BEYOND REASONABLE ACCOMMODATION:
THE AVAILABILITY AND STRUCTURE OF A
CAUSE OF ACTION FOR WORKPLACE
HARASSMENT UNDER THE
AMERICANS WITH DISABILITIES ACT*

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INTRODUCTION

Employment discrimination law has undergone a metamorphosis in the last few years. New legislation and judicial interpretation of existing legislation have broadened the rights available to the victims of discrimination, and have created new duties with which employers must comply. The passage of the Americans with Disabilities Act1 added one of the largest pieces to the new employment discrimination puzzle. Because the ADA is still in the early stages of development, it is essential to define the bases for potential causes of action under the Act, and to delineate workable structures for analyzing those causes of action.

The ADA was signed into law in 1990.2 Title I of the ADA prohibits discriminatory employment practices against qualified individuals with disabilities,3 and requires employers to reasonably accommodate such individuals unless accommodation would constitute an undue hardship on the employer.4

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4 42 U.S.C. § 12112(b)(5)(A) (Supp. III 1991). Title I of the Act became effective on July 26, 1992, for employers that have twenty-five or more employees, and will become effective on
Since the passage of the ADA, much of the material discussing its employment provisions has focused on the duty to provide reasonable accommodation. However, the ADA's proscription of discriminatory employment practices against disabled individuals goes beyond this requirement. The Act precludes discrimination in any term or condition of employment. In this regard the ADA is similar to Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination and workplace harassment based on race, color, religion, sex, or national origin, and the Age Discrimination in Employment Act, which prohibits discrimination and harassment based on age.

This Article addresses the basis for a cause of action under the ADA arising from workplace harassment, and sets forth a structure for ADA harassment claims. The structure suggested is a modified form of the "hostile work environment" cause of action. Significantly, the Equal Employment Opportunity Commission has issued Proposed Guidelines defining when harassment against several pro-

July 26, 1994, for employers that have fifteen or more employees. 42 U.S.C. § 12111(5)(A) (Supp. III 1991) provides:

The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

Id.; see also 1 ADA Man. (BNA) No. 23, at 70:0001 (Jan. 1992) (explanatory note prior to Act).

8 The theory of hostile work environment is based on the concept that workplace harassment can become actionable when it creates a hostile or abusive working environment. It was first recognized in Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972), which acknowledged the availability of a cause of action arising from a working environment heavily charged with discrimination. Although Rogers was based on a hostile racial environment, the cause of action for hostile work environment has been developed primarily in the context of sexual harassment, and in 1986 the Supreme Court decided the landmark sexual harassment case, Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986), holding that a hostile work environment can arise from harassment which is sufficiently severe and pervasive to alter the conditions of employment and create an abusive working environment. Since Meritor, other courts have developed the cause of action. See, e.g., Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991) (discussing the history of the hostile work environment cause of action and refining the test for such claims in the sexual harassment context). Most recently, the Supreme Court decided Harris v. Forklift Sys., Inc., 114 S. Ct. 367 (1993), which reaffirmed Meritor and attempted to clarify several issues that had developed in the lower courts. See infra text accompanying notes 24, 36-37, for a discussion of Harris.
9 Hereinafter the Equal Employment Opportunity Commission will be referred to as "EEOC."
tected classes, including disabled individuals, violates federal discrimination laws; those Guidelines also utilize the concept of hostile work environment. Thus, the existence of a cause of action for hostile work environment under the ADA has been acknowledged.

Hopefully, the EEOC Proposed Guidelines will heighten awareness regarding the ADA's proscription of workplace harassment aimed at disabled individuals. However, it is not mandatory that courts follow EEOC guidelines, and in fact, the EEOC has sometimes reconsidered its own positions concerning guidelines it has issued. Moreover, the Proposed Guidelines apply to race, color, religion, gender, age, and national origin, in addition to disability. Thus, while the Proposed Guidelines as presently drafted are a useful tool, they do not adequately address some of the unique concerns regarding harassment of disabled employees.

It is therefore important to take an in-depth look at the basis for a harassment cause of action under the ADA, and to develop a workable structure for that cause of action. Employers need a framework for workplace harassment of disabled individuals so that they can implement training policies for their agents and employees similar to those now used regarding sexual harassment. Similarly, it is impor-

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11 Id. at 51,269 (to be codified at 29 C.F.R. § 1609.1(b), (c)).

12 Meritor, 477 U.S. at 65; see also Wendy Pollack, Sexual Harassment: Women's Experience vs. Legal Definitions, 13 HARV. WOMEN'S L.J. 35, 59-61 (1990) (opining that the Meritor Court did not follow the EEOC guidelines in determining what harassing conduct is actionable, but accepted a stricter standard). But see Ellison, 924 F.2d at 877 (stating that the Meritor Court approved of, and paid detailed attention to, the EEOC guidelines).

13 See, e.g., Meritor, 477 U.S. at 70-71.

14 EEOC Proposed Guidelines, supra note 10, at 51,268 (to be codified at 29 C.F.R. § 1609.1(a)).

15 The EEOC Proposed Guidelines provide an excellent general structure for hostile work environment claims. However, there are several aspects of the Proposed Guidelines, discussed more thoroughly below, which this Author believes require modification in relation to the ADA. The structure for an ADA hostile work environment cause of action set forth in this Article utilizes the framework of the EEOC Proposed Guidelines where possible, modifying that structure based on the language of the ADA, and where appropriate, Title VII law.

16 One commentator has acknowledged the increase in employee training regarding sexual harassment: "One indication of the seriousness with which corporations are beginning to view the problem of sexual harassment is the growing popularity of videotaped training programs, designed to alleviate the problem by sensitizing employees to the victim's perspective." Elaine D. Ingulli, Sexual Harassment in Education, 18 RUTGERS L.J. 281, 285 n.18 (1987) (citation omitted).

In fact, training regarding the prevention of harassment aimed at several protected classes may become required for employers to avoid liability for conduct which creates a work environment hostile to members of those classes. For example, the EEOC Proposed Guidelines, supra note 10, at 51,269 (to be codified at 29 C.F.R. § 1609.2(d)), state that an employer
tant to recognize and analyze the ADA's breadth now so that both employees and employers will know their rights and duties.

Part I of this Article outlines the hostile work environment cause of action as it exists under Title VII, and the reasons that such a cause of action, with appropriate modifications, is inherent in the language of the ADA. It also looks at how the relationships among the ADA, Title VII, and the Rehabilitation Act of 1973, support a cause of action for harassment under the ADA. Finally, Part I examines state discrimination laws which protect disabled individuals under the same statutory scheme as other protected classes. These statutes demonstrate that utilizing traditional employment discrimination causes of action in regard to disabled employees is workable.

Part II of this Article sets forth the appropriate structure to be applied to the hostile work environment cause of action in relation to disabled employees. The test suggested is similar to the hostile work environment cause of action under Title VII, and to the one set forth in the EEOC Proposed Guidelines. However, modifications to those tests based on the unique provisions of the ADA are proposed. These include (1) the requirement that the complainant be a qualified individual with a disability as defined in the ADA, and (2) the modification of the Title VII "reasonable person" standard and the

"should take all steps necessary to prevent harassment from occurring, including . . . methods to sensitize all supervisory and non-supervisory employees to issues of harassment . . . " Id.


18 See discussion infra part II.A.2.


20 42 U.S.C. § 12111(8) (Supp. III 1991) defines a qualified individual with a disability as follows:

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

Id.

21 In Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370 (1993), the Supreme Court applied the "reasonable person" standard to sexual harassment claims based on hostile work environment under Title VII. Prior to Harris, it was unclear whether a reasonable person, reasonable woman, or reasonable person of the same sex standard should apply. However, Harris does not define reasonable person, and implies that when the victim is female, it may mean "reasonable woman." See infra notes 24 and 37 for a discussion of possible interpretations of the reasonable person standard in Harris.

The reasonable woman standard is grounded in the concept that whether harassment creates a hostile work environment must be determined based on the victim's perspective,
EEOC proposed "reasonable person in the same or similar circumstances" standard,\(^2\) to a "reasonable person with the same disability" standard.\(^3\) This "same disability" standard acknowledges the fact while shielding employers from being forced to accommodate the idiosyncratic concerns of hypersensitive employees. See Ellison v. Brady, 924 F.2d 872, 878-81 (9th Cir. 1991) (adopting reasonable woman standard for these reasons, but acknowledging that when the victim is male a "reasonable man" standard would apply); see also Andrews v. City of Phila., 895 F.2d 1469, 1482 (3d Cir. 1990) (reasonable person of the same sex as victim standard); Rabidue v. Osceola Ref. Co., 805 F.2d 611, 626 (6th Cir. 1986) (reasonable woman standard), cert. denied, 481 U.S. 1041 (1987).

\(^2\) EEOC Proposed Guidelines, supra note 10, at 51,269 (to be codified at 29 C.F.R. § 1609.1(c)).

\(^3\) This standard is similar to the reasonable person in the same or similar circumstances standard suggested by the EEOC Proposed Guidelines. However, "reasonable person with the same disability" is a more workable standard, because the standard proposed by the EEOC could be interpreted in several different ways. For example, "the same circumstances" could refer to any disability, a broad class of disabilities, or the complainant's exact disability. Likewise, because the standard is not specific as to the definition of a reasonable person with whom the complainant should be compared, it could be interpreted to enable the trier of fact to determine how a "reasonable person" with a disability would react to a given situation based on his or her own belief as to what reactions are reasonable for individuals with disabilities. However, most people do not share a commonality of experience with disabled individuals, and thus, the average person is incapable of determining what constitutes a reasonable reaction for a disabled individual.

The "reasonable person with the same disability" standard proposed in this Article provides for a consistent interpretation of the definition of "reasonable person," and acknowledges the need for some form of appropriate evidence as to how such people would reasonably react to a given situation. There are ample resources for determining how individuals with particular disabilities will likely react to a given situation, and numerous organizations exist to help individuals with a particular disability. The following list provides examples of such organizations, but by no means is the list an exhaustive one: the Epilepsy Foundation, Kidney Foundation, American Diabetes Association, Deafpride, Inc., AIDS Foundation, American Council of the Blind, Lupus Foundation, Cystic Fibrosis Foundation, Association For Retarded Citizens, and the National Parkinson Foundation. See also Information Sources by Disability, 2 ADA Man. (BNA) No. 7, at 90:0001-0095 (Aug. 1992). Additionally, there is psychological data regarding the sensitivities of individuals with specific disabilities. See Maureen O'Connor, Defining "Handicap" for Purposes of Employment Discrimination, 30 Ariz. L. Rev. 633, 635 n.12 (1988) (listing several sources regarding the psychological and sociological impact of disabilities); see also Robert L. Burgdorf Jr., The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute, 26 Harv. C.R.-C.L. L. Rev. 413, 424 n.56 (1991) (noting that sexual problems of persons with disabilities are increasingly addressed and listing several sources dealing with the psychological aspects of disability). Likewise, testimony of those with the same disability as the victim could aid the trier of fact in determining what reactions are reasonable for someone with that same disability.

The EEOC proposed standard may have been meant to refer to individuals with the same disability as a victim of harassment. If such is the case, specific language saying exactly that will create less confusion and provide better guidance. The standard proposed in this Article should provide a workable basis for a trier of fact to evaluate a claim, while avoiding inconsistency such as that caused by the various interpretations of the reasonableness standard in the sexual harassment context, recently addressed by the Supreme Court in Harris, but not clearly resolved. See infra note 37 (discussing concerns about reasonableness standard set forth in Harris); see also Robert S. Adler & Ellen R. Peirce, The Legal, Ethical, and Social Implications of the "Reasonable Woman" Standard in Sexual Harassment Cases, 61 Fordham L. Rev. 773
that individuals with particular disabilities will be offended by different conduct.\textsuperscript{24}

Additionally, Part II explores the relationship between reason-

(1993) (in-depth discussion of the evolution of the reasonable woman standard, and the benefits and concerns related to that standard, including concerns relating to its vagueness); Jolynn Childers, Note, Is There a Place for a Reasonable Woman in the Law? A Discussion of Recent Developments in Hostile Work Environment Sexual Harassment, 1993 DUKE L.J. 854 (discussing reasonable woman standard in sexual harassment cases, and noting that there are definitional problems with that standard); Robert Unikel, Comment, "Reasonable" Doubts: A Critique of the Reasonable Woman Standard in American Jurisprudence, 87 NW. U. L. REV. 326 (1992) (stating reasonable woman standard is inappropriate for application in American jurisprudence, and discussing the practical, theoretical, and linguistic difficulties attendant to the reasonable woman standard). Thus, it is hoped that when the EEOC issues final guidelines, the standard proposed herein is considered. For further discussion of the reasonableness standard, see infra part II.B.2.

\textsuperscript{24} Unlike other classes covered by anti-discrimination statutes, which are defined by a single trait, such as sex or race, individuals with disabilities are discriminated against based on the numerous and varied characteristics inherent in the hundreds of disabilities covered by the ADA. The Court of Appeals for the Fifth Circuit acknowledged the unique nature of disability discrimination claims in addressing a disparate impact claim brought by a disabled individual under the Rehabilitation Act:

In our opinion, in the disparate impact context, there should be only minor differences in the application of the Griggs principles to handicap discrimination claims. One difference, however, is that, when assessing the disparate impact of a facially-neutral criterion, courts must be careful not to group all handicapped persons into one class, or even into broad subclasses. This is because "the fact that an employer employs fifteen epileptics is not necessarily probative of whether he or she has discriminated against a blind person."


In the hostile work environment context, the numerous disabilities covered under the ADA, and the varied sensitivities of individuals with such disabilities, demonstrate why the reasonable person standard set forth in Harris for classes protected under Title VII is inadequate in regard to disabled employees. Fortunately, Harris applies only to Title VII, making no mention of the ADA, and specifically refusing to address the EEOC Proposed Guidelines which apply to disability. Title VII case law is instructive in the ADA context, but the structure of causes of action under the ADA must account for the unique concerns relating to discrimination aimed at disabled individuals. While the Harris standard may indeed mean reasonable woman when a female is the victim, or reasonable person with the same disability in the disability context, see infra note 39, it is possible that it will be applied utilizing the trier of fact's determination of what is reasonable for such an individual based on the totality of the circumstances. This is dangerous in the disability context because most people have little contact with disabled individuals, and those who do, often have contact only with individuals with one or two specific disabilities. For example, while a male trier of fact (either judge or jury member) will likely have significant contact with women to draw on in determining what a reasonable person in a female sexual harassment victim's situation would consider hostile and abusive, the same could not be said of most nondisabled individuals hearing a disabled individual's claim. Thus, for the reasons set forth here and supra note 23, it is essential that the trier of fact be specifically instructed to consider what a reasonable person with the same disability as the complainant would deem hostile or abusive in evaluating a hostile work environment claim in the disability context. How this can be achieved is discussed supra note 23 and part II.B.2.
able accommodation and "hostile work environment." While the failure to reasonably accommodate by itself will seldom reach the level necessary to create a hostile work environment, instances where failure to accommodate can contribute to, or even create, a hostile work environment are delineated.

Finally, Part III discusses employer liability for conduct by co-employees and supervisors that creates a hostile work environment. General agency principles set forth under Title VII law, and reinforced in the ADA context by the EEOC Proposed Guidelines, should be utilized with appropriate modifications. For example, it is suggested that the Title VII test for employer liability should be modified to impose strict liability if employers use methods of administration that have a discriminatory effect, or perpetuate the discrimination of others subject to the employer's common administrative control as set forth in section 12113(b)(3) of the ADA. Additionally, when failure to reasonably accommodate contributes to a hostile work environment, the defenses available in response to the alleged failure to accommodate claim should apply. However, those de-

25 In Meritor Sav. Bank v. Vinson, 477 U.S. 57, 69-73 (1986), the Court stated that while it was not specifically ruling on employer liability, such liability should be guided by agency principles. Additionally, the EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11 (1993) [hereinafter EEOC Guidelines on Sex Discrimination], upon which the Meritor Court partially relied, provide:

(c) Applying general title VII principles, an employer, employment agency, joint apprenticeship committee or labor organization (hereinafter collectively referred to as "employer") is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job [functions performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.]

(d) With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

Id. § 1604.11(c), (d).

26 The EEOC Proposed Guidelines, supra note 10, at 51,269 (to be codified at 29 C.F.R. § 1609.2), adopt a test for employer liability which is similar to the traditional Title VII test. See discussion infra part II.C.


28 See Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. pt. 1630 (1993) [hereinafter EEOC ADA Regulations] (If a required or necessary accommodation would impose an undue hardship on the operation of the employer's business, such undue hardship is a defense to a claim of failure to accommodate.; 42 U.S.C. § 1981a(a)(3) (Supp. III 1991) (Good faith efforts to identify and provide appropriate reasonable accommodation, in consultation with the qualified individual with a disability, is a defense to a damage award under the Civil Rights Act of 1991 as applied through the ADA.).
fenses should not preclude the remaining allegations in a given case, if they are sufficient, from rising to the level of a hostile work environment.  

I. WORKPLACE HARASSMENT OF DISABLED INDIVIDUALS IS ACTIONABLE UNDER THE ADA

A. The Hostile Work Environment Cause of Action

A cause of action for workplace harassment has existed for some time under federal law, and has been recognized under state law. The term "hostile work environment" is used to describe a work environment that is subject to severe and pervasive harassment which interferes with the terms and conditions of employment and creates a hostile or abusive working environment—and thus is actionable. Although recently the hostile work environment cause of action has been used primarily in sex discrimination cases, its genesis was in the context of race discrimination.

In Meritor Savings Bank v. Vinson, a sexual harassment case, the Supreme Court adopted a framework for analyzing the hostile work environment cause of action. A number of courts, both federal and state, have interpreted the standards set forth in Meritor, and created tests based on those interpretations. Recently, the Court reaf-

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29 Such allegations might involve verbal or physical conduct aimed at the complainant, or any other conduct which rises to the level necessary to create a hostile work environment. See supra part II (delineating structure for hostile work environment cause of action).

30 The cause of action was originally recognized in 1971 by the Fifth Circuit Court of Appeals in Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972). See supra note 8.


33 See, e.g., Rogers, 454 F.2d at 234.

34 477 U.S. 57 (1986).

35 See Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991) (A hostile work environment exists where an employee is subject to unwelcome conduct of a sexual nature which a reasonable woman would consider sufficiently severe and pervasive to alter the conditions of employment and create a hostile or abusive working environment); Andrews v. City of Phila., 895 F.2d 1469 (3d Cir. 1990) (A hostile work environment claim can be successful when the employee can show that he or she suffered intentional discrimination because of sex, the discrimination was pervasive and regular, the discrimination detrimentally affected the plaintiff, the discrimi-
firmed the *Meritor* standard in *Harris v. Forklift Systems, Inc.*, and attempted to clarify several aspects of that standard upon which courts had disagreed. Regardless of the test applied, however, the parameters of the cause of action are generally the same. At the center of any hostile work environment test is the requirement that the work environment be so charged with animus towards a protected class that it interferes with the terms and conditions of employment.

The hostile work environment cause of action has been applied in the sex, race, religion, and national origin contexts. Thus, the cause of action is not limited to one protected class; it could apply to any nation would have detrimentally affected a reasonable person of the same sex in that position, and as to employers, the existence of respondeat superior liability; Hall v. Gus Constr. Co., 842 F.2d 1010 (8th Cir. 1988) (To prevail on a sexual harassment claim an employee must show she belonged to a protected group, was subject to unwelcome sexual harassment which was based on sex and affected a term, condition, or privilege of employment, and regarding employer liability, her employer knew or should have known of the harassment in question and failed to take proper remedial actions;); Rabidue v. Osceola Ref. Co., 805 F.2d 611 (6th Cir. 1986) (To prevail on a sexually offensive work environment claim an employee must prove she was a member of a protected class, was subject to unwelcome sexual harassment in the form of sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature and which had the effect of unreasonably interfering with her work performance and created an intimidating, hostile, or offensive work environment that affected seriously her physical well-being and, as to employer liability, the existence of respondeat superior liability). In *Harris v. Forklift Sys., Inc.*, 114 S. Ct. 367 (1993), the Supreme Court addressed some issues which had arisen under the various tests. See infra note 37. For a discussion of hostile work environment claims brought under state discrimination laws, and a list of state cases recognizing same, see supra note 31 and cases cited therein. See also infra part II.A for a discussion regarding the structure that most courts agree should be applied to hostile work environment causes of action.


37 In *Harris*, the Supreme Court granted certiorari to determine whether harassment, to be actionable, must seriously affect a complainant’s psychological well-being or lead the complainant to suffer injury. Id. at 370. The Court found that there was no such requirement under Title VII, but noted that the complainant must subjectively perceive the environment as abusive to make out a claim. Id. at 370-71. Utilizing the general framework set forth in *Meritor*, the Court also attempted to clarify the reasonableness standard to be applied to sexual harassment claims, despite the fact that certiorari was not granted on that issue. Id. The Court utilized a reasonable person standard, but refused to address the EEOC Proposed Guidelines which apply a reasonable person in the same or similar circumstances, meaning reasonable person of the same sex, standard to gender harassment claims, see infra note 151, and noted that its test is not mathematically precise. *Harris*, 114 S. Ct. at 371. Additionally, whether a working environment is hostile can only be determined by looking at all of the circumstances. Id. The implication of the Court’s failure to address the Proposed Guidelines, acknowledgment of the imprecise nature of its test, and consideration of the totality of the circumstances, is that the reasonable person standard proposed in *Harris* is a flexible one—which could mean reasonable woman if the victim is female, reasonable African-American if the victim is black, and so forth.

38 *Meritor*, 477 U.S. at 66-67; Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971). The structure for a hostile work environment cause of action in the disability context, including what type of conduct creates a hostile work environment, is set forth in Part II of this Article.

39 See, e.g., *Meritor*, 477 U.S. at 57 (sex); Rogers, 454 F.2d at 234 (race); Gray v. Gray-
class protected by a statute that prohibits discrimination in the terms and conditions of employment. The language and construction of the ADA, as well as the EEOC Proposed Guidelines, demonstrate the appropriateness of such a cause of action in the context of disability discrimination.

B. The Language of the ADA and Interpretive Materials: The ADA Protects Disabled Employees Against Workplace Harassment That Creates a Hostile Work Environment

1. The Antidiscrimination Provisions of Title I of the ADA

The first section of the ADA delineates the findings of Congress in relation to disabled individuals. It acknowledges that, unlike members of other protected classes, disabled individuals often had no


40 42 U.S.C. § 12101 (Supp. III 1991) provides:

(a) Findings
The Congress finds that—

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to as-
legal recourse when they were the victims of discrimination\textsuperscript{41} and recognizes that disabled individuals are a discrete and insular minority that have suffered restrictions and a history of purposeful discrimination in many "critical areas," including employment.\textsuperscript{42} Thus, equality for individuals with disabilities is declared to be among the nation's proper goals.\textsuperscript{43}

Accordingly, the primary purpose of the ADA is to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."\textsuperscript{44} Such language in the ADA's statement of purpose demonstrates the breadth of the Act's prohibition on discrimination. Thus, despite the fact that most materials interpreting the ADA's employment provisions focus on the duty to accommodate or the denial of employment opportunities based on disability, the Act prohibits all forms of discrimination against disabled individuals.

Further proof that the ADA's prohibition of employment discrimination against individuals with disabilities extends beyond reasonable accommodation is derived from the fact that the Act protects only "qualified" individuals with disabilities,\textsuperscript{45} and an individual is qualified if he or she can perform the essential functions of the job.

\begin{itemize}
\item[(9)] the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.
\end{itemize}

(b) Purpose

It is the purpose of this chapter—

\begin{enumerate}
\item to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
\item to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
\item to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and
\item to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.
\end{enumerate}

\textit{Id.}

\textsuperscript{45} 42 U.S.C. § 12112(a) (Supp. III 1991) sets forth what is actionable under the ADA, and specifically prohibits covered entities from engaging in such discrimination against a qualified individual with a disability.
with or without reasonable accommodation. Thus, individuals with disabilities who need no accommodation are protected under the ADA.

2. The ADA's Prohibition of Discrimination in any Term, Condition, or Privilege of Employment

The ADA specifically prohibits any covered entity from discriminating against a qualified individual with a disability, because of his or her disability, in regard to hiring, job applications, advancement, discharge, compensation, training, or "other terms, conditions, and privileges of employment." As noted earlier, the hostile work environment theory is predicated on the infringement of terms and conditions of employment.

Absent an exception, the ADA should be construed to protect against workplace harassment of disabled employees. However, the ADA has no exception precluding claims based on workplace harassment. Indeed, the ADA's prohibition on discrimination in the workplace is to be broadly construed, and materials interpreting the ADA, such as the EEOC Proposed Guidelines, acknowledge that the Act prohibits discrimination in any employment practice.

3. The ADA's Prohibition of Methods of Administration That Have a Discriminatory Effect or Perpetuate the Discrimination of Others

It would make little sense to prohibit discrimination against disabled individuals in all employment practices, but to provide no redress for workplace harassment—perhaps the most grievous form of discrimination. In fact, the ADA specifically states that utilizing methods of administration, standards, or criteria that have a discriminatory effect or perpetuate the discrimination of others, subject to the common administrative control of the employer, violates the Act.

48 See supra note 38 and accompanying text.
49 42 U.S.C. § 12101 (Supp. III 1991) sets forth the findings and purpose of the ADA. The broad remedial purpose of the Act indicates that its provisions, including Title I, should be construed broadly. See supra note 40 for the full text of § 12101.
51 EEOC ADA Regulations, supra note 28, § 1630.7; see also 42 U.S.C. § 12112(b)(3) (Supp. III 1991). In addition to the implications of this provision in relation to hostile work environment claims discussed in this Part, the provision infers the availability of a cause of action for disparate impact under the ADA—i.e., a facially neutral policy that has a disproportionate impact on a protected class.
Administrative methods are often directly tied into claims of hostile work environment, and have been used as a basis to create respondent superior liability for harassment perpetrated by supervisors and coemployees. Therefore, an employer who utilizes such methods of administration is in violation of the ADA. This construction is consistent with the breadth of the ADA's antidiscrimination provisions, and supports the availability of a hostile work environment cause of action under the ADA.

4. The Availability of Compensatory and Punitive Damages Under the ADA

The ADA provides disabled individuals with the same comprehensive remedies that are available to victims of workplace harassment under Title VII. The Civil Rights Act of 1991 provides that compensatory damages are available to complainants under the ADA or Title VII, and in cases involving malice or reckless indifference, punitive damages are also available. This is in addition to traditional employment remedies such as injunctive relief, back pay, front pay, and restoration of benefits which are likewise available under both statutes. Moreover, the powers and procedures utilized in Title

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52 That methods of administration can contribute to a hostile work environment is inherent in the purpose of the cause of action. For example, delegation of supervisory powers to individuals insensitive to harassment against a protected class or classes can contribute to the creation, or perpetuation, of a hostile work environment. See Andrews v. City of Phila., 895 F.2d 1469, 1486 (3d Cir. 1990) (Employer can be liable for harassing conduct where supervisory personnel acquiesce or approve of harassment, and to avoid liability the employer must show it investigated employee complaints regarding harassment and took appropriate remedial action.). Moreover, an employer's methods of delegating authority and its policies and procedures can also create a hostile work environment.

53 Methods of administration such as the availability and enforcement of discrimination policies, grievance procedures, and discipline are directly related to employer liability for hostile work environment claims. See EEOC v. Hacienda Hotel, 881 F.2d 1504, 1516 (9th Cir. 1989) (holding that employer could be liable for sexual harassment where internal grievance procedures and discrimination policy were inadequate); see also EEOC Proposed Guidelines, supra note 10, at 51,269 (to be codified at 29 C.F.R. § 1609.2(d)) (An employer should take all steps necessary to prevent harassment, including policies, sanctions, and methods of sensitizing employees to discrimination.). Any method of administration that has a discriminatory effect or perpetuates the discrimination of others under the employer's common control could contribute to a hostile work environment if it creates, facilitates, perpetuates, or augments harassing conduct.

54 See Ellison v. Brady, 924 F.2d 872, 881-83 (9th Cir. 1991) (discussing employer liability for the conduct of coworkers based on the adequacy of the employer's remedial actions and related administrative decisions).

55 See supra note 52 and accompanying text.


VII cases are available under the ADA. The specific incorporation into the ADA of the remedies, powers, and procedures available under Title VII reinforces the application of the ADA to the types of discrimination prohibited by Title VII, including hostile work environment.

5. The ADA Compliance Checklist, the EEOC Proposed Guidelines, and Workplace Harassment

The ADA Compliance Checklist developed by the Bureau of National Affairs suggests that employers take steps to prevent workplace behavior that disabled employees will likely consider derogatory, negative, stereotypical, demeaning, or otherwise objectionable, and to delete material that disabled employees would find objectionable from documents utilized by the employer. This recommendation apparently relates to harassment. Likewise, the EEOC Proposed Guidelines are specifically designed to outline the kind of behavior that will be actionable as harassment under the ADA and Rehabilitation Act. References to harassment in these materials supports the application of the hostile work environment cause of action under the ADA. Thus, the language of the ADA and the materials that interpret it demonstrate that the Act prohibits workplace harassment of disabled employees.

C. The Relationships Among The ADA, Title VII, and the Rehabilitation Act: Implications Regarding Workplace Harassment and the ADA

1. The ADA and Title VII

Through the ADA, Title VII, and other discrimination statutes, Congress has provided protection for various classes of individuals affected by employment discrimination. Each statute applies only to the classes it specifically delineates, thus acknowledging the differences in the provisions necessary to pro-

60 Id.
61 EEOC Proposed Guidelines, supra note 10, at 51,269 (to be codified at 29 C.F.R. § 1609.1(b), (c)).
tect the various classes. Disabled individuals are not protected by Title VII, and racial minorities are not protected as a class by the ADEA or the ADA. Yet, the relationship between Title VII and the ADEA is instructive in analyzing the relationship between Title VII and the ADA, because the analysis under one discrimination statute is often applied to another.

As case law developed under Title VII and the ADEA, the tests applied to discrimination claims under Title VII were applied to ADEA claims. Although each statute protects different classes, they utilize similar standards when the discrimination involved is of the same type. Accordingly, to the extent that a claim under the ADA is based on the same type of discrimination prohibited under Title VII, Title VII analysis should apply in resolving the ADA claim.

In this regard, the ADA utilizes the powers, remedies, and procedures available under Title VII. The remedial aspects of the Civil Rights Act of 1991 also apply to both Title VII and the ADA, and the findings and purpose of the ADA show an intent to provide a comprehensive remedial scheme similar to that provided under Title VII. Both procedurally and analytically, the ADA is tied to Title VII.

2. The Rehabilitation Act, Title VII, and the ADA

Prior to the passage of the ADA, the Rehabilitation Act was the only major federal law which protected disabled individuals against employment discrimination. However, the Rehabilitation
Act only provides protection if the claimant is employed by the federal government, is a government contractor, or receives federal funding. The ADA is the first federal statute to prohibit employment
discrimination aimed at disabled individuals regardless of the nature of an employer's business or relationship to government. Since there is no federal statute like the ADA, Congress instructed that Rehabilitation Act analysis be applied to the ADA to the extent both Acts provide the same protection.

As with the ADEA, courts interpreting the Rehabilitation Act have analyzed employment discrimination claims using Title VII tests. For example, courts have utilized the "McDonnell Douglas" test in analyzing Rehabilitation Act claims based on the discrimina-

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12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

Id. However, Title I of the ADA, which specifically deals with employment, does have some limitations in its application. Pursuant to 42 U.S.C. § 12111(5)(B)(i) (Supp. III 1991), Title I of the ADA does not apply to the United States government, any corporation wholly owned by the United States government, or any Indian tribe. Such entities remain covered under the Rehabilitation Act. It also does not apply to a bona fide private membership club, other than a labor organization, exempt from taxation under § 501(c) of the Internal Revenue Service Code of 1986. 42 U.S.C. § 12111(5)(B)(ii) (Supp. III 1991). Another significant limitation to the application of Title I of the ADA relates to the number of employees an employer has. Title I of the ADA applies only to employers with 25 or more employees until July 26, 1994, when it will apply to employers with 15 or more employees. 42 U.S.C. § 12111(5)(A) (Supp. III 1991). Significantly, Title II of the ADA, which covers state and local government entities, applies to employees of such entities who are not covered under the Rehabilitation Act (i.e., not working in programs receiving federal funding), and claims brought under Title II will be analyzed under the same standards as those brought under Title I of the ADA. 42 U.S.C. §§ 12131-12165 (Supp. III 1991); see also State and Local Governments, Employment Practices, 1 ADA Man. (BNA) No. 12, at 25:0002-0003 (Apr. 1992).

75 See EEOC ADA Regulations, supra note 28, app. § 1630.2(g) (noting that Congress intended relevant Rehabilitation Act case law to apply to the term "disability" under the ADA), § 1630.1(c) (except as provided in the ADA, the ADA does not apply a lesser standard than the Rehabilitation Act). As noted previously in this Article, Title VII analysis should also be utilized where appropriate. See discussion supra part I.C.1.

76 In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Supreme Court set forth the requirements for a prima facie case of disparate treatment employment discrimination in the context of a race discrimination case brought under Title VII. This test provides:

The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. at 802. If the plaintiff establishes a prima facie case, the burden shifts to the defendant to articulate some legitimate nondiscriminatory reasons for the rejection. Id. If legitimate nondiscriminatory reasons are set forth, plaintiff must show that the stated reasons are pretexts for discrimination. Id. at 804.

The test for a prima facie case of discrimination under Title VII will vary depending on the protected class involved and the nature of the discriminatory employment practice. The Court acknowledged the potential for such variations by the following language:
tory denial of employment or the emoluments of employment. Similarly, in *Taylor v. Garrett*, the court noted that Title VII concepts are often applied to Rehabilitation Act cases.

Since the ADA looks to the Rehabilitation Act as a key source of interpretive authority for analyzing employment discrimination claims, and the Rehabilitation Act looks to Title VII for interpretive guidance when the discriminatory conduct involved is protected against under both statutes, it is reasonable to conclude that the ADA will also utilize Title VII analysis, modified by applicable Rehabilitation Act cases, when the discrimination involved is prohibited by those statutes. This is consistent with the relationship between the ADA and Title VII.

A court analyzing an ADA claim based on workplace harassment might therefore look to the Rehabilitation Act to determine the appropriateness of the analysis utilized for such claims under that Act. However, as discussed below, there is no uniformity among the few Rehabilitation Act cases addressing workplace harassment. As a result, a court would most likely look directly to Title VII in interpreting such a cause of action under the ADA, because Title VII law supplies a framework capable of consistent interpretation.

The test for workplace harassment under Title VII is based on the hostile work environment theory. However, as the ADA is influenced by both Title VII and the Rehabilitation Act, it is necessary

The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations.

*Id.* at 802 n.13.

The *McDonnell Douglas* test is primarily used in cases involving the denial of employment opportunities or related rights and benefits, and termination of employment. The Supreme Court has set forth a different test for harassment claims by protected individuals. *See Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65-67 (1986).

*Id.* at 939 n.11; *see also Prewitt v. United States Postal Serv.*, 662 F.2d 292, 305 n.19 (5th Cir. 1981) (Title VII jurisprudence is for the most part applicable to intentional social bias discrimination against the handicapped.).

*See supra* note 75 and accompanying text.

*See supra* note 78 and accompanying text.

*See discussion supra* part I.C.1.

*Whether the Rehabilitation Act provides for a harassment cause of action has been questioned. See James v. Frank, 772 F. Supp. 984 (S.D. Ohio 1991) (court acknowledged that Mr. James was harassed, but the opinion, and remedy provided therein, focused only on the employer's failure to reasonably accommodate). However, harassment claims brought under common law causes of action have been recognized in Rehabilitation Act cases. See discussion infra* this part.

*See discussion supra* part I.A. The application of this test to ADA claims will be discussed in Part II of this Article, *infra*. Additionally, quid pro quo harassment, which involves the conditioning of employment, or the emoluments of employment, on sexual favors, has been
to address Rehabilitation Act cases that deal with workplace harassment before exploring the application of the hostile work environment theory to the ADA.

Initially, it should be noted that there are few published cases brought under the Rehabilitation Act involving claims for workplace harassment by disabled employees. Of those, the majority involve claims brought under the common law theories of constructive discharge or intentional infliction of emotional distress. In fact, it has been questioned whether the Rehabilitation Act even provides relief for workplace harassment.

However, an analysis of the few Rehabilitation Act cases involving harassment, even if those cases involved common law theories, is beneficial to both demonstrate the need for a clear cause of action for harassment under the ADA, and to define the appropriate test for that cause of action. The fact that the EEOC has been asked to draft proposed guidelines on workplace harassment of disabled employees suggests that the small number of Rehabilitation Act harassment cases is not indicative of the pervasiveness of such harassment. Furthermore, it indicates that the ADA was not meant to utilize the common law theories applied under the Rehabilitation Act in analyzing harassment claims.

The Rehabilitation Act's employment provisions have been utilized primarily to require that employers receiving government funds recognized under Title VII in the sexual harassment context. See Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986).


See supra note 82 and accompanying text. However, the EEOC Proposed Guidelines erase any doubt in this area because they apply to cases brought under the Rehabilitation Act. EEOC Proposed Guidelines, supra note 10.

If the existence of a cause of action for workplace harassment against disabled employees had clearly existed under the Rehabilitation Act, there would likely have been more such cases. Yet, because the Rehabilitation Act is limited to employees of employers receiving government funding, and because there was no clear pronouncement delineating a hostile work environment cause of action under the Rehabilitation Act, it is not surprising to see a dearth of such cases. In fact, one of the most important purposes of the ADA is to clearly define a set of rights which disabled individuals are entitled to, and which they have been denied in the past. See supra note 40. Also telling is the fact that the EEOC Proposed Guidelines prohibit workplace harassment against disabled employees. It would make little sense for the EEOC to draft guidelines applicable to harassment of disabled employees under the ADA and the Rehabilitation Act if there was no need to.

The EEOC Proposed Guidelines provide for a harassment cause of action under the ADA and Rehabilitation Act. Thus, victims bringing claims under the ADA, and now, the Rehabilitation Act, do not need to utilize common law concepts. See EEOC Proposed Guidelines, supra note 10.
provide reasonable accommodation to disabled individuals. Because the focus of the Rehabilitation Act has been on reasonable accommodation and its language is not as broad as that of the ADA regarding other forms of discrimination, claims of harassment brought under the Rehabilitation Act were usually based on common law theories, and brought in conjunction with, or pendant to, a claim that an employer failed to reasonably accommodate. However, the standards for applicable common law theories such as constructive discharge and intentional infliction of emotional distress vary by jurisdiction, and are generally stricter than those applied to hostile work environment.

In Kent by Gillespie v. Derwinski, the court held that an emotionally and mentally handicapped employee was constructively discharged, as defined by Ninth Circuit case law, because she was subject to unnecessary discipline and taunting. The court utilized the theory of constructive discharge as part of its Rehabilitation Act analysis, holding that the complainant, under the Rehabilitation Act, had to prove that she was an otherwise qualified handicapped individual, and that she was constructively terminated because of her handicap. To prove constructive discharge, the complainant had to demonstrate, by the totality of the circumstances, that a reasonable person in her position would have felt that she was forced to quit because of intolerable and discriminatory working conditions.

Conversely, in Johnson v. Shalala, the Fourth Circuit Court of Appeals held that an employee failed to establish that she was constructively discharged under the test applied in the Fourth Circuit.

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91 Common law causes of action such as constructive discharge impose a greater burden on the complainant than does hostile work environment. See Walter C. Arbery, Note, A Step Backward for Equality Principles: The "Reasonable Woman" Standard in Title VII Hostile Work Environment Sexual Harassment Claims, 27 GA. L. REV. 503, 524 (1993) (noting that constructive discharge claims require a victim of harassment to quit because of the working conditions, thus focusing on the justification for a complainant's reaction to harassing conduct, and imposing a greater burden on the complainant than hostile work environment which focuses on the harasser's conduct); see also Peter G. Nash & Jonathan R. Mook, Employee Tort Actions for Sexual Harassment in Virginia: Negotiating the Liability Mine Field, 1 GEO. Mason U. CIV. RTS. L.J. 247, 250 (1990) (noting that Virginia, like other jurisdictions, has established a "very strict" test that must be met to establish an emotional distress claim).
93 Id. at 1040-41.
94 Id. at 1038-39.
95 Id. at 1040.
96 991 F.2d 126 (4th Cir. 1993).
Despite evidence that the employer's accommodation attempts were inadequate under the Rehabilitation Act, the employee failed to state a claim because constructive discharge in the Fourth Circuit requires proof that the employer intended to drive the employee from the job. 97

Finally, in Doe v. Board of County Commissioners, 98 an employee alleged that her supervisor intentionally subjected her to harassment because of her mental handicap. The employer sought to dismiss her claim for intentional infliction of emotional distress which was brought in conjunction with several other state and federal claims. 99 The court noted that Florida recognized the tort of intentional infliction of emotional distress, and applied the definition set forth in the Restatement (Second) of Torts, 100 holding that the complainant had made sufficient allegations of intentional harassment by her supervisor to withstand judgment on the pleadings.101 Nevertheless, to ultimately prevail on her claim, the employee would have to meet the strict standard for intentional infliction of emotional distress.

Thus, prior to the enactment of the ADA, federal courts attempted to provide relief to the victims of disability-based harassment through common law theories, sometimes incorporating them into Rehabilitation Act analysis. However, there was no uniformity to the method in which the common law theories were applied, or the tests under which such theories were analyzed. If the courts had had the benefit of a uniform cause of action for harassment under the Rehabilitation Act, employers would have been able to take affirmative steps to avoid illegal harassment, and employees would have had a way to gauge if the conduct to which they were subject was illegal. Without a clear rule determining what conduct was illegal, employees facing

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97 Id. at 131-32. Such a showing of deliberateness could only be made if the employee demonstrated the complete failure to accommodate after repeated requests, or through direct evidence of intent to force the employee from the job. Id. at 132.
99 Id. at 1449. The court did not state what these state and federal provisions were.
100 Id. at 1450.
101 Doe v. Board of County Comm'rs, 815 F. Supp. at 1450.
similar harassment might have had no remedy under the Rehabilitation Act,\textsuperscript{102} or an “excellent remedy,”\textsuperscript{103} depending on the jurisdiction in which the case was heard.\textsuperscript{104} The necessity of a clearly defined right to be free from workplace harassment under the ADA, and the availability of a workable structure applicable to claims enforcing that right, such as the Title VII structure, is evidenced by the inconsistency of the Rehabilitation Act cases involving workplace harassment.

D. State Discrimination Laws, Hostile Work Environment, and the Analysis of Disability-Based Employment Discrimination Claims

1. State Discrimination Laws That Protect Disabled Individuals

All fifty states, the District of Columbia, and Puerto Rico have enacted legislation prohibiting employment discrimination against disabled individuals.\textsuperscript{105} The protection afforded disabled individuals by these statutes may also apply to other classes, and can range from a comprehensive prohibition on employment discrimination based on race, religion, ethnicity, sex, age, disability, and other protected attributes by all employers, public or private,\textsuperscript{106} to those limited to public employment that includes fewer protected classes.\textsuperscript{107} Some states that prohibit disability-based discrimination analyze claims by disabled individuals under the general statutory scheme applied to all protected classes, while including provisions relating to the unique

\textsuperscript{102} See \textit{supra} note 82.
\textsuperscript{103} See Kent by Gillespie v. Derwinski, 790 F. Supp. 1032, 1041 (E.D. Wash. 1991) (Courts may grant the full panoply of remedies, including equitable relief and monetary damages, to successful plaintiffs under § 504 of the Rehabilitation Act.).
\textsuperscript{104} The EEOC Proposed Guidelines, \textit{supra} note 10, apply to the Rehabilitation Act as well as the ADA, Title VII, and the ADEA. Thus, for those disabled employees not covered by the ADA, relief is available when they are faced with actionable workplace harassment. See \textit{supra} note 74.
\textsuperscript{105} 1 ADA Man. (BNA) No. 18, at 80i (July 1993) (alphabetical listing by state of legislation regarding disability discrimination).
\textsuperscript{106} Good examples of comprehensive discrimination legislation are provided by the California Fair Employment and Housing Act, \textsc{Cal. Gov't Code} §§ 12900-12996 (Deering 1993), \textit{amended by Cal. Gov't Code} § 12940(h)(1) (Deering 1994) (prohibiting discrimination by public and private employers with five or more employees, on the basis of race, religion, color, national origin, ancestry, physical, and in some cases mental, disability, medical condition, marital status, sex, or age), and the New Jersey Law Against Discrimination, \textsc{N.J. Rev. Stat.} §§ 10:5-1 to 10:5-42 (1993) (prohibiting discrimination by all public and private employers on the basis of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, familial status, sex, present or former handicap, or atypical hereditary cellular blood trait).
\textsuperscript{107} An example of a limited state discrimination statute is provided by \textsc{Miss. Code Ann.} § 25-9-103 (1993), which provides protection only in relation to government employment.
concerns attendant to disability discrimination.\footnote{108 See, e.g., Cal. Gov't Code §§ 12900-12996 (California Fair Employment and Housing Act, which applies to several protected classes, including individuals with disabilities); N.J. Rev. Stat. §§ 10:5-1 to 10:5-42 (New Jersey Law Against Discrimination, which applies to disabled individuals along with several protected classes). For a detailed listing of all state discrimination laws that prohibit discrimination against individuals with disabilities, see 2 ADA Man. (BNA) No. 18, at 80:i-0310 (July 1993).}

2. States That Recognize a Cause of Action for Hostile Work Environment Under Discrimination Statutes

Several states that provide similar rights to all protected classes have recognized a cause of action for workplace harassment of individuals belonging to those protected classes. For example, California has specifically recognized a cause of action for workplace harassment under its Fair Employment and Housing Act.\footnote{109 The California Fair Employment and Housing Act's harassment provision, Cal. Gov't Code § 12940(h), provides in pertinent part that it is an unlawful employment practice:

(1) For an employer, labor organization, employment agency, apprenticeship training program or any training program leading to employment, or any other person, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, or age, to harass an employee or applicant. Harassment of an employee or applicant by another employee or supervisor shall be unlawful if the entity, or its agents or supervisors, knows or should have known of this conduct and fails to take immediate and appropriate corrective action. An entity shall take all reasonable steps to prevent harassment from occurring. Loss of tangible job benefits shall not be necessary in order to establish harassment.

Id. at § 12940(h)(1).} Other states have recognized that such a cause of action is inherent in their statutes even without specific statutory language dealing with harassment, because those statutes prohibit discrimination in terms and conditions of employment, and workplace harassment becomes actionable when it interferes with terms and conditions of employment.\footnote{110 See, e.g., Lehmann v. Toys 'R' Us, Inc., 626 A.2d 445 (N.J. 1993) (holding that under the New Jersey Law Against Discrimination, the test for determining the existence of a hostile work environment in a sexual harassment case is whether the alleged conduct would not have occurred but for the complainant's gender, and was severe and pervasive enough to make a reasonable woman believe that the conditions of employment are altered and the working environment is hostile or abusive).

Most states that recognize a cause of action for workplace harassment base their analysis of such claims on the hostile work environment theory as developed under Title VII law.\footnote{111 See supra note 30 and accompanying text.} However, some state courts have significantly modified the Title VII test for hostile work environment.\footnote{112 See, e.g., Lehmann, 626 A.2d at 445.} Regardless of the exact test applied, these state
discrimination statutes provide relief to the members of any class
which they protect.

3. Comprehensive State Discrimination Statutes and the Proper
Construction of the Federal Statutory Scheme

The purpose of many comprehensive state discrimination laws
that protect several classes, including disabled individuals, is to eradi-
cate discrimination against individuals based on their membership in
protected classes. This supports the conclusion that within any
comprehensive statutory scheme aimed at eliminating discrimination,
all protected classes should be afforded the same rights under similar
standards; these state discrimination statutes provide broad protec-
tions to such classes. Similarly, Title VII, the ADA, and the ADEA
provide a comprehensive federal statutory scheme aimed at eradicat-
ing discrimination and protecting several classes; each applies similar
analyses to discrimination claims, with the ADA adding concepts
unique to the disability context. The state discrimination statutes
which serve the same purpose as the federal statutes, and provide
remedies for all protected classes, are instructive in analyzing the fed-
eral statutory scheme: they demonstrate the logic in providing all pro-
tected classes the same causes of action, and in allowing for
modifications necessitated by the unique attributes of a given class.

II. THE STRUCTURE OF A CAUSE OF ACTION BASED ON
WORKPLACE HARASSMENT UNDER THE ADA

A. Lessons Learned from the Title VII and EEOC Proposed
Guideline Tests for Workplace Harassment

1. The Need for a Consistent Structure for Workplace Harassment
Claims Under the ADA

The ADA is applicable in all jurisdictions, and many states

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113 See id. at 451 (purpose of New Jersey Law Against Discrimination "is nothing less than
the eradication 'of the cancer of discrimination'") (citing Fuchilla v. Layman, 537 A.2d 652,
660 (N.J. 1988)); Walnut Creek Manor v. Fair Employment and Hous. Comm'n, 814 P.2d
704, 709 (Cal. 1991) (case brought under California's Fair Employment and Housing Act
holding that the eradication of discrimination in housing is a legitimate regulatory purpose);
Gay Rights Coalition of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1, 41
Act the legislature spoke with "unmistakable clarity of the importance with which it regards
the eradication of discrimination on the basis of . . . inappropriate criteria"); Michigan Dep't of
Civil Rights ex rel. Cornell v. Edward A. Sparrow Hosp. Ass'n, 326 N.W.2d 519, 521-25
(Mich. Ct. App. 1982) (MacKenzie, J., dissenting) (among the purposes of the former Michi-
gan State Fair Employment Practice Act was the eradication of discrimination).

will look to ADA law in applying their discrimination laws to disabled individuals. Thus, the structure given to causes of action under the ADA will have profound implications for the rights of disabled individuals nationwide, both under federal and state law.

The need for consistency in construing ADA harassment claims can be illustrated by the evolution of the hostile work environment cause of action. The cause of action was initially recognized by the Fifth Circuit Court of Appeals in Rogers v. EEOC, in the context of racial discrimination. In 1986, fifteen years after the Rogers decision, the Supreme Court decided Meritor Savings Bank v. Vinson, and acknowledged the cause of action in the context of sexual harassment. Significantly, the Court indicated that the cause of action applies to all classes protected by Title VII.

Prior to Meritor, there was no clear rule as to whether a cause of action for workplace harassment that did not impinge on an employee's pecuniary interest existed, and thus no uniform structure for workplace harassment claims. The EEOC had issued Guidelines regarding sexual harassment, but they were subject to different interpretations or simply not followed. In Meritor, the Supreme Court applied parts of the EEOC Guidelines dealing with sexual harassment, but acknowledged that they were not binding as promul-

115 That many states will look to ADA law in applying their discrimination laws to disabled employees is indicated by the fact that state courts have looked to the Rehabilitation Act in determining the rights and duties their state statutes create regarding employment of disabled individuals. See Padilla v. City of Topeka, 708 P.2d 543, 551 (Kan. 1985) (Although phrased differently between federal and Kansas legislation, the basic concept of handicap is similar.); Bauer v. Republic Airlines, Inc., 442 N.W.2d 818, 820 (Minn. Ct. App. 1989) (Definition of "handicapped individual" under Rehabilitation Act is appropriately applied to the Minnesota Human Rights Act.); Smith v. Ortiz, 517 N.Y.S.2d 352, 354 (Sup. Ct. 1987) (both New York statute and Rehabilitation Act prohibit employment discrimination on the basis of a disability which does not impede reasonable employee job performance); Braun v. American Int'l Health & Rehabilitation Servs., Inc., 846 P.2d 1151, 1154-55 (Or. 1993) (Oregon statute prohibiting employers from discriminating against disabled persons is in conformity with the Rehabilitation Act.); Coffman v. West Virginia Bd. of Regents, 386 S.E.2d 1, 8 (W. Va. 1988) (Miller, J., dissenting) (West Virginia statute "parallels" to a substantial degree the Rehabilitation Act.).

116 454 F.2d 234 (5th Cir. 1971) (discrimination against a Hispanic employee), cert. denied, 406 U.S. 957 (1972).


118 Id. at 66.

119 See id. at 67-68 (in Meritor, the district court believed no claim for sexual harassment was actionable if it had no economic impact on the victim's employment).

120 EEOC Guidelines on Sex Discrimination, supra note 25.

121 In Meritor, 477 U.S. at 71, the Court noted that even the EEOC advocated a position which was "in some tension with the EEOC Guidelines." For a detailed discussion of the interpretations given EEOC guidelines, including the Supreme Court's rejection of some guideline provisions, see John S. Moot, Comment, An Analysis of Judicial Deference to EEOC Interpretive Guidelines, 1 ADMIN. L.J. 213 (1987).
gated rules, and in fact did not follow the Guidelines as to employer liability for the acts of supervisors.

After *Meritor*, courts applied various structures to hostile work environment claims; they agreed on the basic framework underlying the cause of action, but applied different standards to it. Thus, employers and employees had no consistent interpretation regarding their rights and duties in relation to hostile work environment. Eventually, a general structure evolved, based on *Meritor*, which most jurisdictions accepted, but there were still many issues that required clarification. *Harris v. Forklift Systems, Inc.* was a recent attempt by the Supreme Court to clarify some of these issues, while reaffirming *Meritor* and noting the imprecise nature of the structure for hostile work environment claims.

In interpreting workplace harassment claims under the ADA, we have the benefit of hindsight attained during the evolution of the hostile work environment cause of action under Title VII. If a consistent structure is not created for ADA harassment claims, or the structure created is not precise, the cost to employers, individual employees, and judicial resources will be unnecessarily high. The hostile work environment cause of action provides such a structure, but appropriate modifications, as discussed in Part II.B. of this Article, must be incorporated into the current framework due to the unique needs of individuals with disabilities.

2. The Title VII Structure for Hostile Work Environment Claims as Interpreted by the EEOC Proposed Guidelines

Title VII analysis of hostile work environment claims is applicable to the basic structure of that cause of action under the ADA. Most courts agree on the general analysis to be used in a hostile work environment claim under Title VII, although there are some variations regarding the exact test utilized. The standard for a Title VII hostile work environment claim based on sexual harassment was most recently articulated in *Harris*. To prevail on a claim of hostile

122 *Meritor*, 477 U.S. at 65.
123 *Id.* at 70-72.
124 See cases cited *supra* note 35.
125 See discussion *infra* part II.A.2.
126 114 S. Ct. 367, 370-71 (1993). See also *supra* note 37 for a discussion of the *Harris* opinion.
127 See cases cited *supra* note 35. Some of these variations were clarified in *Harris*, but the reasonable person standard set forth in *Harris* could be subject to varied interpretations as well. See *supra* note 37. Thus, even if the test to be applied to hostile work environment claims under Title VII is now uniform, the appropriate application of that test is still unclear.
128 *Harris*, 114 S. Ct. at 370-71.
work environment, an employee must show that she was subject to conduct which a reasonable person would consider sufficiently severe or pervasive to alter the conditions of her employment, and create a hostile or abusive working environment.\textsuperscript{129} The \textit{Harris} Court also held that the complainant must have subjectively perceived the environment to be abusive.\textsuperscript{130} However, it is not necessary that a complainant’s psychological well-being be affected or that she suffer injury.\textsuperscript{131} The structure applied to hostile work environment claims pursuant to \textit{Harris} reaffirms and augments the framework set forth in \textit{Meritor}.\textsuperscript{132}

As stated earlier, the EEOC issued Proposed Guidelines on harassment\textsuperscript{133} which relied heavily upon both \textit{Meritor} and \textit{Ellison v. Brady}.\textsuperscript{134} Accordingly, the general framework set forth in the Proposed Guidelines closely resembles the Title VII cause of action for hostile work environment. The Proposed Guidelines provide in part:

(a) Harassment on the basis of race, color, religion, gender, national origin, age, or disability constitutes discrimination in the terms, conditions, and privileges of employment and, as such, violates title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e \textit{et seq.} (title VII); the Age Discrimination in Employment Act, as amended, 29 U.S.C. 621 \textit{et seq.} (ADEA); the Americans with Disabilities Act, 42 U.S.C. 12101 \textit{et seq.} (ADA); or the Rehabilitation Act of 1973, as amended, 29 U.S.C. 701 \textit{et seq.}, as applicable.

(b)(1) Harassment is verbal or physical conduct that denigrates or shows hostility or aversion toward an individual because of his/her race, color, religion, gender, national origin, age, or disability, or that of his/her relatives, friends, or associates, and that:

(i) Has the purpose or effect of creating an intimidating, hostile, or offensive work environment;

(ii) Has the purpose or effect of unreasonably interfering with an individual’s work performance; or

(iii) Otherwise adversely affects an individual’s employment opportunities.

(c) The standard for determining whether verbal or physical

\textsuperscript{129} Id. at 370.
\textsuperscript{130} Id.
\textsuperscript{131} Id. at 370-71.
\textsuperscript{132} Id.; see also \textit{Meritor Sav. Bank v. Vinson}, 477 U.S. 57, 67 (1986) (harassment is actionable when it is sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment).
\textsuperscript{133} EEOC Proposed Guidelines, \textit{supra} note 10.
\textsuperscript{134} 924 F.2d 872 (9th Cir. 1991).
conduct relating to race, color, religion, gender, national origin, age, or disability is sufficiently severe or pervasive to create a hostile or abusive work environment is whether a reasonable person in the same or similar circumstances would find the conduct intimidating, hostile, or abusive. The "reasonable person" standard includes consideration of the perspective of persons of the alleged victim's race, color, religion, gender, national origin, age, or disability. It is not necessary to make an additional showing of psychological harm.\(^\text{135}\)

Thus, according to the EEOC Proposed Guidelines, harassment of employees belonging to classes protected by Title VII, the ADEA, the ADA, or the Rehabilitation Act constitutes discrimination in the terms, conditions, and privileges of employment under those statutes. For a claim to be actionable, however, such harassment must be severe and pervasive enough that a reasonable person in the same or similar circumstances as the alleged victim would find the conduct intimidating, hostile, or abusive.

While the EEOC Proposed Guidelines are a good starting point for analysis of the appropriate structure to be applied to harassment claims under the ADA, they do not properly address issues raised by the specific language of the ADA and the unique circumstances of disabled individuals.\(^\text{136}\) Additionally, the EEOC Proposed Guidelines need to be streamlined to create a workable cause of action, capable of consistent interpretation by courts.\(^\text{137}\)

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\(^{135}\) EEOC Proposed Guidelines, supra note 10, at 51,268 (to be codified at 29 C.F.R. § 1609.1). The lack of necessity to show psychological harm was recently accepted by the Supreme Court in *Harris*, 114 S. Ct. at 367.

\(^{136}\) The EEOC has attempted to apply the same guidelines to such diverse classes as race, color, religion, gender, national origin, and age, as well as disability. See EEOC Proposed Guidelines, supra note 10.

\(^{137}\) To some extent, this might occur through the hearing process the EEOC has initiated in relation to the Proposed Guidelines. Individuals will have sixty days from the date of publica-

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B. Proposed Modifications to the Title VII and EEOC Proposed Guideline Tests for Hostile Work Environment Claims as Applied to the ADA

1. A Complainant Must Be a Qualified Individual with a Disability as Defined by the ADA

Title I of the ADA prohibits employment discrimination against any qualified individual with a disability, or against a qualified individual because of the known disability of a person with whom that qualified individual has a relationship or association. An individual is disabled for purposes of the ADA if he or she has a physical or mental impairment that substantially limits one or more major life activities, a record of such impairment, or is regarded as having such impairment. A qualified individual with a disability is defined as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."

In order to have the benefit of the prohibition against employment discrimination in the terms, conditions, and privileges of employment provided by Title I of the ADA, an employee or job applicant must first show that he or she is a qualified individual with a disability.

The first requirement of a prima facie case of hostile work environment under the ADA—that the alleged victim be a qualified individual with a disability—is not addressed in the EEOC Proposed Guidelines, but courts would likely apply this requirement in conjunction with the Proposed Guidelines or any other test for hostile work environment. The concept is also not addressed under the Title VII test for hostile work environment because it is unique to disability discrimination, and thus inapplicable to other protected classes.

2. The Objective Reasonableness Standard

As noted above, the Supreme Court, interpreting Title VII, has held that, in order to make out a prima facie case of hostile work environment in the sexual harassment context, an alleged victim must demonstrate that a reasonable person would consider the conduct alleged sufficiently severe and pervasive to alter the conditions of em-

\[138\] 42 U.S.C. § 12112 (Supp. III 1991). Additionally, the ADA protects individuals who are discriminated against based on a perceived disability, even when the victim does not have such disability. 42 U.S.C. § 12102(2) (Supp. III 1991).


\[141\] EEOC Proposed Guidelines, supra note 10.
ployment, and create a hostile or abusive working environment.\footnote{142} The EEOC Proposed Guidelines modify the reasonable person standard, propounding instead a “reasonable person in the same or similar circumstances” standard.\footnote{143} Although the EEOC proposed standard is generally well thought out, it invites inconsistent interpretation, and a modified version would be more appropriate.

Additionally, the EEOC Proposed Guidelines alter the structure of the Title VII test, requiring only that the alleged conduct be sufficiently severe and pervasive that a reasonable person in the same or similar circumstances would find the conduct intimidating, hostile, or abusive.\footnote{144} The proposed standard fails to directly reference the basis for a hostile work environment claim: conduct that alters the terms and conditions of employment.\footnote{145} However, interference with the terms and conditions of employment is mentioned in a separate section of the Proposed Guidelines.\footnote{146} Hence, although disjointed, both the prerequisite under Title VII that the terms and conditions of employment be affected, and the requirement that the conduct affecting those terms and conditions be severe and pervasive enough to affect a reasonable person in the alleged victim’s class, are included in the EEOC Proposed Guidelines.

To avoid the possibility of confusion by the numerous courts that will likely encounter hostile work environment claims by disabled individuals, particularly those courts that do not deal with such concepts on a regular basis, the structure of the cause of action must be framed in a clear and coherent fashion, one that is not easily subject to misinterpretation. Thus, an appropriate standard for ADA hostile work environment claims must consider both the structure proposed in \textit{Harris}\footnote{147} and the variation of the reasonable person standard set forth in the EEOC Proposed Guidelines,\footnote{148} with appropriate modifications.

I therefore contend that the proper structure for analyzing a hostile work environment cause of action under the ADA should be (1) whether the alleged victim is a qualified individual with a disability, and (2) whether the individual was, or is, subject to intimidating, hostile, or abusive conduct based on a known disability, which that indi-

\footnote{142} Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370 (1993).
\footnote{143} EEOC Proposed Guidelines, \textit{supra} note 10, at 51,269 (to be codified at 29 C.F.R. \S\ 1609.1(c)).
\footnote{144} \textit{Id}.
\footnote{145} \textit{Id}.
\footnote{146} \textit{Id} at 51,268 (to be codified at 29 C.F.R. \S\ 1609.1(a)).
\footnote{147} See discussion \textit{supra} part II.A.2, note 126 and accompanying text.
\footnote{148} See \textit{supra} note 139 and accompanying text.
individual perceived, and a reasonable person with the same disability would consider, sufficiently severe or pervasive to alter the terms, conditions, or privileges of employment, thereby creating a hostile or abusive work environment. The victim’s psychological well-being need not be affected nor must the victim suffer injury for the conduct to be actionable. The EEOC Proposed Guidelines provide guidance in determining whether the conduct alleged is intimidating, hostile, or abusive.

This Proposal utilizes the unique provisions of the ADA, the structure for hostile work environment claims provided by Title VII law, and the definition of conduct necessary to create a hostile work environment claim under the ADA as set forth in the EEOC Proposed Guidelines. Significantly, it also advocates a “reasonable person with the same disability” standard in lieu of either the EEOC’s proposed “reasonable person in the same or similar circumstances” standard or a general “reasonable person” standard. The reason for this is that both the EEOC proposed standard, and the reasonable person standard, are too imprecise to be uniformly applied.

149 When the alleged victim is claiming he or she was discriminated against because of a relationship or association with a disabled individual pursuant to 42 U.S.C. § 12112(b)(4) (Supp. III 1991), the test should be modified as follows:

Whether the alleged victim is related to, or associated with, a disabled individual, and as a result of that association or relationship was, or is, subject to intimidating, hostile or abusive conduct which that individual perceived, and a reasonable person in the same circumstances would consider, sufficiently severe and pervasive so as to alter the terms, conditions, or privileges of employment, thereby creating a hostile or abusive work environment.

Thus, the structure suggested for a claim by a relative or associate of a disabled person utilizes the reasonable person in the same circumstances standard. However, for the same reasons set forth supra note 23, the term “similar circumstances” in the EEOC Proposed Guidelines, supra note 10, at 51,269 (to be codified at 29 C.F.R. § 1609.1(c)), is not utilized.

150 In this regard, subsection (b) of the EEOC Proposed Guidelines, supra note 10, at 51,269 (to be codified at 29 C.F.R. § 1609.1 (b)(2)), is instructive. The second paragraph of subsection (b) provides:

(2) Harassing conduct includes, but is not limited to, the following:

(i) Epithets, slurs, negative stereotyping, or threatening, intimidating, or hostile acts, that relate to race, color, religion, gender, national origin, age, or disability; and

(ii) Written or graphic material that denigrates or shows hostility or aversion toward an individual or group because of race, color, religion, gender, national origin, age, or disability and that is placed on the walls, bulletin boards, or elsewhere on the employer’s premises, or circulated in the workplace.

Id.

151 The EEOC proposed reasonable person in the same or similar circumstances standard appears to mean reasonable person with the same disability because the second line of proposed § 1609.1(c) reads:

The “reasonable person” standard includes consideration of the perspective of persons of the alleged victim’s race, color, religion, gender, national origin, age, or disability.
while an inflexible standard is inappropriate, the need for precision was demonstrated in the sexual harassment context by the confusion over the appropriate reasonableness standard to be applied to Title VII hostile work environment claims.

One can interpret "reasonable person in the same or similar circumstances" or "reasonable person" in several ways as they relate to disabled individuals. They could mean, as I propose, a reasonable person with the same disability. However, they could also mean any reasonable disabled individual, any individual with a disability affecting the same major life function or functions affected by the victim's disability, or any reasonable nondisabled person's perception of how he or she would react if he or she were in the same or similar circumstances as the alleged victim. Thus, courts could take years to develop a consistent standard upon which employers and employees can rely.

The "reasonable person with the same disability" standard delineates exactly what test should be applied, and takes the unique aspects of various disabilities, and the perceptions and sensitivities of those who live with them, into consideration. Therefore, a blind individual's claim would be considered in the context of a reasonable blind person, that of a deaf person in the context of a reasonable hearing-impaired person, and so on. When an individual falls into more than one disability classification, but the conduct alleged is aimed at either

Id. at 51,269 (to be codified at 29 C.F.R. § 1609.1(c)). However, if reasonable person with the same disability is meant, then that is what should be stated. The standard the EEOC proposes is easily subject to divergent interpretations. See supra note 23. It is likely that the EEOC proposed reasonable person in the same or similar circumstances standard is worded the way it is because the proposed guidelines apply to several protected classes, not just disabled individuals, and the standard lends itself well to some of the other classes. However, a distinction should be made between the standards applied to other classes referred to in the EEOC Proposed Guidelines and those applied to disabled individuals. The same concerns apply to the reasonable person standard set forth in Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 370 (1993), which could be subject to varied interpretations, see supra note 37 (discussing Harris holding, including the reasonable person standard), and which did not discuss the appropriate reasonableness standard to be applied in the disability context. For a discussion of why the reasonable person standard set forth in Harris is likely inapplicable to the ADA and the Rehabilitation Act, see supra note 24.

See Ellison v. Brady, 924 F.2d 872, 879 n.12 (9th Cir. 1991) (acknowledging that the views of reasonable women might change, and thus so can the standard, because the reasonableness inquiry is not static).

See supra note 23.

The EEOC Proposed Guidelines note that the standard "includes consideration" of the perspective of persons with the same disability as the alleged victim. EEOC Proposed Guidelines, supra note 10, at 51,269 (to be codified at 29 C.F.R. § 1609.1(c)). However, as noted supra note 151, even this point of clarification is insufficient to create a consistent interpretation of the standard, because "includes consideration" is nebulous and leaves open many possible interpretations of the standard.
the more general or narrow classification, the standard is flexible enough to account for the variation. For example, if a quadriplegic is subject to the same harassment as a paraplegic, evidence regarding a reasonable paraplegic or quadriplegic could be used interchangeably. Conversely, if the alleged victim is totally deaf, and conduct is aimed at him because he is totally deaf, while other individuals who are not totally deaf but are hearing impaired are not victimized, or perhaps even take part in the conduct, the standard of the reasonable hearing-impaired individual could be refined to reasonable person with total hearing loss.

Obtaining evidence with which to analyze the perceptions of a reasonable individual with a given disability should not be an obstacle to the application of a test taking those unique perceptions into consideration. There are numerous organizations that exist to help individuals with disabilities which could be utilized as resources. Additionally, there have been many psychological studies involving the sensitivities and needs of disabled individuals which would also be excellent resources. Even if no such assistance is available, individuals with a given disability could testify, or parties could utilize an independent research organization involved with the specific disability to survey the perceptions of individuals with that disability.

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155 See supra note 23.
156 Id.
157 Surveys can be utilized in determining the perceptions of individuals in a protected class in regard to harassing conduct. In the sexual harassment context, courts have noted the availability and probative value of surveys in determining female perceptions of work environments. In Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991), the court found that the evidence set forth by the plaintiff supported her hostile work environment claim. In so holding, the court looked carefully at the evidence presented. That evidence included the expert testimony of a consultant on women and work environments. Id. at 1505-06. The court noted that the expert testified that the differential perception of sexual harassment is borne out by her own experiences and survey research. A study of federal employees by the Merit Systems Protection Board found that 11 to 12 percent more women than men characterized sexual remarks or materials of a sexual nature in the workplace as sexual harassment. Regarding the second of these categories, which consisted of letters, calls and materials of a sexual nature, including materials depicting sexually provocative poses, nude, and partially nude pictures, 87 percent of the women considered this behavior to constitute sexual harassment, in contrast to 76 percent of the men.

Id. at 1507 (trial transcript citations omitted).

Likewise, in Volk v. Coler, 638 F. Supp. 1555, 1560 (C.D. Ill. 1986), rev'd in part, 845 F.2d 1422 (7th Cir. 1988), the court took notice of informal survey data showing that seventy percent of the women surveyed had encountered some sort of sexual harassment in their work environment. However, in that case the court found the plaintiff failed to prove she was the victim of a hostile work environment. Id. The existence of the survey data mentioned in Robinson and Volk suggests that the perceptions of members of a definable class regarding harassment aimed at class members can be ascertained through the use of survey evidence. Of
individual suffers from a disability so rare that no method of obtaining insight into the perceptions of a reasonable person with that same disability is practical, the court should consider the perceptions of the actual victim in light of the perceptions of a reasonable person with a disability affecting the same major life function or functions as are affected by the victim's disability.

Even in circumstances where it would be hard to apply the reasonable person with the same disability standard, a more general standard that does not account for the different sensitivities associated with various disabilities should not be applied. Such a standard disregards the basic requirement of the ADA—that all qualified individuals with disabilities be afforded protection under the Act—by lumping all disabled individuals into a group and ignoring the different sensitivities attendant to the various disabilities covered by the ADA. For example, an epileptic might be no more offended than any other employee by conduct aimed at a paraplegic, and it would be inappropriate under the ADA not to consider the effect such conduct actually has on the paraplegic employee if it alters his terms or conditions of employment.

In *Ellison v. Brady*, the court discussed a similar concern in the context of sexual harassment. Holding that a reasonable person standard does not sufficiently consider the unique sensitivities of women, the court opined that a "reasonable woman" standard is necessary to preclude the perpetuation of conduct that women find offensive, because men, who do not share the same sensitivities as women, may not find the same conduct offensive. Likewise, a standard that does not account for the specific disability of an alleged victim of harassment does not properly consider the unique sensitivities of such an individual, and could lead to the perpetuation of conduct that individuals without disabilities, or individuals with other disabilities, do not find offensive, but which a reasonable person with the alleged victim's disability would. Such a construction is inconsis-

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158 924 F.2d 872 (9th Cir. 1991).
159 Id. at 879-81. *Harris* rejected an explicit reasonable woman standard, and applied a reasonable person standard, but that standard may indeed mean reasonable woman when the victim is female for the reasons set forth in *Ellison* and in *supra* note 37 of this Article. Regardless of the appropriate standard under Title VII, the reasoning set forth in *Ellison* for the standard applies as well in the disability context where courts have noted the variety of disabilities protected, see Prewitt v. United States Postal Serv., 662 F.2d 292, 307 (5th Cir. 1981), and that most people are not in a position to determine what a reasonable person with a specific disability would find hostile or abusive. *See supra* note 24.
tent with the command of the ADA, that any qualified individual with a disability be protected in the terms, conditions, or privileges of employment.\textsuperscript{160}

Of course, the standard proposed herein does not mandate that sensitivities common to all disabled individuals be ignored, only that they be considered in the context of the specific disability in question, and the added sensitivities created thereby. Thus, while it is conceivable that a working environment may be hostile to individuals with one specific disability, but not to individuals with other disabilities, if all disabled individuals in a work environment feel it is hostile toward them because of discrimination aimed at only one or a few disabled individuals, the standard is equally useful since, as long as a reasonable individual with the same disability as an alleged victim would have found the conduct sufficiently severe or pervasive, the standard will be met.

3. Consideration of Reasonable Accommodation in the ADA Hostile Work Environment Structure

The duty to reasonably accommodate an employee and thereby enable that employee to perform his or her job is a concept unique to disability discrimination law.\textsuperscript{161} Failure to accommodate by itself will rarely be sufficient to create a hostile work environment, and it need not be alleged to state a claim for hostile work environment under the ADA.\textsuperscript{162} The ADA protects any qualified individual with a disability, regardless of whether that person requires accommodation.\textsuperscript{163}

This does not mean that reasonable accommodation cannot be considered in connection with a hostile work environment claim.


\textsuperscript{161} The duty to reasonably accommodate is mandated both by the ADA, 42 U.S.C. § 12112(b)(5) (Supp. III 1991), and the Rehabilitation Act, \textit{supra} note 17, § 794(d) (utilizing the standards for employment discrimination set forth in Title I of the ADA). However, it should be noted that the term “reasonable accommodation” has applicability in contexts outside of disability discrimination law. For example, employers have a duty to reasonably accommodate the religious practices of employees under Title VII. \textit{See} Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60 (1986) (discussing the requirement of section 701(j) of Title VII regarding an employer’s obligation to accommodate the religious observances of employees). The duty to reasonably accommodate a disabled employee is unique in that such accommodation is required to enable the employee to perform his or her job. The accommodation of religious observances by an employer does not enable that employee to perform the job; it simply acknowledges that employees have a right to observe their religious beliefs without being discriminated against in employment to the extent that such observance does not impose an undue hardship on the employer. \textit{Id.} at 68-69.

\textsuperscript{162} The EEOC Proposed Guidelines, \textit{supra} note 10, provide for a harassment cause of action that does not require an allegation that an employer failed to reasonably accommodate. Likewise, the standard set forth in this Article does not require such an allegation.

under the ADA. Failure to reasonably accommodate can contribute to a hostile work environment, or in rare situations, even create such an environment.\textsuperscript{164} When failure to reasonably accommodate is alleged in conjunction with a hostile work environment claim, it should be incorporated as evidence relating to the severity and pervasiveness of the alleged conduct. A valid hostile work environment claim would therefore exist if a reasonable person with the same disability would have found the totality of the conduct alleged—including failure to reasonably accommodate—sufficiently severe and pervasive to alter the conditions of employment and create an intimidating, hostile, or abusive work environment.\textsuperscript{165}

Because failure to reasonably accommodate under appropriate circumstances can be considered intimidating, hostile, or even abusive, it can contribute to a hostile work environment.\textsuperscript{166} Consider an employee with a mental disability who requires extra sensitivity from her employer to properly perform the essential functions of her job, but instead, the employer ridicules and unnecessarily disciplines her, without providing appropriate supervision.\textsuperscript{167} Under such circumstances, the employer's conduct toward the employee might create, or contribute to, a hostile work environment. Moreover, the failure to accommodate by not providing appropriate supervision might also be perceived by a reasonable employee with the victim's disability as hostile or intimidating conduct contributing to a hostile work environment.

Failure to accommodate can also increase an employee's discomfort in the work environment by physically placing the employee in or near an area that exposes the employee to conduct that creates a hostile work environment. For example, suppose an employee requires an unusually large chair because of a chronic back disability about which he is self-conscious. Locating the employee's work station in the middle of a common area where the chair would clearly be noticed, instead of in an area with less office traffic, could lead to ridicule that he would not have faced in another location.\textsuperscript{168} Despite the em-

\textsuperscript{164} See, e.g., infra text accompanying notes 168-70, 177.

\textsuperscript{165} The "totality of the circumstances" for the conduct alleged standard is logical given the nature of hostile work environment claims, and is set forth in the EEOC Proposed Guidelines, supra note 10, at 51,269 (to be codified at 29 C.F.R. § 1609.1(e)).

\textsuperscript{166} See id. at 51,269 (to be codified at 29 C.F.R. § 1609.1(c)) and discussion supra part II.A.


\textsuperscript{168} Relocation of disabled employees has been deemed an appropriate accommodation in the Rehabilitation Act context. In Arneson v. Sullivan, 946 F.2d 90 (8th Cir. 1991), the court found that an employee suffering from apraxia, a disease which among other things causes distractibility, was a qualified individual with a disability, and set forth the appropriate accommodations for the employee. To accommodate the employee's distractibility the court sug-
ployer's accommodation of providing the chair, the employee might have a hostile work environment claim if he is ridiculed, because the accommodation, as effectuated, facilitated the ridicule that created the hostile work environment.\textsuperscript{169} Moreover, the effects of that ridicule might be compounded because he feels conspicuous. If the employee were placed in the less conspicuous area, whatever conduct he did face might not be considered sufficiently severe or pervasive to create a hostile work environment.\textsuperscript{170} At the very least, the manner of effectuating the accommodation would not have contributed to the creation of a hostile work environment.

One can also imagine situations where failure to accommodate by itself is sufficient to be the primary cause of a hostile work environment. While such situations will probably be rare, the possibility must be acknowledged.

For instance, consider an individual with a respiratory disorder such as emphysema, who works in a smoke-filled environment, and requests several times to be moved to a room with a separate ventilation system because the smoke interferes with her ability to work, and coworkers intentionally smoke more when she is present. She has made her requests in writing to company officers at several levels, but...
receives no response. Failure to provide the requested accommodation, or another reasonable accommodation, could create a hostile work environment, regardless of whether the conduct of her coemployees is considered.\footnote{In cases not involving harassment, the reasonableness of accommodations for employees with respiratory disorders working in smoke-filled environments have been considered. In Vickers v. Veterans Admin., 549 F. Supp. 85 (W.D. Wash. 1982), the employer was found to have accommodated an employee hypersensitive to tobacco smoke by securing a voluntary agreement not to smoke in the employee's office and the adjacent office, installing vents, purchasing an air purifier, and offering additional accommodations such as construction of a floor-to-ceiling partition around the employee's work area, movement of the employee's desk, and assignment to an outside job. In County of Fresno v. Fair Employment and Hous. Comm'n, 277 Cal. Rptr. 557 (Cal. Ct. App. 1991), the court considered a claim brought under California's Fair Employment and Housing Act, which looks to Rehabilitation Act law as guidance, and held that movement of employees with respiratory disorders to a separate room is an insufficient accommodation if the environment is so smoke polluted that only a ban on smoking could abate the smoke problem. \textit{Id.} at 566.} The smoke-filled office itself interferes with her ability to work due to her disability and that situation is intentionally exacerbated when she is present.

Requiring the employee to remain in that environment subjects her to added exposure to smoke because her coworkers smoke more when she is present, and such exposure worsens the employee's condition. Thus, it is possible that a reasonable employee with the complainant's disability would believe the employer's conduct in not providing the requested accommodation under the circumstances was sufficiently severe and pervasive to create a hostile or abusive working environment.

Under such circumstances, failure to accommodate merges into the concept of hostile work environment, because the accommodation requested is removal from the work environment, the conditions in that work environment interfere with the terms and conditions of employment, and such removal would end the effects of the hostile work environment.\footnote{The employee might also argue that the conduct of the smokers created the hostile work environment, because they smoked more when she was present, and that the employer's failure to accommodate creates vicarious liability under the test set forth in part III, infra. The failure to accommodate could demonstrate that the employer failed to take immediate and appropriate remedial action. \textit{Id.} at part III. This would be the better approach if the evidence did not demonstrate that the employer's conduct in not providing the accommodation created a hostile or abusive working environment.} Of course, if the coworkers ridicule the employee after she is relocated, a claim for hostile work environment might still arise.

Significantly, accommodating the employee's request to move from a smoke-filled office is not the same as transferring the victim of workplace harassment to a different work location, while allowing the
harasser to remain, in an attempt to alleviate the harassment.\(^{173}\) Courts have held that such transfers violate Title VII because they punish the victim for the harasser's conduct.\(^{174}\) This analysis is also applicable in the ADA context,\(^{175}\) but because the transfer from the smoke-filled office situation would be a reasonable accommodation requested by the harassment victim, it would not violate the ADA.

Likewise, the situation involving the employee with emphysema is distinguishable from other situations, such as where the accommodation is a change in desk location.\(^{176}\) The smoking situation is different in that the environment itself is hostile to the employee because of her disability, and failure to accommodate her aggravates both the work environment and the disability. In the other situation, it is the employee's location in the environment that causes others to ridicule him, but the environment itself is not dangerous to the employee. Thus, the failure to accommodate does not create the hostile work environment, but enables others to do so.\(^{177}\) However, in both scenarios the accommodation should be granted to help avoid hostile work environment liability.

Where failure to accommodate is not alleged in connection with a hostile work environment claim, the general test set forth in this Article should apply.\(^{178}\) To comply with the duty to prevent the creation of a hostile work environment, employers should provide adequate policies and training for coworkers and supervisors.\(^{179}\) Arguably, when an employee puts an employer on notice about a hostile work environment, the employer's failure to adequately deal with that situation, or to implement appropriate policies, could be deemed failure to reasonably accommodate if the resulting hostile work environ-

\(^{173}\) See Ellison v. Brady, 924 F.2d 872, 882 (9th Cir. 1991) (opining that it is inappropriate to transfer the victim of harassment to a less desirable location to alleviate the harassment).

\(^{174}\) See, e.g., id.

\(^{175}\) See discussion supra part I.C.1 (regarding the applicability of Title VII law to ADA claims).

\(^{176}\) See supra text accompanying notes 168-70.

\(^{177}\) One could argue that the same is true of the smoke-filled environment hypothetical, because the victim's location near coemployees who intentionally smoke more around her enables those coemployees to create a hostile work environment. However, the hostile work environment could be created even if the coemployees did not smoke more around the victim, but merely smoked heavily throughout the day. Additionally, the smoke-filled work environment is the primary cause of the victim's complaints, and the extra smoke caused by intentional conduct of coemployees aimed at the victim does not create the hostile work environment, it only exacerbates it.

\(^{178}\) See discussion supra part II.B.2.

\(^{179}\) EEOC Proposed Guidelines, supra note 10, at 51,269 (to be codified at 29 C.F.R. § 1609.2(d)).
ment prevents employees from performing essential job functions.\textsuperscript{180}

III. EMPLOYER LIABILITY FOR HOSTILE WORK ENVIRONMENT UNDER THE ADA

A. The General Standard of Employer Liability for Conduct That Creates a Hostile Work Environment

Employer liability for conduct that creates a hostile work environment has been addressed by both the EEOC and the courts. The \textit{EEOC Guidelines on Discrimination Because of Sex} suggest that employers are strictly liable for the conduct of their agents and supervisors, and should be held liable for the conduct of coworkers if the employer knew or should have known of the conduct, yet failed to take adequate remedial action.\textsuperscript{181} In \textit{Meritor Savings Bank v. Vinson}, the Supreme Court rejected the strict liability standard, holding that general agency principles should be utilized to determine employer liability for the conduct of supervisors.\textsuperscript{182} Some courts have addressed the issue of liability for the conduct of nonsupervisory employees, generally holding that employers should be liable for the conduct of coworkers, where they knew or should have known of the conduct and failed to take appropriate remedial action as set forth by the EEOC.\textsuperscript{183} Other courts have modified these principles in analyzing hostile work environment claims brought under state discrimination statutes.\textsuperscript{184}

The EEOC Proposed Guidelines would make an employer liable for its conduct and that of its agents and supervisory employees, where the supervisory employee alleged to be the harasser is acting in

\textsuperscript{180} However, it is unnecessary to analyze this issue in depth, because the cause of action for hostile work environment is available to a qualified individual with a disability whether or not that environment itself prevents the employee from performing the essential functions of the job. \textit{See} discussion \textit{supra} part II.B.2 (setting forth test).

\textsuperscript{181} EEOC Guidelines on Sex Discrimination, \textit{supra} note 25, \S 1604.11(c), (d).


\textsuperscript{183} \textit{See}, e.g., Ellison v. Brady, 924 F.2d 872, 881-83 (9th Cir. 1991) (looked to the EEOC Compliance Manual to help determine what action is required to remedy harassment by coworkers); \textit{Hall v. Gus Constr. Co.}, 842 F.2d 1010, 1015-16 (8th Cir. 1988) (employer is liable if management level employees knew or should have known of offensive conduct and failed to take remedial steps to end that conduct).

\textsuperscript{184} \textit{See}, e.g., \textit{Lehmann v. Toys 'R' Us, Inc.}, 626 A.2d 445, 460 (N.J. 1993) (Under New Jersey Law Against Discrimination, in a hostile work environment case an employer is strictly liable for traditional employment damages such as back pay, reinstatement, front pay, and equitable relief, for compensatory damages based on general agency principles, and for punitive damages only if there is a showing of maliciousness or willfulness on the part of the employer.).
an agency capacity, or when the employer knew or should have known of the conduct and failed to take immediate and appropriate corrective action. An employer would also be liable for the conduct of coworkers where the employer, its agents, or supervisory personnel knew or should have known of the conduct, and the employer failed to take immediate and appropriate corrective action. Under the Proposed Guidelines, an employer can also be liable for the acts of nonemployees in appropriate circumstances. Additionally, employers are advised to take all steps necessary to prevent harassment, such as providing sensitivity training and implementing an effective policy against harassment with an appropriate complaint procedure and sanctions, both of which should be made available to all employees.

The standards for employer liability under Title VII case law and the EEOC Proposed Guidelines are essentially the same. For the most part, they are appropriate in the ADA context, but only if modified to account for the specific language of the ADA.

B. Employer Liability and the ADA's Mandate Regarding Methods of Administration

The language of the ADA provides a basis for employer liability

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185 The EEOC Proposed Guidelines provide that an employer is liable for its conduct and that of its agents and supervisory employees:

[regardless of whether the employer knew or should have known of the conduct, where the harassing supervisory employee is acting in an "agency capacity." To determine whether the harassing individual is acting in an "agency capacity," the circumstances of the particular employment relationship and the job functions performed by the harassing individual shall be examined. "Apparent authority" to act on the employer's behalf shall be established where the employer fails to institute an explicit policy against harassment that is clearly and regularly communicated to employees, or fails to establish a reasonably accessible procedure by which victims of harassment can make their complaints known to appropriate officials who are in a position to act on complaints.

186 Id. (to be codified at 29 C.F.R. § 1609.2(a)).

187 Id. (to be codified at 29 C.F.R. § 1609.2(b)).

188 Id. (to be codified at 29 C.F.R. § 1609.2(c)) (stating that an employer can be liable for the harassing conduct of nonemployees when the employer, its agents, or supervisory personnel knew or should have known of the conduct, and failed to take immediate and appropriate corrective action, as feasible. In making such an assessment, consideration should be given to the extent of the employer's control over the nonemployees and any legal responsibility the employer had regarding their conduct.).

189 Id. (to be codified at 29 C.F.R. § 1609.2(d)).

190 Once again, the EEOC Proposed Guidelines set forth an excellent starting point, but fail to consider the dichotomy between the ADA and the other statutes covered by the Guidelines. Id. (to be codified at 29 C.F.R. § 1609.2).
in the hostile work environment context. The Act prohibits the use of methods of administration that have a discriminatory effect or perpetuate the discrimination of others subject to the employer's common control. All employees, supervisory or nonsupervisory, are subject to the common control of the employer, and methods of administration can include both administrative action and inaction.

Viewing this in the context of an employer's duty to take action to prevent harassment, an employer cannot have policies that enable supervisors to create a hostile work environment or fail to have adequate policies against harassment with appropriate reporting procedures. Additionally, employers must utilize methods of administration or discipline that are aimed at preventing coworkers from harassing employees. Employers cannot use any other method of administration that has the effect of creating or perpetuating harassment. If an employer does not utilize appropriate methods of

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192 The fact that employers are able to take action to remedy harassment by coemployees, see Ellison v. Brady, 924 F.2d 872, 881-83 (9th Cir. 1991), and supervisors, see Andrews v. City of Phila., 895 F.2d 1469, 1486 (3d Cir. 1990), demonstrates that while an employer cannot control every action of an employee, all employees are subject to the common control of the employer by virtue of the employment relationship. Otherwise, employers could not enforce remedial measures necessary to vitiate a hostile work environment.

In Hunter v. Allis-Chalmers Corp., Engine Div., 797 F.2d 1417 (7th Cir. 1986), a racial harassment case, the court held that, regarding employer liability for the intentional acts of employees, an employer is directly liable (that is, independently of respondeat superior) for those torts committed against one employee by another, whether or not committed in furtherance of the employer's business, that the employer could have prevented by reasonable care in hiring, supervising, or if necessary firing the tortfeasor. Id. at 1422 (citations omitted). This language, which was cited in Hall v. Gus Constr. Co., 842 F.2d 1010, 1016 (8th Cir. 1988), demonstrates that employees are under the common control of the employer who controls their hiring, supervision, and termination.

193 An employer who fails to take adequate remedial action in response to a hostile work environment can be liable under Title VII. See, e.g., Ellison, 924 F.2d at 881-83. Thus, liability for methods of administration can be based on administrative inaction as well as action. Similarly, in cases brought under 42 U.S.C. § 1983, courts have held municipalities liable for a policy of inaction, see Oviatt v. Pearce, 954 F.2d 1470 (9th Cir. 1992) (award against municipality upheld in favor of arrestee when municipality's inaction regarding the incarceration of detainees without prompt pretrial procedures amounted to deliberate indifference regarding arrestee's constitutional rights), and have held that failure to act can constitute a policy which subjects a municipality to liability, see Reynolds v. Borough of Avalon, 799 F. Supp. 442 (D.N.J. 1992) (failure of policymaking officials to take action regarding sexual harassment could be actionable, but only if it rises to the level of deliberate indifference).

194 Ellison, 924 F.2d at 882; EEOC Proposed Guidelines, supra note 10, at 51,269 (to be codified at 29 C.F.R. § 1609.2(d)).

195 And in appropriate circumstances nonemployees. See EEOC Proposed Guidelines, supra note 10, at 51,269 (to be codified at 29 C.F.R. § 1609.2(e)) (providing that in appropriate circumstances an employer can be liable for a hostile work environment created by non-employees).
administration, that employer should be strictly liable for conduct which creates a hostile work environment.

The language of the ADA necessarily leads to this conclusion. The ADA’s mandate regarding methods of administration is clear, and violation of the mandate enables the creation or perpetuation of the hostile work environment. If appropriate methods of administration are utilized, employer liability should be guided by the standards set forth in Part III.D.

C. Use of ADA Defenses to an Alleged Failure to Accommodate in the Context of a Hostile Work Environment Claim

The ADA provides employers accused of failing to reasonably accommodate with the defense that the requested or necessary accommodation would impose an undue hardship on the operation of the employer’s business. Additionally, the Civil Rights Act of 1991 provides a defense to damage awards upon a claim that the employer failed to reasonably accommodate, if the employer demonstrates that it made good faith efforts, in consultation with the employee, to identify and make a reasonable accommodation that would provide the employee equal opportunity and would not impose undue hardship on the employer. Likewise, if an employee is offered a reasonable accommodation but refuses it, the employer will not be liable for failure to accommodate under the ADA.

If these defenses, or any others, are available to an employer in the context of an alleged failure to reasonably accommodate, such defenses should also be available when failure to accommodate is alleged in connection with a hostile work environment claim. However, those defenses should only be available to the extent that they rebut the alleged failure to reasonably accommodate. Suppose an employer successfully asserts a valid defense to the allegation that it failed to

197 In the context of liability for the conduct of supervisors, this standard is in agreement with the EEOC Proposed Guidelines. The Proposed Guidelines would hold an employer who does not have an effective complaint procedure liable for the acts of supervisors because such supervisors are given apparent authority under those circumstances. See EEOC Proposed Guidelines, supra note 10, at 51,269 (to be codified at 29 C.F.R. § 1609.2(a)(2)). However, the standard proposed herein would impose liability on an employer if any of its methods of administration have the effect of creating or perpetuating a hostile work environment, regardless of whether the harassing conduct alleged was perpetrated by a supervisory or nonsupervisory employee.
200 EEOC ADA Regulations, supra note 28, § 1630.9(d).
201 See discussion supra part II.B.3.
reasonably accommodate, and such failure is alleged to have contributed to a hostile work environment. If the remaining allegations are sufficient to maintain the cause of action for hostile work environment, the complainant should be able to proceed, and the court should determine the appropriate disposition of the evidence related to the failure to accommodate claim.

The disposition of defenses to an alleged failure to reasonably accommodate would depend on the facts of each case, because issues such as "undue hardship" and "good faith" will be decided by the trier of fact based on the available evidence. Thus, even in those rare cases where the failure to accommodate is alleged as the primary cause of the hostile work environment, the applicability of defenses will likely be determined fairly, in accordance with the requirements of the ADA, the facts of the case, and the rules of the court involved.

D. The Appropriate Test to Determine Employer Liability for the Conduct of Supervisory and Nonsupervisory Employees

Based on the foregoing interpretation of the law regarding employer liability for conduct creating a hostile work environment, including the EEOC Proposed Guidelines, the following test for such liability under the ADA is suggested: An employer is liable for its conduct and that of its supervisory personnel when the supervisory personnel, whose conduct created the hostile work environment, were acting in an agency capacity or when the employer knew or should have known of the conduct, and failed to take immediate and appropriate remedial action. An employer is liable for the conduct of nonsupervisory personnel when the employer, its agents, or supervisory personnel knew or should have known of the conduct, and the employer failed to take immediate and appropriate remedial action.

The appropriateness of remedial action should be guided by existing

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203 See discussion supra part II.B.3.

204 An employer may also be liable for the conduct of nonemployees when the employer, its agents, or supervisory employees knew or should have known of the conduct and failed to take immediate and appropriate corrective action, as feasible. In such cases, the extent of the employer's control over nonemployees and any other legal responsibility that the employer had with respect to their conduct should be considered. EEOC Proposed Guidelines, supra note 10, at 51,269 (to be codified at 29 C.F.R. § 1609.2(c)).
However, if an employer's methods of administration have a discriminatory effect or perpetuate the discrimination of others subject to common administrative control, thus enabling the creation or perpetuation of harassment, the employer will be strictly liable for conduct that creates a hostile work environment. In this regard, there should be a rebuttable presumption\(^{206}\) that such methods of administration

\(^{205}\) The language of the employer liability section of the EEOC Proposed Guidelines which requires "immediate and appropriate corrective action," id. (to be codified at 29 C.F.R. § 1609.2(a)(1)), is similar to the EEOC Guidelines on Sex Discrimination, supra note 25, § 1604.11(d), which apply to Title VII, and also require "immediate and appropriate corrective action" (in response to the harassing conduct of coemployees). Additionally, the concept of hostile work environment which should be applied to harassment of disabled individuals arose in Title VII law. See discussion supra part II.A. Thus, cases dealing with the appropriateness of remedial action for hostile work environments under Title VII are instructive in the context of disabled individuals.

There is an abundance of Title VII case law dealing with the appropriateness of remedial action in relation to conduct creating a hostile work environment. For example, in Ellison v. Brady, 924 F.2d 872, 881-83 (9th Cir. 1991), the court held that the temporary transfer of an employee whose conduct created a hostile work environment might be an insufficient remedy if that employee returned to his former location, and remanded so that the district court could determine the impact on the victim of the return of the harasser to the office where the victim was located. Id. at 882-83. Cases from other circuits, some of which are cited in Ellison, have also considered the sufficiency of remedies aimed at alleviating a hostile work environment, and have created general tests or found specific remedies to be necessary or sufficient. See Andrews v. City of Phila., 895 F.2d 1469, 1486 (3d Cir. 1990) (employer must investigate complaints and take appropriate action to curb sexism); Dornhecker v. Malibu Grand Prix Corp., 828 F.2d 307, 309 (5th Cir. 1987) (remedies must be "assessed proportionately to the seriousness of the offense," and assurance that victim would not have to work with harasser after return from the business trip which victim was on, which assurance came within twelve hours of complaint, was sufficient); Barrett v. Omaha Nat'l Bank, 726 F.2d 424, 426-27 (8th Cir. 1984) (full investigation, reprimand of harasser, and placement of harasser on ninety-day probation with a warning that further misconduct would result in discharge, was sufficient to remedy a hostile work environment); Katz v. Dole, 709 F.2d 251, 256 (4th Cir. 1983) (employer must take measures reasonably calculated to end harassment, and an ineffective sexual harassment policy is insufficient).

\(^{206}\) The utilization of rebuttable presumptions in the context of employment discrimination cases is not uncommon. Recently, in St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742 (1993), the Supreme Court utilized a rebuttable presumption in a disparate treatment case. In so doing, the Court defined the concept of a presumption and explained how, in the disparate treatment context, a presumption could be rebutted, referring to Federal Rule of Evidence 301:

To establish a "presumption" is to say that a finding of the predicate fact (here, the prima facie case) produces "a required conclusion in the absence of explanation" (here, the finding of unlawful discrimination). Thus, the \textit{McDonnell Douglas} presumption places upon the defendant \dots the burden of "producing evidence" that the adverse employment actions were taken "for a legitimate, nondiscriminatory reason." \"[t]he defendant must clearly set forth, through the introduction of admissible evidence," reasons for its actions which, \textit{if believed by the trier of fact}, would support a finding that unlawful discrimination was not the cause of the employment action. It is important to note, however, that although the \textit{McDonnell Douglas} presumption shifts the burden of \textit{production} to the defendant, \"[t]he ultimate burden of persuading the trier of fact that the defendant intentionally
have a discriminatory effect or perpetuate the discriminatory conduct of others, when the employer does not have in place an effective policy against harassment, an appropriate complaint procedure for the victims of harassment, appropriate sanctions against employees perpetuating harassment, including supervisory employees, or training regarding harassment when economically feasible for the employer.\textsuperscript{207} No policy or procedure is appropriate if it is not clearly communicated to all of the employer's agents and employees, both supervisory and nonsupervisory.\textsuperscript{208}

When failure to reasonably accommodate is alleged in connection with a hostile work environment claim, all defenses applicable to that allegation should remain available. However, such defenses are only applicable to rebut the claim that the employer failed to reasonably accommodate. If such defenses are successfully asserted regarding the allegation that the employer failed to reasonably accommodate, the claim of hostile work environment will remain viable so long as the remaining evidence, taken as a whole, is sufficient to maintain such a claim.\textsuperscript{209}

CONCLUSION

Employment discrimination law is undergoing a major transformation. Among the most significant changes is the effectuation of the Americans with Disabilities Act which prohibits, inter alia, discrimination against disabled individuals in regard to employment, public services, public accommodations, and services operated by private entities. The ADA is the first federal legislation to provide protection for disabled individuals, regardless of whether the employer is public, private, or receives federal funding. The Act’s proscription on em-

\textsuperscript{207} EEOC Proposed Guidelines, \textit{supra} note 10, at 51,269 (to be codified at 29 C.F.R. § 1609.2(d)) (employers should effectuate appropriate policies and procedures to prevent harassment). Regarding the necessity that such policies be effective, see \textit{Katz}, 709 F.2d at 256 (harassment policy which is ineffective will not preclude employer liability).

\textsuperscript{208} EEOC Proposed Guidelines, \textit{supra} note 10.

\textsuperscript{209} \textit{Id.} at 51,269 (to be codified at 29 C.F.R. § 1609.1(e)) (in determining whether conduct constitutes harassment the record as a whole should be considered).
HARASSMENT AND THE ADA

Employment discrimination is broad, and the remedies available for ADA claims pursuant to the Civil Rights Act of 1991 include compensatory and punitive damages. It is therefore imperative that the bases for the causes of action available under the ADA, and their structures, be set forth early. This will provide employers with the opportunity to take preventive action, and disabled individuals, many of whom have never been protected against such a broad array of discriminatory employment practices, with a consistent remedy when they are the victims of employment discrimination.

Among the discriminatory employment practices prohibited by the ADA is workplace harassment. The language of the Act, which clearly forbids discrimination in relation to any term, condition, or privilege of employment, and prohibits methods of administration that have a discriminatory effect or perpetuate the discrimination of others under an employer's common control, acknowledges such a cause of action. The basis for an actionable claim of workplace harassment is that harassing conduct interferes with the terms and conditions of employment. Also, an employer's methods of administration are important in establishing employer liability for the conduct of employees.

Additionally, the EEOC has proposed guidelines on harassment, which protect disabled employees, as well as several other classes, from workplace harassment. These guidelines demonstrate the availability of such a cause of action, although they do not discuss the statutory basis for it under the ADA. Because the EEOC Proposed Guidelines are not binding, and do not specifically account for some of the unique provisions of the ADA or needs of disabled individuals, it is important to analyze the cause of action in light of its statutory basis, and to develop a workable structure accordingly.

Based on the case law applicable to workplace harassment under Title VII, state discrimination statutes, the EEOC Proposed Guidelines, and common law theories used under the Rehabilitation Act, the best theory of liability to be utilized in connection with claims for workplace harassment under the ADA is "hostile work environment." However, in order to provide a workable structure for hostile work environment claims under the ADA, the test for hostile work environment developed under Title VII must be modified to account for the unique provisions of the ADA and concerns relating to disability-based discrimination. Unfortunately, the EEOC Proposed Guidelines, while an excellent starting point, apply to too many classes to account for the specific concerns applicable to workplace harassment of disabled employees.
Likewise, the traditional standards for employer liability in connection with workplace harassment must be modified to account for the dichotomy between hostile work environment claims brought under the ADA, and those brought under other discrimination statutes. Additionally, whether dealing with the structure of the hostile work environment cause of action under the ADA, or employer liability for such a claim, the applicability of the concept of reasonable accommodation, and the defenses to claims that an employer failed to reasonably accommodate, must be integrated into the hostile work environment theory. However, this must be done in such a manner that failure to reasonably accommodate need not be alleged to successfully state a claim for hostile work environment, but can be asserted in connection therewith when appropriate.

The structure for the hostile work environment cause of action under the ADA set forth in this Article provides a workable framework for such claims. It can augment the EEOC Proposed Guidelines if they are codified as presently expressed, or influence their revision in relation to the ADA. Regardless of the structure applied, there is a significant statutory basis for such a cause of action. Thus, attacks on the availability of a hostile work environment cause of action under the ADA should not prevail.

The ADA provides disabled individuals with protection in all the terms and conditions of employment, regardless of whether their employers receive government funding. This development is long overdue. Now that such rights do exist, delineating their statutory basis and setting forth workable standards for their application is necessary to insure compliance with the Act, and to provide a framework within which those rights can be protected.