AN ANALYSIS OF THE APPLICABILITY OF HOSTILE WORK ENVIRONMENT LIABILITY TO THE ADA

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In recent years, the development of a large body of federal anti-discrimination law has had a significant impact on the American workplace. Due to the enactment of Title VII of the Civil Rights Act of 1964 ("Title VII"), the Age Discrimination in Employment Act ("ADEA"), and the Americans with Disabilities Act ("ADA"), employers have become cognizant that their actions, or the actions of their employees, may subject them to legal liability. This heightened awareness has shaped the employment relationship as employers strive to comply with the discrimination statutes and employees continue to assert their rights under these laws.

The hostile work environment theory of liability has had a profound effect on employment law. It is a recognized and well-established theory of recovery under Title VII. In the past, however, the hostile work environment cause of action had been confined to Title VII in its application. Currently, there is a controversial question on the horizon: can a hostile work environment theory of liability exist under the ADA?

This issue has emerged from recent ADA case law. The ADA is a nebulous statute that includes several terms and definitions that may be subject to various interpretations. Therefore, many of the early lawsuits under the ADA focused on clarifying terms such as "disability." In fact,
"[s]ince the passage of the ADA, much of the material discussing [its] employment provisions has focused on the duty to provide reasonable accommodation." Currently, the focus is shifting to the hostile work environment question. While some criticize extending the theory from Title VII to the ADA, several federal district courts have held that hostile work environment claims are actionable under the ADA. Although no federal appeals court has explicitly ruled on the issue of whether such claims exist, several circuits have assumed that courts will recognize hostile work environment claims relating to disability. While some view the recognition of hostile work environment claims under the ADA as a logical and necessary extension of the theory, others see it as one more superfluous obstacle in the minefield of discrimination liability employers already face.

This comment will explore whether the expansion of hostile work environment liability to the ADA is desirable and, more importantly, whether it is even workable. Part I examines the ADA itself, including the relevant language of the statute, the legislative history, and the Equal Employment Opportunity Commission ("EEOC") regulations issued pursuant to the statute. Part II analyzes the recent trend of employee-based lawsuits against their employers under the ADA for creating or acquiescing to a hostile work environment. Part III contrasts the ADA and Title VII to determine if the construction, history, and interpretation of the statutes are similar enough to permit the extension of the hostile work environment theory to the ADA. Part IV identifies and analyzes the arguments in favor of and against applying hostile work environment liability to the ADA. Part V examines Frank Ravitch’s proposal for using a modified Title VII hostile work environment framework to provide a remedy for workplace harassment under the ADA. Finally, Part VI provides some suggestions and final thoughts on this issue.

6. See infra Part IV.
I. EXAMINATION OF THE ADA

A. Statutory Language

The text of the ADA is critical to the determination of whether a cause of action for hostile work environment liability exists under the ADA. The language of the statute provides an excellent starting point for analysis. The relevance of the discussed provisions will emerge more clearly in subsequent sections. At this point, it suffices to merely identify the germane portions of the statute so that they may be referenced when the issue of hostile work environment claims under the ADA is explored further.

First, it is useful to examine the congressional findings because they provide the justifications and motivations for the enactment of the ADA. Congress reports that 43,000,000 Americans are disabled in some way and that this number is increasing. Historically, society has discriminated against disabled individuals by isolating and segregating them; this discrimination continues to be a pervasive social problem affecting many areas, including employment. The unequal treatment of disabled individuals stems from "stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society."

Unlike individuals who face discrimination because of race, color, sex, national origin, religion, or age, Congress found that individuals who suffer because of their disability are often left without legal recourse against such discrimination. Congress' recognition of this fact is indicative of its intent to provide disabled individuals with the same rights that protected classes receive under Title VII and the ADEA. However, since hostile work environment is a permissible theory of liability under Title VII, disabled individuals are not on equal footing with other protected classes if they have no legal remedy to redress harassment in the workplace. Thus, these legislative findings strengthen the argument in favor of recognizing hostile work environment as a viable cause of action under the ADA.

Finally, the legislative findings also indicate that society bears the cost of employment discrimination against disabled individuals when such
individuals are kept in a position of dependency and non-productivity.\textsuperscript{12} Therefore, a proper goal of Congress is to "assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals."\textsuperscript{13}

Congress also addresses the purpose of the ADA and breaks it down into four prongs:

1. to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

2. to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

3. 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

4. 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.\textsuperscript{14}

These explicitly stated purposes highlight the importance of resolving the uncertainty of whether hostile work environment claims may be brought under the ADA. Consistency and clarity cannot be achieved until this issue is resolved.

In addition to the findings and purpose of the ADA, the statutory definition of discrimination contained in Title I of the ADA is crucial to the issue at hand.\textsuperscript{15} The question of whether hostile work environment claims are viable under the ADA depends on whether disability harassment can be defined as "discrimination." As a general rule, the statute provides: "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to...[various employment practices] and other terms, conditions, and privileges of employment."\textsuperscript{16} This language of "terms, conditions, and privileges of employment" supports extending hostile work environment liability to the ADA because Title VII contains virtually identical language.\textsuperscript{17}

\textsuperscript{12} Id. § 12101(a)(9) (West 2000).
\textsuperscript{13} Id. § 12101(a)(8) (West 2000).
\textsuperscript{14} Id. § 12101(b) (West 2000).
\textsuperscript{15} Title I is the section of the ADA applicable to employment. Id. §§ 12111-12117.
\textsuperscript{16} 42 U.S.C.A. § 12112(a) (West 2000).
B. Legislative History

The findings discussed above are the distilled product of the vast legislative history of the ADA. Yet, it is still useful to delve further into the legislative history because it will shed more light on the policy reasons underlying the statute’s enactment.

As the findings demonstrate, the discrimination targeted by the ADA imposes a great burden on the government and society in general. Failure to allow disabled individuals to enter the workforce and perform at their highest capacity costs the United States economy between $200 billion and $300 billion a year in support payments and lost productivity. However, the overwhelming majority of unemployed disabled individuals indicated that they wanted to work and could not find a job. In fact, eighty-two percent of disabled individuals said they would give up their government benefits in exchange for a full-time job.

The legislative history also reveals employers’ fears about employing disabled individuals, such as increased insurance costs and expensive workplace accommodations. However, a study of 1,452 disabled employees should prove that these fears are unfounded. It concluded that ninety-one percent of the disabled workers had an average or above average performance rating, ninety-three percent rated average or above average with respect to job stability, seventy-nine percent had at least average attendance records, and the disabled employees’ co-workers did not resent the accommodations that were made to allow the disabled individuals to perform their duties. “The continuing effect of mistaken stereotypes across the spectrum of employers... is likely the single greatest factor in keeping most working age adults with disabilities out of the economic mainstream of our Nation.”

Understanding the policy behind the ADA is necessary in order to determine whether a hostile work environment theory of liability comports with the policy. Disability harassment is often predicated on stereotypes and myths about the disabled, and may interfere with disabled individuals’ productivity in the workforce. Therefore, it seems as if the legislative history of the ADA not only permits, but demands, that courts recognize hostile work environment as a theory of recovery under the ADA.

19. Id.
20. Id. (citing S. REP. NO. 101-116, at 9 (1989)).
21. Id.
22. Id. at 496.
C. EEOC Regulation

The EEOC has issued Proposed Guidelines on harassment that allow individuals discriminated against in the workplace because of race, color, religion, gender, national origin, age, or disability to bring a harassment claim. The guidelines, though not binding, bring the ADA into the Title VII hostile work environment rubric and indicate that the EEOC supports such an extension of hostile work environment liability. Clearly, a hostile work environment cause of action is feasible under the ADA.

II. RECENT TREND: HOSTILE WORK ENVIRONMENT CASES BROUGHT UNDER THE ADA

A. District Court Decisions Recognizing the Hostile Work Environment Cause of Action Under the ADA

In *Haysman v. Food Lion*, a federal district court in Georgia ruled that a harassment claim is actionable under the ADA. Haysman, the assistant manager of a supermarket, suffered an on-the-job injury to his back and knee that required surgery. As a result, his doctor ordered limitations on his physical activity, and gave him a permanent disability rating of seven percent. In addition, the physical injury exacerbated Haysman’s pre-existing emotional disorder, so he was given a twenty percent permanent partial disability rating based on his psychological problems. When he returned to work, Food Lion created a special position for Haysman that required him to perform various lightweight duties such as dusting shelves and greeting customers. Although this was a lower level position than the one Haysman previously held as assistant store manager, Haysman was no longer qualified for his prior position because of his inability to perform heavy lifting and his sporadic attendance due to his injury.

Haysman contended that when he returned to work after being on disability, his supervisors subjected him to verbal harassment and physical

25. *Id.*
27. *Id.* at 1097.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* at 1102-03.
He alleged that the store manager accused him of "snowballing" the company with his disability. Haysman also alleged that the assistant manager told him he had to work every minute of his shift, regardless of his pain, and that he "would break him" and was going to "ride him until he quit." Additionally, Haysman said his supervisor used extreme profanity toward him, and he would strike or kick Haysman’s injured back or knee when he passed by. Haysman argued that Food Lion failed to reasonably accommodate him because the harassment was an attempt to force him to leave his employment with the store.

The court ruled that the type of harassment Haysman alleged is actionable under the ADA, but it rejected the "reasonable accommodation" analysis. Instead, the court held that the claim should be based on either a hostile work environment or a constructive discharge theory. The court adopted the Title VII framework for hostile work environment, and found that a material question of fact existed as to whether Food Lion was liable to Haysman for fostering a hostile work environment.

This case provides a significant benchmark for ADA hostile work environment liability. Despite the fact that an employer did not deny a disabled person employment, and although it provided reasonable accommodations for his disability, the court indicated that an employer can still be exposed to liability under the ADA for creating a verbally and physically abusive work environment.

Lanni v. New Jersey presents another, more recent case in which a federal district court denied the defendants’ motion for summary judgment and allowed a jury to hear an employee’s ADA-based hostile work environment claim. In Lanni, the plaintiff-employee, a radio dispatcher for a division of the state Department of Environmental Protection, suffered from dyslexia and other related neurological impairments which resulted in slow speech and memory problems. The alleged harassment by co-workers and supervisors included pasting pictures of Lanni on a life-sized turkey decoy and onto a photograph of a person in a wheelchair; repeatedly and publicly correcting Lanni’s spelling mistakes (once by leaving an open

32. Id. at 1098.
33. Id.
34. Id.
35. Id.
36. Id. at 1100.
37. Id. at 1106.
38. Id.
39. The court identifies four elements of a hostile work environment claim by relying on sexual harassment precedent. See infra p. 727 and note 85.
42. See Smith, supra note 4 (discussing the legal repercussions of Lanni).
43. Lanni, 177 F.R.D. at 298.
dictionary next to a highlighted error in the logbook); and calling him derogatory names, such as "dunce," "stupid," and "moron." Lanni also claimed his co-workers joked about shooting him and drew their guns in his presence.

In defense, the State contended that such joking was good-natured and consensual, and that Lanni himself often participated in the teasing. The State's lawyer, Barbara Ann Berreski, cited instances when co-workers routinely gave Lanni rides home and collected money for him when his house burned down to illustrate that the conduct was not mean-spirited and that no animus was harbored toward Lanni. Nevertheless, the jury awarded Lanni $227,000 in damages, making it one of the first verdicts for a plaintiff in a lawsuit alleging hostile work environment under the ADA.

However, while many federal district courts seem willing to embrace the Title VII hostile work environment theory of liability under the ADA, the next section will show that the circuit courts have been more tentative in their approach.

B. The Treatment of Hostile Work Environment Claims Under the ADA in Federal Courts of Appeals

The federal courts of appeals have been more hesitant to accept the hostile work environment claim as a cause of action under the ADA. When faced with the issue, many circuits have opted to assume the existence of such a cause of action rather than directly decide the question. These circuits have been able to circumvent the issue because the cases have not been factually appropriate to apply the theory. The following examples illustrate the way the circuit courts have handled hostile work environment under the ADA thus far.

In McConathy v. Dr. Pepper/Seven Up Corp., a benefits manager afflicted with a jaw disease filed suit against her employer, asserting

44. This alleged harassment was set forth in the unpublished December 1997 opinion of the New Jersey Court. See Smith, supra note 4, at 24-25.
45. Id.
46. Id. at 25.
47. Id.
48. Id. at 24.
49. See, e.g., Mannell v. Am. Tobacco Co., 871 F. Supp. 854 (E.D. Va. 1994) (accepting the hostile work environment theory of liability, but holding that plaintiff did not make out a prima facie claim of violation); Davis v. York Int'l Inc., 1993 WL 524761 (D. Md. 1993) (denying the employer's motion for summary judgment on the issue of whether the employer was liable for workplace harassment under the ADA).
50. See e.g., McConathy v. Dr. Pepper/Seven Up Corp., 131 F.3d 558 (5th Cir. 1998); Wallin v. Minnesota Dep't of Corrections, 153 F.3d 681 (8th Cir. 1998).
51. 131 F.3d 558.
various causes of actions including claims of harassment. The alleged harassment consisted of verbal comments made by McConathy’s supervisor, such as accusations that she was taking advantage of the corporation’s health benefits and warnings that McConathy’s ailments would no longer be tolerated. In addition, McConathy claimed that her supervisor excluded her from business meetings, ignored her presence in the workplace, and encouraged her staff to keep information about business projects from her. Finally, McConathy contended that she had to defer her much-needed jaw surgery because her supervisor would not listen to her when she attempted to inform him of the surgery she required. Essentially, McConathy asserted a hostile work environment claim under the ADA.

The district court granted Dr. Pepper’s motion for summary judgment, dismissing McConathy’s hostile work environment claim sua sponte. On appeal, the Fifth Circuit affirmed the district court’s decision. Regarding the hostile work environment claim, the circuit court held that it would assume such a cause of action existed for the sake of argument, but that it did not consider this case factually appropriate to make an actual determination if it constituted a legally viable claim. The court clearly indicated that McConathy should not be interpreted otherwise: “This case should not be cited for the proposition that the Fifth Circuit recognizes or rejects an ADA cause of action based on hostile environment harassment.” Ultimately, the court upheld the district court’s order for summary judgment because it deemed the conduct of McConathy’s supervisor as “insensitive” and “rude,” but not pervasive or severe enough to state a claim of harassment under the Title VII hostile work environment framework. Therefore, the court was able to review the lower court’s decision while carefully preserving its neutrality on the issue of hostile work environment under the ADA.

An example of a circuit court handling an ADA hostile work environment claim in a similar manner is Wallin v. Minnesota Department of Corrections. The plaintiff, Wallin, claimed that he was discriminated against by his superiors and co-workers because of his alcoholism and

52. Id. at 561.
53. Id. at 560.
54. Id.
55. Id. at 561.
56. Id.
57. Id.
58. Id. at 563.
59. Id.
60. Id. at 563-64.
61. 153 F.3d 681 (8th Cir. 1998).
Wallin had been discharged twice from his position as corrections officer and reinstated twice after grievance proceedings. Subsequent to his second reinstatement, Wallin filed suit alleging, among other things, that he was subject to a hostile work environment. He based his claim on "incidents of friction" between himself and his co-workers.

Similar to the Fifth Circuit's decision in *McConathy*, the Eighth Circuit in *Wallin* opted to assume, without deciding, that the hostile work environment cause of action exists under the ADA. Ultimately, the court upheld the grant of summary judgment for the defendants because it deemed the harassment alleged by Wallin to consist of three isolated incidents that were not severe enough to constitute a hostile work environment. Moreover, when Wallin reported the third incident to his employer under the harassment reporting procedures, the harassing co-worker was reprimanded, and no further incidents of harassment occurred. Because of this evidence, the court held that Wallin's hostile work environment claim could not be sustained and avoided having to actually recognize disability harassment as a cognizable ADA claim.

*Walton v. Mental Health Ass'n of Southeastern Pennsylvania* provides a more recent example of a circuit court that merely assumed the existence of the claim, rather than explicitly stating its viability. When analyzing Walton's harassment claim, the Third Circuit found that the similarity between the ADA and Title VII creates a cause of action for a hostile work environment under the ADA. Nonetheless, the court decided to "assume this cause of action without confirming it because Walton did not show that she [could] state a claim."

Walton, who suffered from depression, alleged her supervisor's conduct and verbal remarks amounted to hostile work environment harassment. Examples of harassment alleged by Walton included repeated phone calls from her supervisor during her hospitalization to discern when she would return to work, pressure to attend certain job-related functions, her supervisor's remarks that Walton was "manic depressive," and instances where Walton's supervisor undermined her

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62. *Id.* at 684.
63. *Id.* at 687.
64. *Id.* at 688.
65. *Id.*
66. The court engaged in an analysis of the hostile work environment claim without discussing whether or not it existed under the ADA. *Id.* at 687-88.
67. *Id.* at 688.
68. *Id.* at n.7.
69. *Id.* at 688.
70. 168 F.3d 661 (3d Cir. 1999).
71. *Id.* at 666.
72. *Id.* at 666-67.
73. *Id.* at 664, 667.
relationship with her staff. While the court acknowledged that a strained relationship existed between Walton and her supervisor, it determined that no evidence supported the allegation that the supervisor’s conduct could be attributed to Walton’s disability. Therefore, despite the Third Circuit’s apparent belief that the Title VII hostile work environment framework applies to the ADA, it declined to definitively adopt that viewpoint because Walton did not present a factually appropriate case.

Overall, the circuit courts appear willing to recognize the hostile work environment claim for disability harassment under the ADA if a case with the requisite facts should arise. Yet it is noteworthy that certain circuit court cases, such as McConathy, do not seem factually distinguishable from district court cases that have recognized the hostile work environment cause of action under the ADA. Perhaps this is indicative of the circuit courts’ reluctance to recognize disability harassment as an avenue of relief under the ADA. Despite such restraint, the relevant case law indicates that the circuit courts will soon start unequivocally acknowledging the existence of hostile work environment claims under the ADA.

C. Newsletters Focusing on Hostile Work Environment Claims Under the ADA

As the courts move toward recognizing ADA hostile work environment claims, newsletters and employment reporters aimed at advising employers are honing in on the issue by encouraging employers to exercise heightened vigilance in monitoring harassment in the workplace. These publications draw on examples to make employers aware of recent

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74. Id. at 667 n.4.
75. Id. at 667.
76. Like McConathy, in Haysmen v. Food Lion, Inc., 893 F. Supp. 1092, 1098 (S.D. Ga. 1995), the supervisor accused the disabled employee of using his disability to take advantage of the company and showed indifference to the employee’s pain.
77. See, e.g., The ADA Plot Thickens, IND. EMP. L. LETTER (Baker & Daniels), Jan. 1997, at 3 (cautioning employers that they may face unexpected ADA claims); Hostile Work Environment Claims Expanding Into New Areas, ME. EMP. L. LETTER (Moon, Moss, McGill, Hayes & Shapiro, P.A.), Feb. 1999, at 3 (noting that some courts recognize “hostile work environment” claims in age and disability discrimination cases); Sticks and Stones May Break My Bones, But Names Will Net Me Cash, KAN. EMP. L. LETTER (Boyd A. Byers), June 1999, at 5 (explaining that disability harassment claims are actionable under ADA); Tenth Circuit, supra note 5 (advising employers that even though the 10th Circuit did not rule that disability harassment was a cognizable claim in a case, courts will probably recognize ADA harassment claims); When Does Teasing Cross the Line and Become Discrimination?, N.J. EMP. L. LETTER (Pitney, Hardin, Kipp, & Szuch), Jan. 1998, at 4 (discussing ADA liability from teasing overweight worker); District Court Dismisses Frequently Tardy Employee’s ADA Claim Without a Trial, MASS. EMP. L. LETTER (Skoler, Abbot, & Presser), Sept. 1999, at 1 (finding that an arthritic condition constitutes a disability under the ADA) [hereinafter District Court].
developments in the hostile work environment area of discrimination law. It is useful to examine these examples to ascertain what types of harassment claims disabled employees bring under the ADA.

In one instance, an employee with an arthritic condition claimed that a co-worker’s use of an offensive computer screensaver, a memorandum disparaging the disabled, and the defacement of his logbook created a hostile work environment. The First Circuit held that the plaintiff had not offered enough proof to establish a hostile work environment claim under the law. However, other hostile work environment claims under the ADA have met with more success. For example, an employee suffering from multiple sclerosis sued her employer for tolerating a workplace environment where her speech and gait were mimicked, for perpetuating myths about her disability, and for fostering an atmosphere of resentment and pity among co-workers. The newsletter points out that although the employee’s claim ultimately failed, the employer still had to defend against it, which demonstrates the growing sense of legitimacy attached to these claims. Another example of a court declining to grant summary judgment, and therefore sending an ADA hostile work environment claim to a jury, involved workplace taunts and ridicule about the plaintiff’s weight.

The pervasive theme of these publications signals employers to beware of this new development in employment discrimination law. These newsletters aim to increase consciousness that seemingly innocent teasing can be interpreted as harassment by a disabled employee and that employees now have legal recourse under the ADA. This demonstrates the practical impact of the evolution of the hostile work environment claim under the ADA. The courts’ recent receptiveness to such claims is shaping the legal landscape of employment discrimination.

III. THE LINKAGE BETWEEN TITLE VII AND THE ADA

When courts either assume or explicitly adopt the hostile work environment cause of action under the ADA, they generally employ the Title VII framework. In Haysman, the court utilized the elements

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78. District Court, supra note 77.
79. Id.
80. The ADA Plot Thickens, supra note 77.
81. Id.
82. When Does Teasing Cross the Line and Become Discrimination?, supra note 77.
83. See McConathy v. Dr. Pepper/Seven Up Corp., 131 F.3d 558, 563 (5th Cir. 1998) (noting in dicta that if the 5th Circuit decided to entertain an ADA harassment claim it would model its approach after Title VII); Haysman v. Food Lion Inc., 893 F. Supp. 1092, 1107 (S.D. Ga. 1995) (employing Title VII framework in hostile work environment ADA claim).
required to sustain a sexual harassment claim under Title VII to ascertain whether the ADA hostile work environment claim was colorable under the facts at hand. 84 The test a plaintiff must meet to establish sexual harassment in an employment context under Title VII, as applied in *Haysman*, is: “(1) the employee must be a member of a protected class, (2) the employee must have been subjected to unwelcome harassment, (3) the harassment must be based on the protected characteristic, (4) the harassment must have affected a term or condition of employment.”85 Similarly, the *McConathy* court asserts: “In order to be actionable on a hostile environment theory, disability-based harassment, like sexual harassment, would presumably have to ‘be sufficiently pervasive or severe to alter the conditions of employment and create an abusive working environment.’”86 Clearly, the Title VII model is being grafted onto ADA disability harassment claims. But on what basis are courts adopting the Title VII model?

Courts place much emphasis on the similar statutory constructions of Title VII and the ADA, particularly the “terms and conditions” language.87 The ADA provides, in relevant part: “No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”88 This language connects the ADA to Title VII because both statutes prohibit discrimination in the “terms and conditions” of employment. In Title VII cases, this language has been the foundation for the prohibition on the hostile work environment.89

According to Frank S. Ravitch, since courts apply similar tests to Title VII and ADEA claims when they involve similar types of discrimination, it seems appropriate to apply the Title VII framework to ADA claims which involve the same types of discrimination.90 Thus, in hostile work environment claims brought under the ADA, the Title VII test for establishing a hostile work environment should apply. Many courts have interpreted the ADA by analyzing and applying Title VII cases; as a result,

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85. *Id.* (citing Cross v. Alabama, 49 F.3d 1490, 1504 (11th Cir. 1995)).
86. 131 F.3d at 563 (quoting Farabella-Crosby v. Horizon Health Care, 97 F.3d. 803, 806 (5th Cir. 1996)).
87. See id.; Silk v. City of Chicago, 194 F.3d 788, 804-05 (7th Cir. 1999); see also 42 U.S.C.A. § 2000e-2(a)(1) (West 2000) (“It shall be an unlawful employment practice for an employer to . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment . . . ”).
89. See Smith, supra note 4, at 24.
many Title VII and ADA cases discuss common ideas and arguments.91

IV. THE DEBATE OVER EXTENDING HOSTILE WORK ENVIRONMENT LIABILITY TO THE ADA

A. Arguments in Favor of Recognizing Hostile Work Environment as a Legal Cause of Action Under the ADA

In order to fulfill the goals of the ADA, proper statutory construction demands recognition of the hostile work environment cause of action.92 This area needs uniformity and consistency, as demonstrated by the evolution of hostile work environment liability theory in the sexual harassment realm. Ravitch argues that the ADA lacks a consistent structure for workplace harassment:

The ADA is applicable in all jurisdictions and many states 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.93

Ravitch illuminates the slow and confusing evolution of the Title VII hostile work environment doctrine and points out that issues still exist surrounding the hostile work environment cause of action that require clarification.94 A lesson can be gleaned from the development of the Title VII hostile work environment claim—when interpreting workplace harassment claims under the ADA, a need arises for a precise and uniform structure.95

Ravitch also analogizes between state discrimination laws and the federal statutory scheme designed to protect certain classes from discrimination.96 He argues that examination of state statutory schemes illustrates the logic of making the same causes of action available to all protected classes under the comprehensive federal statutory scheme (i.e., Title VII, the ADEA, and the ADA) aimed at eradicating discrimination.97 California provides an example of a state that has made workplace

92. See discussion supra Parts I.A., I.B.
94. Id. at 1499-1500.
95. Id. at 1500.
96. Id. at 1498.
97. Id.
disability harassment illegal by statute. The California Fair Employment and Housing Act provides, in relevant part, that it is an unlawful employment practice “[f]or an employer ... 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.”

State law and local codes and ordinances that provide the same protection as the ADA often contain more liberal provisions than the federal statute. Thus, these state and local laws that provide employees with a remedy for workplace harassment undermine the goal of effectuating a clear national mandate to eradicate disability discrimination.

B. Problems with Extending Hostile Work Environment Liability to the ADA

While some view the recognition of a hostile work environment cause of action under the ADA as a logical extension of Title VII, others maintain that good reasons exist to exclude disability harassment from its scope. Most of the arguments opposing the extension of hostile work environment to the ADA relate to the fact that the hostile work environment does not apply neatly to the ADA.

Some lawyers, while conceding the similarity of the legal framework of the ADA and Title VII, focus on the fact that defendants may contest the existence of the plaintiff's disability, the hostile work environment, and the connection between the two. This is a complicating factor unique to the ADA.

K. Tia Burke, a management lawyer at Philadelphia's Christie, Pabarue, Mortensen, & Young, identifies another problem which only applies to harassment claims brought under the ADA: "Companies attempting to reasonably accommodate an employee's disability may unwittingly foster discontent among co-workers who might not understand the law's requirements." The disabled employee's co-workers may harass the employee over the "special treatment" he or she receives. Thus, if hostile work environment claims are deemed valid under the ADA, by complying with one facet of the ADA—the reasonable accommodation

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98. Id. at 1497.
99. Id. n.109 (citing CAL. GOV'T CODE § 12940(h) (Deering 1994)) (emphasis added).
100. See Murphy, supra note 2, at 18.
101. See Smith, supra note 4, at 24.
102. Id.
103. Id.
104. Id. at 25.
requirement—an employer may open the door to another type of violation.

The confidentiality requirements of the ADA exacerbate this difficult situation. Some disabilities are not visible, such as epilepsy or learning disabilities. Therefore, an employer's hands are tied by the need to maintain confidentiality when addressing the harassing conduct of the disabled employee's co-workers while simultaneously trying to curb the hostile work environment.105 For example, if an employee's disability requires him to eat frequent meals, and the employer accommodates him by allowing him to take breaks to eat throughout the workday, his co-workers may relentlessly taunt him. However, in attempting to dispel the harassment, the employer may not reveal the reason behind the frequent breaks, i.e. the employee's disability. The employer must keep that information confidential. The ADA cautions employers to "take care to maintain confidentiality with respect to an employee's disability" to avoid violating the confidentiality provisions of the ADA.106

Opposition to hostile work environment claims under the ADA may also center on First Amendment/censorship issues. Kingsley R. Browne, a critic of hostile work environment liability under Title VII, contends that by policing speech that disabled workers find offensive, courts violate the First Amendment guarantee to free speech.107 Browne argues that employers already have incentives, such as productivity and morale of employees, to foster civility among co-workers.108 Employees also have other avenues of legal recourse against abusive co-workers.109 Therefore, a cause of action for workplace harassment under the ADA is unnecessary, and, moreover, unconstitutional.110 As the provisions of the ADA encourage employers to adopt a zero-tolerance stance on "politically incorrect speech," a system of government-supported censorship is emerging.111

Browne points out that in other arenas, like academia, unpopular speech is protected, while speech in the workplace remains heavily regulated.112 He attributes this to an "elitist perspective," opining that workers' speech lacks value because workers do not convey ideas when they speak, or that society does not view their ideas as important.113

105. Id.
106. ADA Hostile Work Environment Claim Allowed to Proceed, ARIZ. EMP. L. LETTER (Lewis & Roca LLP), June 1997, at 5.
107. Smith, supra note 4, at 25.
108. Id.
109. Id.
110. Id.
111. Id.
113. Id.
Speakers who violate Title VII because of their expressed views on race and sex are being punished for their social attitudes. Browne labels such speech in the workplace as "political." Yet, the threat of litigation and the constantly evolving Title VII jurisprudence produces a chilling effect on such speech. Although Browne's arguments against hostile work environment liability are directed at Title VII, they also apply to the ADA. Expression about the roles of the disabled in society can also be categorized as political speech, just like workers' views on race and sex.

V. THE RAVITCH PROPOSAL: APPLICATION OF A MODIFIED TITLE VII FRAMEWORK TO ADA HOSTILE WORK ENVIRONMENT CLAIMS

Ravitch acknowledges that the hostile work environment framework used for Title VII claims provides a good basis for an ADA disability harassment scheme. However, Ravitch proposes several modifications necessary to adapt the framework to the unique facets of disability discrimination. In addition, Ravitch examines the EEOC Proposed Guidelines, which protect disabled individuals as well as other classes, from workplace harassment. He argues that they, too, are lacking; in

114. Id. at 500.
115. Id. at 497.
116. Id. at 506-07.
117. Ravitch, supra note 3, at 1500.
118. Id.
119. Ravitch cites the EEOC Proposed Guidelines 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 . . . .

(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 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,
their breadth, they fail to address the unique circumstances of disabled employees and the specific language of the ADA. Using the Title VII framework coupled with the EEOC Proposed Guidelines as a starting point, Ravitch constructs a model framework to be applied to hostile work environment causes of action brought under the ADA.

First, to reap the benefit of Title I of the ADA, which prohibits discrimination in the terms, conditions, and privileges of employment, the employee or applicant must show that he/she is a qualified individual with a disability. The ADA defines a "qualified individual with a disability" 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." Ravitch observes that this requirement for a prima facie case of hostile work environment liability under the ADA is neither addressed in Title VII nor in the EEOC Proposed Guidelines because it only applies to disabled individuals, not to other protected classes.

Ravitch also criticizes the objective reasonableness standard. While the EEOC's more flexible "reasonable person in the same or similar circumstances" standard is more appropriate for claims brought under the ADA than a strict objective reasonableness standard, and despite that Ravitch finds the EEOC standard to be "well-thought out," he finds the standard in need of modification because it is likely to be subject to inconsistent interpretation. Ravitch also notes that the EEOC Proposed Guidelines alter the structure of the Title VII framework in a confusing manner because the guidelines do not clearly state that the harassment must alter the terms and conditions of employment. That language constitutes the cornerstone of the hostile work environment cause of action.

Ravitch resolves these perceived flaws in the EEOC framework by proposing that the second requirement of a prima facie hostile work environment claim under the ADA be the following:

[W]hether the individual was, or is, subject to intimidating, hostile, or abusive conduct based on a known disability, which that 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

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Id. at 1501-02.
120. Id. at 1502.
121. Id. at 1503.
123. Ravitch, supra note 3, at 1503.
124. Id. at 1504.
125. Id.
creating a hostile or abusive work environment.\textsuperscript{126}

Ravitch finds this component of the appropriate framework for ADA harassment claims to be ideal because it encompasses the uniqueness of the ADA, the Title VII structure, and the EEOC's definition of the conduct sufficient to create a hostile work environment.\textsuperscript{127} In addition, the "reasonable person with the same disability" standard captures the precision necessary in this area of law to avoid needless uncertainty and confusion.\textsuperscript{128}

Ravitch finds the terms "reasonable person" and "reasonable person in the same or similar circumstances" to be inherently confusing because they can be interpreted in several different ways.\textsuperscript{129} The "reasonable person with the same disability" standard emphasizes the individual, whereas the more general standard groups all disabled individuals into one classification.\textsuperscript{130} This ignores the fact that the ADA covers a myriad of disabilities, and that specific sensitivities attach to specific disabilities.\textsuperscript{131} To fulfill the purpose of the ADA, the standard must take into account the unique aspects of different disabilities.\textsuperscript{132} This is illustrated by the example that an epileptic and a paraplegic might not take offense to the same conduct or comments.\textsuperscript{133} According to Ravitch, the "reasonable person with the same disability standard" is flexible enough to account for discrimination aimed at general or narrow classifications, but is not open to different interpretations.\textsuperscript{134}

Ravitch addresses one potential criticism of his modified standard—namely, the evidentiary difficulty of establishing that a reasonable person with the same disability as the plaintiff would perceive the work environment as hostile.\textsuperscript{135} He advocates using resources such as organizations that help the disabled, psychological studies that address the needs and sensitivities of individuals with certain disabilities, and even allowing individuals possessing the same disability as the alleged victim to testify.\textsuperscript{136} As a last resort, if the plaintiff's disability is extremely rare,
reasonable persons with a disability affecting the same life function should be permitted to testify.\textsuperscript{137} Despite difficulties that might arise in trying to obtain insight into the perceptions of a reasonable person with the same disability, Ravitch remains adamant that a more general standard is inadequate.\textsuperscript{138}

Ravitch's third proposed modification pertains to the reasonable accommodation requirement of the ADA.\textsuperscript{139} Ravitch provides examples of how this unique provision of the ADA may become intertwined with hostile work environment claims.\textsuperscript{140} For instance, an employer may fail to supervise a mentally disabled employee who requested extra sensitivity and guidance in order to perform his/her job functions.\textsuperscript{141} The requested extra sensitivity and supervision are reasonable accommodations, and failure to provide them could be considered intimidating, hostile, or abusive; thus, a hostile work environment may be created.\textsuperscript{142} Another example is failure to move an employee with a respiratory disorder to a smoke-free environment.\textsuperscript{143} In a different situation, an employer may provide an accommodation, but implement it in such a way that contributes to a hostile work environment. For example, by placing a special chair in a conspicuous location, an employer may expose a disabled employee to unnecessary ridicule from co-workers.\textsuperscript{144} In all of the above cases, the hostile work environment claims have merged with the failure to accommodate.

The failure to make reasonable accommodations needs to be incorporated into the framework of a hostile work environment claim under the ADA. It is noteworthy that if an employer transfers a disabled employee to another location as part of a reasonable accommodation (e.g., an employee with emphysema is transferred out of an environment where smoking is permitted and co-workers intentionally smoked more around the disabled employee), no ADA violation exists.\textsuperscript{145} Instead, the transfer constitutes a reasonable accommodation under the ADA.\textsuperscript{146} This situation is unlike transferring an employee away from harassers to alleviate racial or sexual harassment, which courts have deemed a violation of Title VII

\textsuperscript{137} \textit{Id.} at 1508.
\textsuperscript{138} \textit{Id.}
\textsuperscript{139} \textit{Id.} at 1509.
\textsuperscript{140} "Failure to reasonably accommodate can contribute to a hostile work environment, or in rare situations, even create such an environment." \textit{Id.} at 1510.
\textsuperscript{141} \textit{Id.}
\textsuperscript{142} \textit{Id.}
\textsuperscript{143} \textit{Id.} at 1512.
\textsuperscript{144} \textit{Id.} at 1511.
\textsuperscript{145} \textit{Id.} at 1512-13.
\textsuperscript{146} \textit{Id.} at 1513.
because it punishes the victim for the harasser’s conduct.\(^{147}\)

Ravitch’s proposal also covers the employer liability issue for hostile work environment under the ADA. He points out that while both the EEOC and the courts have addressed this, a lack of consistency exists in this area.\(^{148}\) The EEOC Proposed Guidelines attempt to clarify employer liability for hostile work environment. According to Ravitch’s interpretation of the Proposed Guidelines, an employer is liable for the acts of its agents or supervisory employees “where the supervisory employee alleged to be the harasser is acting in an agency capacity, or when the employer knew or should have known of the conduct and failed to take immediate and appropriate corrective action.”\(^{149}\) In addition, employers would be liable for the behavior of the victim’s coworkers if the employer, its agents, or supervisory employees knew or should have known of the harassment and failed to take corrective action.\(^{150}\) Ravitch contends that while Title VII case law and the EEOC Proposed Guidelines regarding employer liability can be applied to the ADA, the standard must be slightly modified to appropriately apply it in the ADA context.\(^{151}\)

Ravitch highlights the language of the ADA which mandates that employers must maintain adequate anti-harassment policies and appropriate methods of administering such policies.\(^{152}\) Methods of administration include both action and inaction.\(^{153}\) The ADA, as interpreted by Ravitch, dictates that the employer should be held strictly liable for any conduct that creates a hostile work environment if an employer does not implement clear policies against workplace harassment, or if an employer fails to implement appropriate methods of administration.\(^{154}\)

Ravitch also discusses the defenses to a claim of failure to reasonably accommodate—a claim which is unique to the ADA.\(^{155}\) Such defenses include “undue hardship” (where the employer must establish that reasonably accommodating the disabled employee would place a heavy burden on the employer’s business) and “good faith efforts” (where the

\(^{147}\) *Id.*

\(^{148}\) The EEOC Guidelines on Discrimination Because of Sex suggest a strict liability standard for supervisors and agents of the employers. For harassment by co-workers, the guidelines impose liability if the employer knew or should have known of the harassing conduct and failed to take remedial action. However, the Supreme Court rejected the strict liability standard in favor of general agency principals. See Meritor Savings Bank v. Vinson, 477 U.S. 57, 69-73 (1986). As a result, courts have applied varying standards when assessing employer liability. Ravitch, *supra* note 3, at 1514.

\(^{149}\) *Id.* at 1514-15.

\(^{150}\) *Id.* at 1515.

\(^{151}\) *Id.*

\(^{152}\) *Id.* at 1516.

\(^{153}\) *Id.*

\(^{154}\) *Id.* at 1516-17.

\(^{155}\) *Id.* at 1517-18.
employer must show that it consulted with the disabled employee in an attempt to identify and provide a reasonable accommodation). These defenses become relevant to employer liability in hostile work environment claims under the ADA when one combines a claim of disability harassment with a claim for failure to accommodate. According to Ravitch, even if an employer successfully defends against a claim for failure to reasonably accommodate, and the failure to accommodate constituted a component of the hostile work environment claim, the plaintiff's hostile work environment claim is not necessarily stymied: "If the remaining allegations are sufficient to maintain the cause of action for hostile work environment, the complainant should be able to proceed . . . ." Obviously, this concept is unique to causes of action brought under the ADA.

Therefore, Ravitch would adopt the test for employer liability currently contained within the EEOC Proposed Guidelines; however, he would expand it to clarify that, under the ADA, the employer would be strictly liable if its methods of administration enable the "creation or perpetuation of harassment." In addition, a rebuttable presumption exists that the methods of administration create or perpetuate harassment if the employer fails to implement an effective policy against harassment, complaint procedures, sanctions against harassers, and training dealing with disability harassment. All policies and procedures must be communicated to all of the employers' agents and employees in order to be deemed effective. Moreover, as discussed above, the ADA defenses may be successfully asserted by the employer in response to a failure to accommodate claim; however, as long as the remaining evidence (excluding evidence of the employer's failure to accommodate) sufficiently sustains a hostile work environment claim, the hostile work environment claim may proceed independent of the failure to accommodate claim.

By modifying the Title VII hostile work environment framework, Ravitch proposes a model to be applied to hostile work environment claims brought under the ADA. He contends that his proposal should silence any attacks on the viability of hostile work environment claims related to disability harassment.

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156. Id.
157. Id. at 1518.
158. Id.
159. Id. at 1518-19.
160. Id. at 1520.
161. Id.
162. Id.
VI.  SUGGESTIONS AND COMMENTS

I advocate the adoption of the Ravitch model pursuant to slight modifications in the area of employer liability because the law in that area has changed since Ravitch created his proposal.

Hostile work environment liability is necessary to effectuate the goals and purposes of the ADA, as outlined in Part I above. The striking similarity of the language of Title VII and the ADA indicates legislative intent to base workplace harassment on illegal disability discrimination. It is important to note that Congress chose to include the "terms and conditions" clause in the ADA's definition of discrimination because it was aware that Title VII hostile work environment claims are predicated on that language. Thus, it follows logically that if Congress did not intend to make disability harassment actionable under the ADA, it would have deleted the "terms and conditions" phrase from the statute. Statutory construction coupled with legislative intent creates a strong argument in favor of extending the hostile work environment theory to the ADA.

Arguments opposing such an extension fall into two distinct categories: 1) arguments that are moot in light of the Ravitch proposal, and 2) arguments that attack the hostile work environment theory itself rather than its application to the ADA. 163 Neither type of argument is persuasive.

For example, the notion that the Title VII hostile work environment framework is incompatible with the ADA is derived from the belief that hostile work environment liability is too complicated to be asserted in ADA cases. Though harassment claims under the ADA may be more complex than similar claims brought under Title VII, that alone does not constitute a sufficient reason to leave disabled individuals without a remedy for workplace harassment. Without legal recourse, harassed disabled employees will be powerless to resist or gain compensation, and the goals of the ADA will be thwarted. Moreover, the Ravitch proposal illustrates how a few minor changes to the Title VII framework can mold it into a useful model for hostile work environment claims under the ADA.

An argument also exists which asserts that providing reasonable accommodation for disabled employees, in compliance with the ADA, may lead to resentment among the employee's co-workers over "special treatment." 164 This resentment could itself manifest and sustain a hostile work environment, creating a "catch-22" for the employer. By complying with the law, he may be creating a situation that violates the law. Again, the Ravitch proposal takes into account the interrelationship between reasonable accommodation and harassment.

163.  See supra Part IV.B.
164.  Smith, supra note 4, at 25.
Even if the proposal had not addressed this concern, I would still find that this argument lacked merit. Resentment and hostility of other employees should never constitute an acceptable reason for an employer to discriminate against an employee in a protected class. Would anyone argue that a woman who works in a male-dominated industry is not entitled to bring a hostile work environment claim if her male co-workers resent her presence in the workplace? Or that an African-American should not be allowed to bring a racial harassment claim because his or her fellow employees resent him or her? It is doubtful that such an argument would succeed, and disabled employees should not be treated any differently than other protected groups under the law. This is especially true considering that the ADA was enacted to give disabled individuals the same opportunities and protections against discrimination enjoyed by members of other protected classes.

The Ravitch proposal does not address the confidentiality concern raised in connection with the extension of hostile work environment liability to the ADA. The essence of the argument is that because an employer cannot disclose that an employee is disabled, he will be unable to stop disability harassment when the disability is not obvious. For example, if a dyslexic employee's co-workers relentlessly taunt him as "stupid" and "retarded," and the employer knows about the harassment, the employer could be held liable for a hostile work environment. However, in order to stop the harassment, according to the argument, the employer would need to reveal the employee's disability.

The simple solution to this problem is that the employer should promulgate rules and policies mandating professional behavior in the workplace. It is not necessary to divulge an employee's disability to maintain a harassment-free workplace. A clear policy against verbal or other forms of harassment suffices. The employer should strive to emphatically communicate to his or her employees that harassment of any kind is not appropriate in the workplace. In addition, the requirement that the harassment be severe and pervasive enough to alter or interfere with the terms and conditions of employment serves to combat the confidentiality problem. An offhand remark to a dyslexic employee or an isolated incident will not trigger employer liability. In cases where severe disability harassment constitutes a hostile work environment, it is likely that the harassers will know of the disabled employee's disability—either because it is obvious or because the employee disclosed it him or herself.

The final argument raised in opposition to the hostile work environment cause of action under the ADA is the First Amendment/free speech argument.165 This constitutional attack seeks to shake the

165. Id.
foundation of the entire hostile work environment framework, including harassment claims brought under Title VII. However, it does not specifically apply to the hostile work environment under the ADA issue. Therefore, until the courts choose to address this issue as it applies to hostile work environments in general, it is not relevant to this topic.

Although my ultimate conclusion is to adopt the Ravitch model of hostile work environment under the ADA, I do not adopt it in its entirety. Because Ravitch discusses employer liability for the actions of supervisory employees, and the law has changed since Ravitch addressed this, the model must be modified. Recently, the Supreme Court clarified the standard for employer liability in two landmark companion cases: *Faragher v. City of Boca Raton* and *Burlington Industries, Inc. v. Ellerth*.

In *Faragher*, the court held that an employer is vicariously liable for harassment of an employee by a supervisor, subject to an affirmative defense. In that case, the plaintiff was a lifeguard whose immediate superiors verbally and physically harassed her. The lifeguards' employment hierarchy was structured in a para-military chain of command, where the lifeguards worked at a remote location with no real contact with or access to higher-status city officials. Although the city maintained a policy, it failed to disseminate it to the lifeguards working at Faragher's site of employment.

The *Faragher* court recognized the need for a more stringent standard of employer liability than negligence, so it adapted agency principles to reach the following holding: "An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with . . . authority over the employee." When no tangible employment act exists, for example, in a hostile work environment case where the employee is not fired, denied promotion, or the like, the employer may raise an affirmative defense.

The defense is comprised of two elements: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Because the holding in

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168. 524 U.S. at 780.
169. Id. at 780-81.
170. Id. at 781.
171. Id. at 781-82.
172. Id. at 807.
173. Id.
174. Id.
Burlington Industries closely resembles the Faragher decision, I will refrain from describing the facts of that case.\textsuperscript{175}

The Ravitch proposal was somewhat nebulous on the issue of employer liability. As the law has evolved since the inception of the Ravitch proposal, the new standard of employer liability, articulated in Faragher and Burlington Industries, must be incorporated into the Ravitch model.

The courts should adopt the updated Ravitch model for a hostile work liability cause of action under the ADA. The case law in the area indicates that disability harassment presents a problem in the employment arena, and is not going to solve itself. The law must confront it directly and send a clear message that such discrimination is illegal under the ADA and will not be tolerated. The current uncertainty in this area of the law is incompatible with the goals and purposes of the ADA.

\textsuperscript{175} See Burlington Indus., Inc. v. Ellerth, 524 U.S. 752, 765 (1998) (holding, similarly, that an employer may raise an affirmative defense comprised of the two elements described by the Faragher court).