discrimination and harassment, employers can take additional steps to foster a positive and productive work environment for all employees. Statements and practices that address bias and microaggressions, while not necessarily legally mandated, can contribute powerfully to the establishment of such an environment.⁴⁵⁹ Engage employees in developing and implementing these statements and practices.⁴⁶⁰

•**Monitoring the workplace environment** – engaging in a continuous process of raising self- and shared-awareness, for supervisors and employees, particularly as the workforce changes and becomes more diverse over time. Include this responsibility in managers' and supervisors' position descriptions and expectations.

•**Prompt Action on Complaints** – Thoughtful, comprehensive responses to harassing or discriminatory behaviors discovered

as a . . . process . . . a mode of observation, and an information-gathering activity.' Initially, I thought that understanding the situation in which many people of color find themselves in companies with racially toxic cultures, would lead to effective monitoring of discrimination. I was drawn to definitions of empathy that described it as a 'process' and an 'information-gathering activity' because satisfaction of the duty of care is itself a process of information gathering. Perhaps, I thought, empathy for people of color would inspire adequate monitoring of corporate compliance with antidiscrimination law, and such monitoring would foster further understanding of the discrimination faced by people of color. In other words, empathy may inspire satisfaction of the duty to monitor, and the monitoring may foster further empathy.") (internal citations omitted) (alteration in original).

458. See *Best Practices for Workplace Harassment Prevention*, INSPIRED LEARNING (last accessed March 12, 2012), http://www.inspiredelearning.com/harassment/Workplace_Harassment_Best_Practices_White_Paper.htm (including a 35-point questionnaire to check compliance with EEOC guidelines).

459. SUE, *supra* note 93, at 227-30 (outlining in the section entitled "The Way Forward," six specific actions employers can take to address bias and microaggressions, including: Hearing the voices of employees of color, women, and LGBTs in the workplace; building accountability into the system; and developing a systematic and long-term commitment to educate the entire workforce . . . training is also important to the very top).

460. See Vanessa Kelly, *In Search of Best Practices and Employment Policies—The Standards Remain Elusive*, WHITE PAPERS (2011), available at <http://www.schwartzkelly.com/papers.asp?page=2>.

or reported that are consistent with published policies and practices. Communicate to all employees the contact person/office for complaints and the policies and practices to be followed in making a complaint.

•**Assessment, Revision** – (including after-action/incident reviews), which may lead to altering or updating processes to be even more effective in terms of prevention and response.

•**Reducing Employer Liability and Increasing Employee Satisfaction and Productivity** – This can be accomplished by framing the organizational policies and practices as being as important as “the law.” The goal for the organization (and its leaders and members) is to: first and foremost – have a positive workplace environment. Secondly, having such an environment will reduce the likelihood of complaints or lawsuits. Third, if complaints or lawsuits ensue – the employer will be in a stronger position to prevail.⁴⁶¹

If employers and employees assume *shared responsibility* for engaging in the above practices, they not only will prevent or reduce traumatic injuries (such as RBTS), but will position themselves to provide workplaces with greater clarity of expectations, heightened empathy, and superior productivity.

VI. CONCLUSION

There is no better time than the present to foster positive, respectful workplaces, through the application of clear, meaningful workplace policies and legal principles and avenues to redress that advance basic fairness and equity for all employees. While many companies and organizations have long realized this, others apparently have not seen the value of doing so.⁴⁶²

It is incumbent on businesses and organizations to develop and act on missions and values that speak to the importance of mutual respect, and intolerance of harassment, in the workplace. At a

461. See ANDREW FOOSE, 5 STEPS FOR EMPLOYERS TO REINFORCE ANTI-HARASSMENT POLICIES, GLOBAL COMPLIANCE, <http://www.globalcompliance.com/Resources/5-Steps-for-Employers-to-Reinforce-Anti-Harassment.aspx>.

462. While organizations that do not see value in these principles still often “win” lawsuits brought against them (*see supra* cases in Sections III, IV), the fact that they have even been engaged in the legal system by employees who have experienced racial harassment and trauma in their workplaces should be a call to action.

minimum, this should result in RBTS (trauma)–free workplaces in which employees of various backgrounds, races, and genders can, without fear, contribute their time and talents – and thrive.

The responsibility for fostering a positive and productive workplace is a shared one, involving employers, supervisors, and employees. The consequences of not doing so – arising from employer ignorance, indifference, or failure to anticipate and respond to employee complaints arising from racial harassment, or resulting from employee ignorance or fear in raising such complaints at the earliest possible point – are profound. On the other hand, the benefits to businesses and organizations that foster a positive work environment are clear: happier and more engaged employees, work teams that are more collaborate and creative, more effective supervisors and workplaces characterized by lower stress, and fewer harassment and discrimination claims and lawsuits. These businesses and organizations and their employees will also reap the benefits of an enhanced reputation as well as superior productivity.

Author Note: The article originated with the work of the first author. The legal research, analyses, and discussion were contributed by the second author with few exceptions.

[see diagram on following page]

FIGURE 1

Theory: *Shared Responsibility* and Liability for Maintaining Minimal Workplace Standards Regarding Racism, Harassment, and Discrimination

(CARTER, R. AND SCHEUERMANN, T., 2010)

Legal bases:

- Tort law/Infliction of Emotional Distress (negligence/NIED, intentional torts/IIED)
- Title VII employment discrimination
- Contract law

