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Toward a More Perfect Union: Overcoming Division, Discrimination, and Distance Through the Rule of Law

Hon. Bernice B. Donald
Circuit Judge (Ret.), U.S. Court of Appeals for the Sixth Circuit

Michael A. Brody
Former law clerk, Judge Bernice B. Donald, U.S. Court of Appeals for the Sixth Circuit

DISTINGUISHED JURIST IN RESIDENCE LECTURE

TOWARD A MORE PERFECT UNION: OVERCOMING DIVISION, DISCRIMINATION, AND DISTANCE THROUGH THE RULE OF LAW

The Honorable Bernice B. Donald (Ret.) & Michael A. Brody***

OPENING REMARKS

JAMES BRUDNEY: Good afternoon. My name is Jim Brudney, and I am the Director of the Center for Judicial Events and Clerkships at the law school. On behalf of myself and Assistant Dean Suzanne Endrizzi, I am delighted to welcome you to this Lecture by our Distinguished Jurist, the Honorable Bernice Donald, who last month, on January 20, 2023, completed her service on the U.S. Court of Appeals for the Sixth Circuit.

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* Circuit Judge (Ret.), U.S. Court of Appeals for the Sixth Circuit. I am grateful to Michael Brody, my former law clerk, for his invaluable contributions to this Essay. This Essay is based on remarks delivered on February 15, 2023, at the Distinguished Jurist in Residence Lecture held at Fordham University School of Law and hosted by the Center for Judicial Events and Clerkships.

** Former law clerk, Judge Bernice B. Donald, U.S. Court of Appeals for the Sixth Circuit.

Judge Donald has long been a nationally recognized judicial presence, as well as a pathbreaking force for justice. She served on the Sixth Circuit from 2011 until earlier this year, and, before that, on the U.S. District Court for the Western District of Tennessee from 1996 to 2011.

Prior to joining the District Court, Judge Donald served on the U.S. Bankruptcy Court for the Western District of Tennessee, becoming the first Black woman in the United States to serve as a bankruptcy judge. And before that, in 1982, she was elected to the General Sessions Criminal Court, where she became the first Black woman to be elected as a judge in the history of the state of Tennessee.

Judge Donald received her law degree from the University of Memphis School of Law. She has been extremely active in the American, Tennessee, and Memphis Bar Associations, serving in leadership roles on key committees. In 2008, she became the first Black female officer of the American Bar Association, when she was elected secretary of the ABA.

In addition, Judge Donald has been a faculty member for international programs in more than twenty countries, including Brazil, Bosnia, Botswana, Cambodia, Egypt, Kyrgyzstan, Mexico, South Africa, Thailand, Turkey, and Vietnam.

Judge Donald is the recipient of over 100 awards for professional, civic, and community activities, including the Martin Luther King Community Service Award, the Benjamin Hooks Award presented by the Memphis Bar Foundation, and—just this past year—the Sandra Day O'Connor Award for outstanding contributions to justice.

INTRODUCTION

Consider the following hypothetical from the "before times": it is February 2020. You are a sixty-year-old, female African American employee at a large national corporation. Your boss has just scheduled the weekly meeting for your team of fifteen employees—most of whom are white men under forty years old—at the conference room down the hallway. After everyone arrives in the conference room, your coworkers openly mock you for your age, humiliate you with racial epithets, and tease you in a sexually degrading manner. The insults are direct, they are intentional, and you can feel them—the office tension is boiling. In this scenario, your coworkers' behavior might form the basis for a hostile work environment claim based on age, race, or sex.[1]

But fast-forward two months. The COVID-19 pandemic is raging throughout the world, and life as we know it has come to a screeching halt. Now, you work from home on an indefinite basis. Gone are the days of in-person meetings, company holiday parties, and office kitchens where you would engage in "water cooler" talk with your colleagues. Your only connection to the company is through email and the occasional teleconference.

1. *See infra* Part I.

You still feel the same kinds of hostilities from your coworkers as you did when you were working in the physical workplace, but things are a little different now. Whereas in the "before times," your male coworkers offered you some not-so-thinly veiled discriminatory comments, now, their communications are a little more guarded, couched in more tightly worded emails, faux polite teleconferences, and heavily supervised and recorded Zoom meetings. You know they are still trying to sabotage your work efforts and make your life miserable, but their intentions are more ephemeral now. You cannot identify their discriminatory behaviors in the way that you might have been able to in the past. So, does that mean that employment discrimination law offers you less protection now that you are working from home?

These hypotheticals—and unanswered legal questions—are currently permeating the workforce, which is perhaps the area of life undergoing the most abrupt and sweeping changes as a result of the pandemic. Although the past two years have seen a partial return to the office for many employees, work from home, at least in some form, appears to be here to stay.

Fortunately, major technological advances in the last several decades enabled a mass shift from office work to telecommuting, which not only became necessary for many working Americans, but also created unexpected efficiencies.[2] In the blink of an eye, software such as Zoom and Microsoft Teams allowed the bulk of the service economy to seamlessly access work computers, coworkers, and offices from home. Despite results that have exceeded productivity expectations from nearly three years ago, the long-term consequences of these fundamental changes remain unknown.

As far as employment law is concerned, one of the greatest areas of the "unknown" is the law of the virtual workplace. As Professor Michelle A. Travis has explained, "Our new working reality offers an opportunity—and an obligation—to reassess antidiscrimination law's approach to workplace flexibility."[3] We contend that one of those focuses should be—and the primary topic of this Essay is—stereotyping and the role that implicit bias might play in hostile work environment claims in the remote workplace.

We advocate for judicial attentiveness to this topic because we predict a flood of remote workplace–related employment discrimination cases in the months and years ahead. Therefore, it is critical that judges deciding these cases understand that employees who work from home might not have the

2. Although the COVID-19 pandemic has necessitated remote work to a large degree, the traditional office has been subject to evolving change for the last several decades. *See* Jeremy Gelms, Comment, *High-Tech Harassment: Employer Liability Under Title VII for Employee Social Media Misconduct*, 87 WASH. L. REV. 249, 249 (2012) ("The traditional notion of the workplace, however, continues to expand with changing technology and flexible schedules, which increasingly allow employees to stay connected to the work environment at numerous locations outside the physical boundaries of the office."); Michelle A. Travis, *Equality in the Virtual Workplace*, 24 BERKELEY J. EMP. & LAB. L. 283, 293 (2003) (describing nontraditional working arrangements and explaining that "[t]he growth in telecommuting appears to be continuing into the new millennium").

3. Michelle A. Travis, *A Post-Pandemic Antidiscrimination Approach to Workplace Flexibility*, 64 WASH. U. J.L. & POL'Y 203, 205 (2021).

ability to overcome stereotyping that could otherwise be combatted with a traditional interaction in the office. As Professor Roderick M. Kramer has explained, the virtual workplace can make us "feel[] out of the loop, because [we are] missing the kinds of ad hoc conversations that tend to reassure us we're in good standing."[4] Moreover, as Kramer explains, anxiety seeps in "when people feel like they're a token, the only woman in a group, or the only Black person."[5] In videoconferencing, for example, we miss out on critical nonverbal cues and body language, and our ability to recognize those vital elements of communication is even further diluted as videoconferencing groups grow in size.[6]

Employees working from home during the pandemic—particularly women and people of color—struggled in their messaging through remote conferencing. For example, a forty-two-year-old single mother at a podcast production company expressed her concerns about missing out on potential business opportunities because of how she looked on camera.[7] She explained, "I always worry if I'm meeting new people remotely on Zoom, I won't get my serious side across—already being a woman is the worst for that."[8]

In May 2020, Veronica Vargas Stidvent, the executive director of the Center for Women in Law at the University of Texas at Austin School of Law, summed up the complications of the virtual workplace:

> In our rush to abandon using conference calls, we have literally allowed our professional colleagues a window into a part of our lives that is often kept private. Who hasn't spent the first few minutes of a video chat examining our colleagues' remote space, scanning for clues about their personal lives and circumstances? In the office, workers can present their curated professional selves, achieving some sort of parity on a neutral office canvas. But in our quarantined video conferences, those personal and professional boundaries are difficult to maintain, as children and pets wander in the background and our home design and organization invite assumptions about our work ethic.
>
> In our physical office space, we are aware of the hierarchy of job classifications, but we do not expect the mail room to mimic the C-suite. In the virtual world, however, we demand all employees to display some semblance of an ideal home office space—at their own expense. We make assumptions about those who call in from corners of their bedrooms. Are they lazy, sloppy or hiding something? Or do they block out their personal space with a computer-generated design, unless of course they have invested in the upscale green screen and on-brand lighting. When the boss

4. Jessica Grose, *Is Remote Work Making Us Paranoid?*, N.Y. TIMES, https://www.nytimes.com/2021/01/13/style/is-remote-work-making-us-paranoid.html [https://perma.cc/LR2Q-E7VD] (Apr. 30, 2021).

5. *Id.*

6. *See* LYNNE WAINFAN & PAUL K. DAVIS, CHALLENGES IN VIRTUAL COLLABORATION: VIDEOCONFERENCING, AUDIOCONFERENCING, AND COMPUTER-MEDIATED COMMUNICATIONS 19 (2004).

7. *See* Grose, *supra* note 4.

8. *Id.*

> convenes a video call among the team to boost morale, they may be unwittingly emphasizing class and income divisions instead.
>
> The demands of the video conference lay bare these distinctions we can usually hide or ignore: who can afford a dedicated workspace, who has to share that space with a working spouse or partner, who is a primary caregiver, who has the time to "look professional." This is particularly true for women.
>
> Studies show women are judged on their appearance, and it is a difficult target to hit with makeup, but not too much makeup. Attractive but not *too* attractive. And there is a significant "grooming gap" between men and women, as the cost and time for women to meet these norms is significantly higher.[9]

Even as businesses begin to return to some form of traditional office work, teleworking is almost certainly going to remain a staple for the American workforce—at least to a much greater degree than it was prior to the pandemic.[10] As a result, employers are likely going to operate in a radically altered employment paradigm—one in which employees will spend at least a significant portion of their working hours in remote locations.[11]

The work-from-home environment raises multiple issues that we will consider in this Essay: What will the move away from the traditional office mean for the hostile work environment doctrine? What exactly is the "work environment" now? Is the unruly behavior of coworkers or supervisors now insulated to some extent by the lack of a well-defined workplace? Or does employment law already cover the activity of the teleworking office? Moreover, how will our unconscious stereotypes play a role in how we treat coworkers when working remotely? What should be the primary focus of courts tasked with rapidly modernizing the analytical framework for hostile work environment claims in a boundaryless workplace?

In Part I of this Essay, we explain how courts came to recognize the hostile work environment claim as a component of antidiscrimination laws and how the doctrine has evolved. In Part II, we consider the ways in which courts have addressed hostile work environment claims based on conduct outside of the workplace. Finally, in Part III, we consider the role that implicit bias

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9. Veronica Vargas Stidvent, Opinion, *Video Conferencing Is Raising Issues of Sexism and Classism*, DALL. MORNING NEWS (May 1, 2020, 1:31 AM), https://www.dallasnews.com/opinion/commentary/2020/05/01/video-conferencing-is-raising-issues-of-sexism-and-classism/ [https://perma.cc/G874-7X39].

10. A late 2020 survey of 133 U.S. business executives and 1,200 office workers revealed that (1) 83 percent of employers and 71 percent of employees labeled the shift to remote work "successful," (2) 11 percent of employers and 23 percent of employees categorized the shift as producing "mixed results," and (3) 6 percent each of employers and employees labeled the change to remote work "unsuccessful." *It's Time to Reimagine Where and How Work Will Get Done*, PWC (Jan. 12, 2021), https://www.pwc.com/us/en/services/consulting/business-transformation/library/covid-19-us-remote-work-survey.html [https://perma.cc/TPJ6-5RB2].

11. We also note that the work environment for many workers—particularly frontline workers—will almost never be subject to a shift to remote work. We do not mean to downplay the impact that COVID-19 has had on the nature of their respective work environments; rather, the focus of this Essay is simply on the virtual workplace.

plays in the work environment and show that a greater understanding of the supporting scientific literature might provide important guidance to courts that will be struggling to quickly apply out-of-date doctrine to new situations. In particular, we address implicit bias in the context of hostile work environment claims and the fact that remote work presents the possibility that unconscious stereotyping based on protected classes is likely to be worse in the work-from-home environment. We contend that, in the work-from-home environment, courts should focus more on the nature of interactions between employees than on technical definitions of how to define "the workplace." Taking this approach will allow courts to fully incorporate considerations of implicit bias as a substantive component of discrimination law analysis. This approach will allow courts to rapidly develop a robust and consistent body of case law that will provide predictable and equitable results for both employers and employees.

I. HISTORY OF THE HOSTILE WORK ENVIRONMENT DOCTRINE

Most of today's federal employment discrimination claims emanate from Title VII of the Civil Rights Act of 1964,[12] which provides employees with a cause of action against employers who discriminate against them on the basis of their race, color, religion, sex, or national origin.[13] 42 U.S.C. § 2000e-2(a)(1) states:

> It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.[14]

Under this provision of the law, any action taken by an employer—if motivated by an employee's status in one of the enumerated protected classes—can form the basis of a Title VII claim. Such actions fall into two categories: (1) discrete actions and (2) acts forming a hostile work environment.[15] An employee who sues an employer for a discrete act will have a much easier—albeit still quite difficult—time formulating a complaint than an employee who alleges a hostile work environment.[16] As stated by the U.S. Supreme Court, "[d]iscrete acts such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify."[17] These

12. 42 U.S.C. §§ 2000e to 2000e-17.

13. *See id.* § 2000e-2. Employees can also bring employment discrimination claims under 42 U.S.C. §§ 1981 and 1983. Section 1981 provides that "[a]ll persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." *Id.* § 1981(a). Section 1983 permits actions against a "person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." *Id.* § 1983.

14. *Id.* § 2000e-2(a)(1).

15. *See* Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 114–16 (2002).

16. *See id.*

17. *Id.* at 114.

types of actions all amount to "incident[s] of discrimination" and "unlawful employment practice[s]."[18]

Hostile work environment claims, on the other hand, typically involve a series of employer actions that—when measured in the aggregate—amount to discrimination. The first known judicial recognition of a federal hostile work environment claim was in 1971, when the U.S. Court of Appeals for the Fifth Circuit concluded that a Hispanic employee could show a Title VII violation by demonstrating that her employer provided discriminatory service to its Hispanic clientele.[19] In recognizing the hostile work environment claim, the Fifth Circuit explained that Title VII reached beyond claims in which there was tangible economic harm:

> [T]he phrase "terms, conditions, or privileges of employment" in [Title VII] is an expansive concept which sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination . . . . One can readily envision working environments so heavily polluted with discrimination as to destroy completely the emotional and psychological stability of minority group workers . . . .[20]

In the late 1970s and early 1980s, other lower federal courts extended these principles to conclude that hostile work environment claims also encompassed discrimination on the basis of race,[21] religion,[22] national origin,[23] and gender.[24] And as the Supreme Court has expanded protections under Title VII, so too has the reach of the hostile work environment doctrine.[25]

The Supreme Court has been careful not to be too exacting as to the contours of the hostile work environment doctrine. The Court has explained that the hostile work environment analysis "is not, and by its nature cannot be, a mathematically precise test."[26] Further, the Court has noted that "whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances."[27] To this end, the Supreme Court has defined hostile work environment claims:

> Hostile environment claims are different in kind from discrete acts. Their very nature involves repeated conduct. The "unlawful employment

18. *See id.*

19. *See generally* Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971).

20. *Id.* at 238.

21. *See, e.g.*, Firefighters Inst. for Racial Equal. v. City of St. Louis, 549 F.2d 506, 514–15 (8th Cir. 1977); Gray v. Greyhound Lines, E., 545 F.2d 169, 176 (D.C. Cir. 1976).

22. *See, e.g.*, Compston v. Borden, Inc., 424 F. Supp. 157, 161 (S.D. Ohio 1976).

23. *See, e.g.*, Cariddi v. Kan. City Chiefs Football Club, Inc., 568 F.2d 87, 88 (8th Cir. 1977).

24. *See, e.g.*, Henson v. City of Dundee, 682 F.2d 897, 902 (11th Cir. 1982).

25. For example, just recently in *Bostock v. Clayton County*, the Supreme Court held that Title VII prohibits discrimination based on sexual orientation and gender identity. 140 S. Ct. 1731, 1741 (2020). Consequently, lower courts must recognize hostile work environment claims premised on sexual orientation and gender identity discrimination. *See, e.g.*, Kilpatrick v. HCA Hum. Res., LLC, 838 F. App'x 142, 145 (6th Cir. 2020).

26. Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993).

27. *Id.* at 23.

> practice" therefore cannot be said to occur on any particular day. It occurs over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own. Such claims are based on the cumulative effect of individual acts.[28]

Although actions that make up discrete act claims—for example, firing and hiring—are tangible and, perhaps, a little more familiar to the average person, a hostile work environment claim can encompass a far broader assortment of actions, such as insulting and inappropriate comments in the workplace.[29] But because a hostile work environment claim by its nature is more amorphous, the standard that a plaintiff must meet is also a bit higher. What we might think of practically as "hostile" does not necessarily meet the legal standard of a hostile work environment within the meaning of Title VII.[30] Rather, the Supreme Court has held that for a hostile work environment claim to be actionable, an employee must demonstrate that the workplace environment is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[31]

Workplace inconveniences, standing alone, almost never meet the standard for a hostile work environment. Indeed, courts addressing hostile work environment claims often repeat that "Title VII is not a civility code."[32] Rather, to succeed in a hostile work environment claim, the plaintiff must demonstrate that the allegedly harassing conduct was unwelcome, unsolicited, and undesirable.[33]

Courts apply a two-part test to assess the severity and pervasiveness of discrimination in the work environment.[34] A plaintiff must demonstrate that the alleged harassment is hostile under both an objective and subjective standard.[35] Under the objective standard, courts must examine "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it

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28. Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 115 (2002) (citations omitted).

29. *See id.* at 115–16.

30. I refer in this Essay to other protected classes such as age, which is addressed by a statute separate from Title VII—the Age Discrimination in Employment Act of 1967 (ADEA). 29 U.S.C. §§ 621–634. Courts have found that the hostile work environment doctrine applies as equally to the ADEA as it does to Title VII. *See, e.g.*, Dediol v. Best Chevrolet, Inc., 655 F.3d 435, 440–41 (5th Cir. 2011); Crawford v. Medina Gen. Hosp., 96 F.3d 830, 834–35 (6th Cir. 1996). Likewise, courts have extended the Americans with Disabilities Act of 1990 (ADA) to cover hostile work environments. Pub. L. No. 101-336, 104 Stat. 327 (codified as amended in scattered sections of 29, 42, and 47 U.S.C.); *see, e.g.*, Fox v. Gen. Motors Corp., 247 F.3d 169, 176 (4th Cir. 2001) ("For these reasons, we have little difficulty in concluding that the ADA, like Title VII, creates a cause of action for hostile work environment harassment."); Flowers v. S. Reg'l Physician Servs. Inc., 247 F.3d 229, 235 (5th Cir. 2001) ("[W]e find that a cause of action for disability-based harassment is viable under the ADA . . . .").

31. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986) (alteration in original) (quoting Henson v. City of Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

32. Reeves v. C.H. Robinson Worldwide, Inc., 594 F.3d 798, 809 n.3 (11th Cir. 2010).

33. *See Meritor*, 477 U.S. at 68.

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

35. *See id.*

unreasonably interferes with an employee's work performance."[36] Under the subjective standard, the employee must "perceive the environment to be abusive."[37]

The amorphous nature of the hostile work environment analysis has had its benefits and drawbacks for lower courts. On one hand, the elements of the test are so broad that judges in some cases might have too much discretion, which runs the risk of producing inconsistent results.[38] On the other hand, that wide discretion allows courts to address unique factual circumstances brought about by the ever-changing workforce. This flexibility will prove quite useful to courts in the new normal.

II. HOW COURTS HAVE ADDRESSED HOSTILE WORK ENVIRONMENT CLAIMS OUTSIDE THE WORKPLACE

When Congress enacted Title VII, it did little in the way of defining "the workplace."[39] But as far back as 1999, the U.S. Equal Employment Opportunity Commission (EEOC) recognized that Title VII could extend to conduct outside the workplace.[40] The EEOC takes the position that "[h]arassment *outside* of the workplace may also be illegal *if there is a link with the workplace*," such as when "a supervisor harasses an employee while driving the employee to a meeting."[41] This principle created a happy medium—employers would not necessarily be legally responsible for all mistreatment of employees outside the confines of the physical office, but they would at least have to manage and account for such conduct.

Courts were surprisingly quick to adapt in the late 1990s and 2000s. Despite producing inconsistent results, courts seemed to develop a basic consensus that even if all aspects of an alleged harassment took place outside the walls of the physical office, the hostile work environment claim was still actionable if an employee could show that the harassment permeated the actual work atmosphere.[42] Essentially, the courts developed a cause-and-effect test: if the harassing conduct caused harm within the walls of the office, then it was actionable.[43]

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36. *Id.* at 23.

37. *Id.* at 21.

38. *See* Estelle D. Franklin, *Maneuvering Through the Labyrinth: The Employers' Paradox in Responding to Hostile Environment Sexual Harassment—a Proposed Way Out*, 67 FORDHAM L. REV. 1517, 1588 (1999) (noting how the "totality of the circumstances" analysis leads to inconsistencies in sexual harassment cases).

39. *See* Tatiana Hyman, Note, *The Harms of Racist Online Hate Speech in the Post-COVID Working World: Expanding Employee Protections*, 89 FORDHAM L. REV. 1553, 1572 (2021).

40. *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, NOTICE NO. 915.002, ENFORCEMENT GUIDANCE ON VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS (1999), https://www.eeoc.gov/laws/guidance/enforcement-guidance-vicarious-liability-unlawful-harassment-supervisors [https://perma.cc/LDG8-TYKW].

41. *Prohibited Employment Policies/Practices*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/prohibited-employment-policiespractices [https://perma.cc/DY6M-4XMN] (last visited Apr. 3, 2023) (emphasis added).

42. *See infra* notes 44–68 and accompanying text.

43. *See infra* notes 44–68 and accompanying text.

The first courts to confront this issue found hostile work environments only when the outside-of-work conduct was an extension of harassment that was already occurring in the workplace. For example, in 1997, the U.S. District Court for the District of New Hampshire found that a male manager's conduct of "rub[bing] himself on" a female employee when the two were at a bar after working hours was sufficiently related to the employee's claim that the manager inappropriately touched her and made off-color jokes to her *while in the office*.[44] The court explained that "[g]iven that [the] plaintiff experienced harassment at the work site and the incident at the bar may have formed part of a pattern of such harassment, the bar incident may well be relevant to the issue of whether [the] plaintiff experienced a hostile environment at her place of work."[45]

Federal circuit courts soon followed in adopting this approach, and although they all used slightly different versions, the crux of the analysis consistently turned on whether there was a sufficient nexus between the alleged outside-of-work conduct and the employee's reaction to that conduct *while in the office*.[46]

For example, the U.S. Court of Appeals for the Seventh Circuit concluded that "harassment does not have to take place within the physical confines of the workplace to be actionable; it need only have *consequences in the workplace*."[47] In applying that standard, the court found an actionable hostile work environment when a female plaintiff attended a training session, met other trainees at a bar, and, while intoxicated, danced with a male employee who made "sexual advances" on her.[48] The male employee drove her back to her hotel and raped her.[49] He then made frequent visits to the plaintiff at her physical workplace.[50] The court held that the training facility was "different from a typical workplace where 'employees go home at the close of their normal workday.'"[51] Rather, the court reasoned, employees at the training site could "be expected to 'band together for society and socialize as a matter of course.'"[52]

The U.S. Court of Appeals for the Ninth Circuit allowed an employee to go to trial on her claim that her employer subjected her to a hostile work environment when she was raped at a company business meeting.[53] The

44. McGuinn-Rowe v. Foster's Daily Democrat, No. 94623-SD, 1997 WL 669965, at *3 (D.N.H. July 10, 1997).

45. *Id.*

46. *See infra* notes 47–60 and accompanying text.

47. Lapka v. Chertoff, 517 F.3d 974, 983 (7th Cir. 2008) (emphasis added).

48. *Id.* at 979.

49. *See id.*

50. *See id.* at 980.

51. *Id.* at 983 (quoting Ferris v. Delta Air Lines, Inc., 277 F.3d 128, 135 (2d Cir. 2001)).

52. *Id.* (quoting Ferris v. Delta Air Lines, Inc., 277 F.3d 128, 135 (2d Cir. 2001)). Although this case is noteworthy for seemingly breaking new ground as to the analysis used on a hostile work environment claim, the court ultimately found in favor of the employer, concluding that the employer took appropriate corrective action by initiating an investigation and immediately notifying police. *See id.* at 984.

53. *See* Little v. Windermere Relocation, Inc., 301 F.3d 958, 966–67 (9th Cir. 2002).

court concluded that the plaintiff's "employment extended the work environment beyond the physical confines of the corporate office" because "[h]aving out-of-office meetings with potential clients was a required part of the job."[54] The court's reasoning suggested that the employer could have avoided liability had it taken subsequent corrective action, but by failing to do so, the employer permitted the "effects of the rape to permeate" the plaintiff's overall work environment.[55]

Likewise, the U.S. Court of Appeals for the Eighth Circuit found actionable harassment when a female plaintiff accused her male supervisor of attempting to kiss her and engaging in sexually charged conversations with her while on a business trip.[56] Like the Ninth Circuit, the court found as highly relevant the effects of the harassment on the plaintiff while she was *in the workplace*, noting that the plaintiff "often cried" and "was visibly upset."[57]

The U.S. Court of Appeals for the Tenth Circuit took a different approach when it rejected a female employee's hostile work environment claim stemming from her allegations that a retired former supervisor followed her outside the work premises in a "stalking" manner and grabbed her.[58] Although the court acknowledged that the conduct itself was the kind of "severe" conduct that would typically trigger a hostile work environment claim, the court explained that "employers [did not] have a duty under Title VII to protect employees off the work premises from the conduct of nonemployees, even if such conduct may be found to be severe in its sexual overtones."[59] The court found alternative grounds for finding in favor of the employer: the employer's actions in alerting local police and barring the former supervisor from calling the employer's main phone line were enough to remediate the off-the-premises conduct.[60]

As for employer liability for speech made on the internet—which is perhaps now the most prevalent medium for out-of-office, workplace-related harassment—it was actually a state court that weighed in with an early, seminal decision. In 2000, the Supreme Court of New Jersey addressed whether online speech detached from the physical work environment could form the basis of a hostile work environment claim.[61] In *Blakey v. Continental Airlines, Inc.*,[62] a female pilot filed a sex discrimination and retaliation suit against Continental Airlines in federal court.[63] While that litigation was ongoing, her male coworkers posted a series of derogatory and insulting remarks about the plaintiff on Continental's online bulletin board.[64]

54. *Id.* at 967.
55. *Id.*
56. *See* Moring v. Ark. Dep't of Corr., 243 F.3d 452, 456 (8th Cir. 2001).
57. *Id.*
58. Holmes v. Utah, Dep't of Workforce Servs., 483 F.3d 1057, 1068 (10th Cir. 2007).
59. *Id.*
60. *See id.* at 1069.
61. *See generally* Blakey v. Cont'l Airlines, Inc., 751 A.2d 538 (N.J. 2000).
62. 751 A.2d 538 (N.J. 2000).
63. *See id.* at 543.
64. *See id.* at 544.

The forum was accessible to all of the airline's pilots and crew personnel.[65] On appeal in a separate suit, the New Jersey Supreme Court concluded that even though the online bulletin board was technically outside the workplace, the airline did not have a duty to monitor or correct the behavior.[66] The court relied on the broad principles of the hostile work environment doctrine to conclude that even though the airline did not have a duty to monitor nonworkplace communications, "employers *do* have a duty to take effective measures to stop co-employee harassment when the employer knows or has reason to know that such harassment is part of a pattern that is taking place in the workplace and *in settings that are related to the workplace*."[67] Although the court remanded for further fact-finding regarding whether the bulletin board was truly integrated with the workplace, the following passage underscored the court's concerns posed by ignoring nonworkplace conduct as part of hostile work environment claims:

> Our common experience tells us how important are the extensions of the workplace where the relations among employees are cemented or sometimes sundered. If an "old boys' network" continued, in an after-hours setting, the belittling conduct that edges over into harassment, what exactly is the outsider (whether black, Latino, or woman) to do? Keep swallowing the abuse or give up the chance to make the team? We believe that severe or pervasive harassment in a work-related setting that continues a pattern of harassment on the job is sufficiently related to the workplace that an informed employer who takes no effective measures to stop it, "sends the harassed employee the message that the harassment is acceptable and that the management supports the harasser."[68]

Academic commentary also shows a wide variety of approaches to addressing employee harassment outside of the office. On one hand, Douglas R. Garmager argues that employers *should* be held accountable for workplace conduct outside the office, asserting that "[s]uch an expansion [of liability] would encompass modern notions of the workplace, including social obligations, travel requirements, off-premises business meetings, off-premises team-building events, and other social encounters."[69] On the other hand, Alisha A. Patterson has argued that employers should not be held liable for employee harassment outside of the office.[70] Patterson argues that

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65. *See id.*

66. *See id.* at 549.

67. *Id.* at 552 (emphasis added).

68. *Id.* at 550 (quoting Lehmann v. Toys 'R' Us, Inc., 626 A.2d 445, 464 (N.J. 1993)). In many ways, *Blakey* provides a foundation for assessing employer liability in modern forms of employment discrimination claims. *See, e.g.*, Piper v. Metro Sols., LLC, No. 18-CV-3038-T, 2021 WL 1341460, at *4–5 (M.D. Fla. Feb. 16, 2021) (concluding that communications via group chat could form basis for gender-based hostile work environment claim), *report and recommendation adopted*, No. 18-CV-3038, 2021 WL 1050140 (M.D. Fla. Mar. 19, 2021).

69. Douglas R. Garmager, Note, *Discrimination Outside of the Office: Where to Draw the Walls of the Workplace for a "Hostile Work Environment" Claim Under Title VII*, 85 CHI.-KENT L. REV. 1075, 1092 (2010).

70. *See* Alisha A. Patterson, Comment, *None of Your Business: Barring Evidence of Non-Workplace Harassment for Title VII Hostile Environment Claims*, 10 U.C. DAVIS BUS. L.J. 237, 257–68 (2010).

under Title VII's plain language, "courts must limit the scope of admissible evidence [in Title VII cases] to harassment *inside the workplace*."[71] Specifically, she contends that Title VII's use of "workplace-specific terms like 'hire,' 'discharge,' 'compensation, terms, conditions, or privileges of employment,' 'employment opportunities,' and 'status as an employee'" all "preclude[] consideration of non-workplace harassment in hostile work environment claims."[72] The competing approaches endorsed by courts and scholars provide a good foundation for addressing hostile work environment claims in the new work-from-home environment.

III. IMPLICIT BIAS AND ITS IMPLICATIONS FOR THE VIRTUAL WORKFORCE

The above-cited cases illustrate that courts have at least rejected a per se requirement that hostile work environment claims take place within a traditional office setting. However, the precedential utility of those cases is unclear when nearly *all* employee interaction technically takes place "outside" the office, as might be the case for many workplaces in the post-pandemic world.[73]

We predict that defining the boundaries of the new "office" will be a long work in progress. So, in addition to drawing on principles from the cases cited above, we encourage courts to place more focus on the content, substance, and psychology of employee interactions in the virtual workspace.[74] A necessary part of that focus will require courts to consider the role of implicit bias in the new types of interactions that we will have with our peers. And that is where we now turn.

A. Implicit Bias and Stereotyping

Well before the pandemic, the study of implicit bias was exploding in academic circles. Journalist Jesse Singal wrote that "[p]erhaps no new concept from the world of academic psychology has taken hold of the public

71. *Id.* at 258 (emphasis added).

72. *Id.* at 258–59, 264 (quoting 42 U.S.C. § 2000e-2(a)(1)); *see also* Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1848 (1992) (discussing potential First Amendment implications for imposing liability on employers for worker conduct outside of the workplace).

73. Scholars recognized this as a problem as far back as 2001. *See* Joan T.A. Gabel & Nancy Mansfield, *On the Increasing Presence of Remote Employees: An Analysis of the Internet's Impact on Employment Law as It Relates to Teleworkers*, 2001 U. ILL. J.L. TECH. & POL'Y 233, 265 (noting the urgent need for regulatory guidance in clarifying "worksite boundaries for virtual offices").

74. This is not to say that courts should ignore technical questions regarding the physical boundaries of the workplace, which undoubtedly will be an essential element of the hostile work environment analysis. Rather, I believe that courts are now better equipped to focus their attention on the substantive interactions between colleagues on the assumption that "the workplace" is likely to be more loosely defined.

imagination more quickly and profoundly in the 21st century than implicit bias."[75]

Implicit biases are the unconscious beliefs that we associate with individuals who are members of groups different from ours.[76] These feelings are deeply embedded in our subconsciouses and are responsible for a large portion of our attitudes and actions that we take toward a given social group.[77] We develop these biases through repeated interactions with one another over the course of our lives.[78]

Notable implicit bias scholars, including Professor Jerry Kang, have explained that "attitudes and stereotypes may . . . be implicit, in the sense that they are not consciously accessible through introspection."[79] Our own recognition of these biases, however, does not equate to our overcoming them. Indeed, as other implicit bias scholars have explained, "once activated, [implicit biases] influence many of our behaviors and judgments in ways we cannot consciously access and often cannot control."[80]

Implicit bias is derivative of our need as human beings to categorize. Although we are not necessarily born with innate stereotypes, we tend to place labels on people from different groups—whether it be by race, gender, religion, age, or any number of other classifications. Sociologists Cecilia L. Ridgeway and Shelley J. Correll state:

> To interact successfully, people need at least some shared cultural systems for categorizing and defining self and other in the situation so that they can anticipate each other's behavior and act accordingly. Studies of social cognition suggest that a small number of these category systems, usually about two or three, function as primary categories in a society. Primary categories describe things that one must know about a person to render that person sufficiently meaningful that one can relate to her or him . . . . [E]vidence suggests that sex category is always one of a society's primary category systems—in the United States, race is one as well.[81]

Stereotypes guide us with "implicit expectancies that influence how incoming information is interpreted."[82] The problem with stereotyping in employment is that once we process those expectancies, our treatment of our

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75. Jesse Singal, *Psychology's Favorite Tool for Measuring Racism Isn't Up to the Job*, THE CUT (Jan. 2017), https://www.thecut.com/2017/01/psychologys-racism-measuring-tool-isnt-up-to-the-job.html [https://perma.cc/4RAP-59CC].

76. *See id.*

77. *See, e.g.*, Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson*, and Proposed Solutions*, 4 HARV. L. & POL'Y REV. 149, 149 (2010).

78. *See id.*

79. Jerry Kang, Mark Bennett, Devon Carbado, Pam Casey, Nilanjana Dasgupta, David Faigman, Rachel Godsil, Anthony G. Greenwald, Justin Levinson & Jennifer Mnookin, *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1129 (2012).

80. L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626, 2630–31 (2013).

81. Cecilia L. Ridgeway & Shelley J. Correll, *Limiting Inequality Through Interaction: The End(s) of Gender*, 29 CONTEMP. SOCIO. 110, 111 (2000) (citation omitted).

82. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1199 (1995).

peers—absent intervening information to overcome our unconscious beliefs—will often dictate our entire outlook and opinion of them.[83] Because stereotyping imprints our minds with such firm expectancies, our minds can often trick us into believing "stereotype-consistent behavior that did not actually occur" rather than the more obviously observable, stereotype-inconsistent conduct that *did* occur.[84]

For decades now, bias studies have revealed how minority groups from all protected classes are at a disadvantage in the job market.[85] Those studies might be relevant in assessing Title VII violations that are associated with discrete acts. But little has been explored as to the way in which implicit bias affects or can create a hostile work environment and even less has been explored as to how it will impact employee interactions in the virtual workplace.

Scholars are uncertain whether the broad contours of Title VII leave any room for courts to consider implicit bias in the context of hostile work environment claims.[86] At least one scholar has suggested that Title VII necessarily requires an implicit bias consideration, given that Congress's goal in enacting the statute was to cover the "entire spectrum" of employment discrimination against the protected classes.[87] Despite the recent influx of data and literature on implicit bias, courts tend to disregard them when

83. *See* Audrey J. Lee, *Unconscious Bias Theory in Employment Discrimination Litigation*, 40 HARV. C.R.-C.L. L. REV. 481, 484 n.18 (2005) ("[R]esearchers have found that because majority group members tend to have little contact with minority members, stereotyped conceptions of minority groups can result from illusory correlations between minority group membership and negative behavioral events, which, by their more infrequent nature, are more salient.").

84. *Id.* at 484.

85. *See* Christopher Cerullo, Note, *Everyone's a Little Bit Racist?: Reconciling Implicit Bias and Title VII*, 82 FORDHAM L. REV. 127, 141 (2013) (explaining that studies reveal that "an applicant with a 'white' name will receive about one interview for every ten applications, while an applicant with a 'black' name will receive one interview for every fifteen applications," but that "anonymous hiring" might serve as a check on biases and specifically citing to study revealing that when symphony orchestras hired under such conditions, "the chances a woman had to advance to the final round of auditions or secure a position within the orchestra increased by 25 percent"); *see also* Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More Employable than Lakisha and Jamal?: A Field Experiment on Labor Market Discrimination*, 94 AM. ECON. REV. 991, 992 (2004).

86. *See* Laura T. Kessler, *Employment Discrimination and the Domino Effect*, 44 FLA. ST. U. L. REV. 1041, 1059 (2017) ("[T]here is a grave mismatch between what we know from social science about how discrimination operates today and the model we inherited from fifty years ago, which does not account for the dynamic interaction among employee choices, bias, and structural features of the workplace that produce inequality.").

87. *See* Lee, *supra* note 83, at 488 n.47 ("The Supreme Court has long recognized that unlawful discrimination can stem from stereotypes and other types of cognitive biases, as well as from conscious animus . . . . Stereotypes or cognitive biases based on race are as incompatible with Title VII's mandate as stereotypes based on age or sex; here too, 'the entire spectrum of disparate treatment' is prohibited." (alteration in original) (quoting Thomas v. Eastman Kodak Co., 183 F.3d 38, 59 (1st Cir. 1999))).

assessing an employer's discriminatory intent—or lack thereof—in its decision-making.[88]

But we know that stereotyping and implicit bias go hand in hand, so even if courts have yet to make that association as a matter of law, it is inevitable that they will need to do so soon. We can predict what courts might say about that association by first examining what courts have said about stereotyping more generally. From there, we can consider how courts have extended those principles to more recent considerations of implicit bias.

B. How Courts Have Treated Implicit Bias and Stereotyping Theories of Employment Discrimination

In 1989, the Supreme Court expanded the reach of employment discrimination claims to cover sex-based stereotyping. In *Price Waterhouse v. Hopkins*,[89] the Court concluded that an accounting company violated Title VII when it failed to promote a female employee to the company's partnership based on what the company perceived as her lack of conformity with female stereotypes.[90] The partner who informed the employee of the company's decision told her that her chances of making partner would improve if she would "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[91] Justice William J. Brennan, Jr., writing for a plurality of the Court, explained that because these comments stemmed from gender stereotypes, they necessarily played an important role in determining the company's motivation for failing to promote the employee—even if the company's decision was also grounded in other, nondiscriminatory reasons.[92] This has since come to be known as the "mixed motive" theory of sex discrimination.

It remains unclear whether *Price Waterhouse*'s core holding was limited to sex-stereotyping claims or whether it has been extended to encompass all forms of stereotyping based on Title VII's protected classes. At least a few courts have suggested that a "sex-stereotyping-plus" claim—that is, sex stereotyping *in combination* with stereotyping based on one's status in another protected class—might suffice to succeed in an employment discrimination claim. For example, some courts have suggested the viability of sex-plus-race discrimination claims presented by African American

88. *See* Joan C. Williams & Stephanie Bornstein, *The Evolution of "FReD": Family Responsibilities Discrimination and Developments in the Law of Stereotyping and Implicit Bias*, 59 HASTINGS L.J. 1311, 1353–54 nn.288–89 (2008) (collecting relevant articles).

89. 490 U.S. 228 (1989).

90. *See id.* at 250–51.

91. *Id.* at 235.

92. *See id.* at 251 ("Remarks at work that are based on sex stereotypes do not inevitably prove that gender played a part in a particular employment decision. The plaintiff must show that the employer actually relied on her gender in making its decision. In making this showing, stereotyped remarks can certainly be *evidence* that gender played a part.").

women who contend that their employers have stereotyped them as "angry black women."[93]

As the study of implicit bias has developed, scholars have grappled with whether it makes more sense to address implicit bias by utilizing the *Price Waterhouse* framework or to incrementally develop a distinct body of law to address employment discrimination claims premised on implicit bias.[94] Thus far, courts have seldom discussed implicit bias, much less relied on it to advance any substantive understanding of *why* we behave the way we do in the workplace.[95]

Courts have only infrequently considered implicit bias, "and rarely [have they done so] in a positive fashion."[96] One of the reasons for judicial reluctance to delve into this complex field is that implicit bias addresses *unintentional* behaviors, while Title VII's antidiscrimination protections are strictly premised on *intentional* discrimination.[97] Another possible reason is that "jurors may not be disposed to hold someone responsible for conduct that they can readily see themselves as engaging in"—if everyone has

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93. *See, e.g.*, Heard v. Bd. of Trs. of Jackson Cmty. Coll., No. 11-CV-13051, 2013 WL 142115, at *12 (E.D. Mich. Jan. 11, 2013). The court described the "angry black woman" stereotype:

> The Sapphire Caricature portrays black women as rude, loud, malicious, stubborn, and overbearing. This is the Angry Black Woman (ABW) popularized in the cinema and on television. She is tart-tongued and emasculating, one hand on a hip and the other pointing and jabbing (or arms akimbo), violently and rhythmically rocking her head . . . . She is a shrill nagger with irrational states of anger and indignation and is often mean-spirited and abusive . . . . [S]he has venom for anyone who insults or disrespects her.

Id. (alterations in original) (quoting exhibit to plaintiff's brief); *see also* Young v. Control Sols., LLC, No. 15-CV-3162, 2017 WL 2633679, at *4 (N.D. Ill. June 19, 2017) ("Angry and its synonyms are, standing alone, innocent words with no racial connotation. They are words, however, with a long history as part of a stereotypical depiction of black women that can trace its roots to the institution of slavery. Although the parties offer limited evidence on this point, there appears to be an academic consensus regarding both the resilience of this stereotype within American society and its continued detrimental impact upon black women. When a word or concept is so pervasively and enduringly linked to a derogatory stereotype, its use to reference individuals traditionally subject to the stereotype inherently raises the specter of motivation or bias.").

94. *See, e.g.*, Stephanie Bornstein, *Unifying Antidiscrimination Law Through Stereotype Theory*, 20 LEWIS & CLARK L. REV. 919, 940–41 (2016).

95. *See* Charles A. Sullivan, *Making Too Much of Too Little?: Why "Motivating Factor" Liability Did Not Revolutionize Title VII*, 62 ARIZ. L. REV. 357, 394 n.157 (2020) ("Admittedly, there is a chicken-egg problem here. The plaintiffs' bar has rarely relied heavily on implicit bias evidence, which means there have been limited opportunities for courts to decide cases.").

96. *Id.* at 393 n.153.

97. *See* Linda Hamilton Krieger & Susan T. Fiske, *Behavioral Realism in Employment Discrimination Law: Implicit Bias and Disparate Treatment*, 94 CALIF. L. REV. 997, 1034 (2006) ("Title VII's operative text prohibits these subtle forms of discrimination, but the science of implicit stereotyping has barely begun to influence federal disparate treatment jurisprudence. Indeed, from a behavioral realist standpoint, in many circuits, judicial conceptions of intergroup bias have actually regressed over the past two decades, even as psychological science has surged toward an increasingly refined understanding of the ways in which implicit prejudices bias the social judgments and choices of even well-meaning people.").

implicit biases, then nobody has bias.[98] Although Congress, in theory, has the ability to legislate an implicit bias "consideration" into the text of Title VII, it seems unlikely that any such change would occur in the short term.[99]

The few brave courts that have dipped their toes in the water thus far have considered implicit bias both as a legal theory and as an evidentiary consideration.[100]

For example, in *Thomas v. Eastman Kodak Co.*,[101] a 1999 case from the U.S. Court of Appeals for the First Circuit, the plaintiff was the lone African American female employee in her department at Eastman Kodak.[102] She had consistently received "excellent" performance reviews during her employment, which had spanned several years.[103] When a new supervisor—a white male—came aboard, he gave her significantly lower performance reviews in comparison to her white coworkers, and, as a result, the company fired the plaintiff.[104] Relying on *Price Waterhouse*, the court noted the prevalent role of stereotyping in race-based mistreatment and concluded that the plaintiff's case involved "a more subtle type of disparate treatment"[105] and a "less conscious bias."[106] In doing so, the court ultimately found a triable issue of fact regarding the plaintiff's race discrimination claims.[107] The court explained that "[t]he ultimate question is whether the employee has been treated disparately 'because of race.'"[108] "This is so," the court explained, "regardless of whether the employer consciously intended to base the evaluations on race, or simply did so because of unthinking stereotypes or bias."[109] The ruling in this case was a significant departure from almost all prior cases involving Title VII, which typically required an "invidious intent to discriminate."[110]

In 2010, the U.S. District Court for the Eastern District of Wisconsin became one of the first courts to tackle implicit bias as a matter of substantive law. In *Kimble v. Wisconsin Department of Workforce Development*,[111] the plaintiff—an African American male supervisor—alleged that he had been denied a raise due to his race and gender.[112] Fatal to the department's defense of the employee's claim was that it did not have objective criteria by which it evaluated its employees.[113] As the court explained, "[n]o written criteria governed such decisions, and [the plaintiff's supervisor] consulted no one

98. Sullivan, *supra* note 95, at 393 n.155.
99. *See* Cerullo, *supra* note 85, at 155.
100. *See id.* at 158 n.282 (encouraging courts to develop doctrine in this area).
101. 183 F.3d 38 (1st Cir. 1999).
102. *See id.* at 42.
103. *Id.* at 43.
104. *See id.* at 45–46.
105. *Id.* at 58.
106. *Id.* at 64.
107. *See id.* at 64–65.
108. *Id.* at 58.
109. *Id.*
110. Cerullo, *supra* note 85, at 153.
111. 690 F. Supp. 2d 765 (E.D. Wis. 2010).
112. *See id.* at 767.
113. *See id.* at 776.

about them, not even the affected employees' immediate supervisors."[114] These conditions—the court observed—put the department in a position where it might become overly reliant on stereotypes in its decision-making:

> With respect to the operation of stereotypes in the employment context, most scholars believe that stereotyping is a form of categorizing. Individuals draw lines and create categories based in part on race, gender and ethnicity, and the stereotypes they create can bias how they process and interpret information and how they judge other people. . . .
>
> A supervisor's view of an employee may be affected by such lines and categories whether or not the supervisor is fully aware that this is so.[115]

This passage appears to be the best attempt thus far by a court to weave implicit bias considerations into Title VII jurisprudence.

Applying those considerations, the *Kimble* court explained that the evidence in the case revealed that the supervisor "seemed to regard [the] plaintiff as if he were 'veiled with images of incompetency.'"[116] The court arrived at that conclusion after noting that (1) the plaintiff had worked at the department for twelve years, (2) the supervisor had avoided interacting with the plaintiff, and (3) the supervisor "took little interest in [the] plaintiff."[117] In particular, the court noted that the supervisor admitted that she was unaware that the plaintiff had previously received several discretionary raises in the past.[118]

The court also took issue with the supervisor's emphasis on the plaintiff's proofreading and writing abilities, with little acknowledgement as to the plaintiff's ability to run an efficient office and maintain good morale.[119] This, the court noted, "may well have been because she viewed him through the lens of an uncomplimentary stereotype."[120] Ultimately, the court concluded that the supervisor "behaved in a manner suggesting the presence of implicit bias."[121]

Kimble appears to be one of the few cases that has embraced implicit bias analysis as a legal doctrine and as a formal justification for finding employment discrimination.[122] But this approach has struggled to gain

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114. *Id.*

115. *Id.*

116. *Id.* (quoting Floyd D. Weatherspoon, *Remedying Employment Discrimination Against African-American Males: Stereotypical Biases Engender a Case of Race Plus Sex Discrimination*, 36 WASHBURN L.J. 23, 41 (1996)).

117. *Id.* at 776–77.

118. *See id.* at 777.

119. *See id.* at 777–78.

120. *Id.* at 778 ("[A] supervisor might unconsciously place more weight on errors in grammar or spelling in a memo prepared by a Hispanic clerk than in a document submitted by an Anglo counterpart." (quoting Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1131 (1999))).

121. *Id.*

122. *See* Sullivan, *supra* note 95, at 393 & n.153 (describing *Kimble* as "[o]ne of the few cases in which implicit bias arguably played an important role in finding liability" and also noting that "there is an almost total absence of instances where a court looks to implicit bias as an important element of proof of discrimination").

traction, even though the few courts that have been faced with an implicit bias challenge have cited *Kimble*.

In *Wells-Griffin v. St. Xavier University*,[123] an Illinois federal court granted summary judgment in favor of a private university when an African American employee brought a race discrimination claim after the school altered and then eliminated her secretarial position.[124] The employee argued that "her supervisors adhered to 'stereotypical notions that [she] was lazy, incompetent, insubordinate, uneducated, and ungrateful.'"[125] The employee argued that *Kimble*'s implicit bias theory of race discrimination governed her claims.[126] The court did not accept or reject *Kimble*, instead concluding that *Kimble* was distinguishable from the secretary's claims because the secretary had failed to provide evidence that was she was treated *differently* than other employees, even if her supervisors' actions could be attributed to racial stereotyping.[127]

Another Illinois federal court cited *Kimble* but deemed the implicit bias theory too speculative in rejecting an African American employee's claim that certain emails were evidence of his manager's implicit bias against African American employees.[128] The court concluded that even though "[t]he emails could reflect an implicit racial bias against African Americans," they could also reflect other considerations that would not implicate Title VII.[129] Moreover, other considerations—such as the absence of any other racist behavior by the manager in the workplace—negated the likelihood that implicit bias played any role in potential discriminatory behavior.[130]

Two other courts have cited *Kimble*. One did so in the context of preventing the introduction of implicit bias testimony before a jury, explaining that determining whether *intentional* discrimination occurred would not involve any information about "subconscious beliefs derived from stereotypes."[131] Another did so in the context of rejecting a Hispanic job applicant's national origin discrimination claim.[132] In the latter case, a state corrections department hired a white applicant for the position instead of the plaintiff.[133] Although the court did not rely on implicit bias theory in rejecting the plaintiff's discrimination claim, it did note that "prohibitive implicit and cognitive biases can permeate interviews, even when done by a

123. 26 F. Supp. 3d 785 (N.D. Ill. 2014).
124. *See id.* at 792–97.
125. *Id.* at 793 (quoting brief).
126. *See id.*
127. *See id.*
128. *See* Martin v. F.E. Moran, Inc., No. 13 C 3526, 2018 WL 1565597, at *29 (N.D. Ill. Mar. 30, 2018).
129. *Id.*
130. *See id.*
131. Jackson v. Scripps Media, Inc., No. 18-00440-CV-W, 2019 WL 6619859, at *5–6 (W.D. Mo. Dec. 5, 2019).
132. *See* Imbriglio v. Rhode Island, No. CV 16-396, 2019 WL 1777250, at *5 & n.5 (D.R.I. Apr. 23, 2019).
133. *See id.* at *1.

diverse group of unbiased people."[134] However, the plaintiff had not developed enough evidence—specifically because she had not offered any expert testimony on implicit bias—to make it relevant in her case.[135]

Other courts have focused less on implicit bias as a substantive component of employment law, instead treating it as an evidentiary issue—specifically in the context of whether it is appropriate for a jury to hear expert testimony about the prevalence of implicit bias.

In *Samaha v. Washington State Department of Transportation*,[136] for example, an Arab American employee sought to introduce implicit bias research to show that his employer treated him differently from non-Arab employees by holding him to a different performance standard.[137] The court denied the employer's motion in limine to preclude evidence regarding the testimony and report of Dr. Anthony Greenwald—a well-known implicit bias expert.[138] The employer was particularly concerned with Dr. Greenwald's reliance on the Implicit Association Test (IAT), which the employer argued was "mere 'statistical generalizations about segments of the population.'"[139] The court rejected this argument, noting that the IAT had been subject to peer review and—at the time—had been taken online more than twelve million times.[140] Thus, it was sufficiently grounded in science and clear methodology.[141] The court also relied on *Price Waterhouse* and *Thomas* in finding Greenwald's testimony relevant, explaining that "[t]estimony that educates a jury on the concepts of implicit bias and stereotypes is relevant to the issue of whether an employer intentionally discriminated against an employee."[142] Thus, the court held, it would be helpful in assisting the jury in determining whether the plaintiff had suffered employment discrimination.[143]

In *Karlo v. Pittsburgh Glass Works, LLC*,[144] a Pennsylvania federal district court excluded Greenwald's testimony because (1) it was not related to the particular facts of the case, (2) Greenwald had not examined the facts of the particular case, and (3) Greenwald had not spoken to anyone linked to the employer or "perform[ed] any independent, objective analysis on whether implicit biases played any role in the decisions to terminate the remaining Plaintiffs."[145] On appeal, the U.S. Court of Appeals for the Third Circuit briefly concluded that the district court properly excluded the testimony.[146]

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134. *Id.* at *5.
135. *See id.*
136. No. CV-10-175, 2012 WL 11091843 (E.D. Wash. Jan. 3, 2012).
137. *See id.* at *1.
138. *See id.* at *2.
139. *Id.* at *3 (quoting brief).
140. *See id.*
141. *See id.*
142. *Id.* at *4.
143. *See id.*
144. No. 10-CV-1283, 2015 WL 4232600 (W.D. Pa. July 13, 2015), *vacated on other grounds*, 849 F.3d 61 (3d Cir. 2017).
145. *Id.* at *7.
146. *See* Karlo v. Pittsburgh Glass Works, LLC, 849 F.3d 61, 84–85 (3d Cir. 2017).

The Third Circuit did not, however, categorically reject implicit bias testimony.[147] Instead, the court explained that "[c]ourts may, in their discretion, determine that such testimony elucidates the kind of headwind disparate-impact liability is meant to redress."[148] The Third Circuit's ruling on the implicit bias issue was very narrow, and it rejected Greenwald's testimony simply on the notion that it had only "speculative application" to the employer.[149]

In *Johnson v. Seattle Public Utilities*,[150] the Washington Court of Appeals affirmed a state trial court's decision to exclude Greenwald's testimony.[151] Following similar logic to the district court in *Karlo*, the state appeals court in this instance held that Greenwald's testimony was properly excluded because Greenwald's "generalized opinions . . . [we]re not tied to the specific facts of the case" and "would be confusing and misleading for the jury."[152]

Considering all of these cases, *Kimble*—despite being a nonbinding decision from a district court—offers the best framework for addressing unconscious biases in employment discrimination because it affords judges and juries the best opportunity to identify, conquer, and, hopefully, eradicate stereotyping in the workplace. The *Kimble* framework also provides courts with an opportunity to apply *Price Waterhouse* more fervently to employment discrimination in the virtual workplace. That is because our biases most strongly associated with Title VII's protected classes are likely to be elevated in a work-from-home environment.

C. Kimble *as a Framework for Governing Implicit Biases in the Virtual Workplace*

Although remote work may not significantly alter the *tasks* that employees perform, it will undoubtedly change the way in which employees *interact* with their peers. We therefore urge courts to consider implicit bias—as framed in *Kimble*—as a means of addressing hostile work environment claims in the virtual workplace. We believe that consideration of implicit bias is necessary for the proper adjudication of hostile work environment claims because the modern virtual workplace is likely to foster the worst of our implicit biases, and the law must account for that profound change.

Simply put, in deciding hostile work environment claims—whether on a motion to dismiss or on a motion for summary judgment—a judge should liberally construe evidence and literature on implicit bias when considering virtual workplace harassment. This is not a radical solution. In fact, one could argue that *Kimble*'s treatment of implicit bias is a necessary next step in the development of the *Price Waterhouse* doctrine. More specifically, we cannot identify the very stereotypes that *Price Waterhouse* considers to be

147. *See id.* at 85.
148. *Id.*
149. *Id.* at 84–85.
150. No. 76065-3-I, 2018 WL 2203321 (Wash. Ct. App. May 14, 2018).
151. *See id.* at *6–8.
152. *Id.* at *8 (quoting report of proceedings).

impermissible without fully understanding the role that implicit bias plays in creating and acting on those stereotypes.

Kimble—which serves as an integral step in further developing the *Price Waterhouse* doctrine—provides a strong framework for how courts should address implicit bias. We contend as much because it is almost certain that employees who are working from home are likely to make decisions and interact with their coworkers based on their implicit biases. This change in behavior is largely a function of the limited and nontraditional means of interaction that employees would otherwise have with their colleagues. For example, through Zoom meetings, coworkers can still see gender and race and may even be able to make rough estimates as to the ages of their coworkers. But they will not have the traditional workplace interactions by which they would otherwise be able to "gauge the emotional interactions and mood" of the office in a manner that would otherwise likely be beneficial.[153] The potential danger of this change is that employees will form impressions—and, by extension, implicit biases—of one another based on these characteristics, rather than through normal interactions.

Additionally, because discrimination itself will be harder to detect in the remote workplace, an understanding of implicit bias will help courts identify Title VII violations when they are not readily apparent. In February 2021, in one of the first COVID-19-era employment law cases, the U.S. District Court for the District of Connecticut highlighted this exact problem, explaining that discrimination will be more challenging to notice in the virtual workplace:

> Discrimination is often unmasked when an employee learns that another worker outside of their protected class is being treated more favorably or when a manager persistently uses derogatory language. Such behavior is more likely to be uncovered through an employee's direct observation and personal interactions with their peers and managers. The separation and isolation of gig and remote work makes detecting and ultimately proving discrimination more difficult because these interactions are less frequent and occur virtually.[154]

153. Kacey Marr, Comment, *The Right to "Skype": The Due Process Concerns of Videoconferencing at Parole Revocation Hearings*, 81 U. CIN. L. REV. 1515, 1533 (2013) (quoting Anne Bowen Poulin, *Criminal Justice and Videoconferencing Technology: The Remote Defendant*, 78 TUL. L. REV. 1089, 1131 (2004)) (considering the detrimental effects of videoconferencing on the attorney-client relationship).

154. Hale v. Iancu, No. 19-CV-1963, 2021 WL 9405460, at *11 (D. Conn. Feb. 23, 2021) (citing Abdu-Brisson v. Delta Air Lines, Inc., 239 F.3d 456, 467–68 (2d Cir. 2001)). In a 1993 case, albeit in an entirely different context—addressing whether there was a Confrontation Clause violation—the Sixth Circuit spoke to a similar issue and masterfully stated the pitfalls of virtual versus in-person confrontation:

> [With virtual confrontation,] the jury and the judge never actually see the witness. The witness is not confronted in the courtroom situation. The immediacy of a living person is lost. In the most important affairs of life, people approach each other in person, and television is no substitute for direct personal contact. Video tape is still a picture, not a life, and it does not come within the rule of the confrontation clause which insists on real life where possible, not simply a close approximation.

Stoner v. Sowders, 997 F.2d 209, 213 (6th Cir. 1993).

A strong and developing body of case law consistent with *Kimble* will help address those many complexities that come with the work-from-home environment. That is because *Kimble* provides courts with a powerful alternative method of addressing new kinds of virtual hostile work environment claims in a "paradigm [in which] employment discrimination law largely depends on the basis of readily observable visual cues and traits."[155]

The post-pandemic work-from-home boom will likely present courts with many opportunities to apply and further develop *Kimble*, as stereotyping takes hold in the virtual workplace and creates new lines of argument and theoretical approaches to a whole host of Title VII issues.[156] A strong understanding and judicial acceptance of *Kimble* will be necessary to further understand new forms of harassment, most of which will take place electronically.

For example, the majority of post-pandemic virtual hostile work environment claims might emanate from sexually charged or racially insensitive emails, whereas in the past, those same claims would have largely been based on in-office events. When people communicate electronically, the dynamics of their interactions are vastly different than when they interact in person.[157] The possibility of subtle yet crude and inconsiderate language being used is almost certainly higher[158] because, in a sense, we are concealing our true identities when we hide behind our laptops from the comfort of our homes.[159]

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155. Miriam A. Cherry, *A Taxonomy of Virtual Work*, 45 GA. L. REV. 951, 977 (2011).

156. Before the pandemic, psychologists identified particular triggers that facilitate stereotyping in the physical workplace. *See* Lee, *supra* note 83, at 484. An understanding of these triggers will be helpful in gaining a better understanding of stereotyping in the virtual workplace. The most obvious example of this would be when there is only one or a few minority employees in an otherwise homogenous work group. *See id.* Examples include a Black woman in an office with mostly white males or a sixty-year-old employee in a Silicon Valley office with dozens of twentysomethings just out of college. A second example is when an employee takes a "nontraditional" job. *See id.* Examples include a Black woman who works in the pro shop of a formerly "whites only" golf course or an older male who works at a day spa frequented mostly by middle-aged and younger women. A third example is when decision-makers have discretion to use ambiguous criteria for evaluating their subordinates. *See id.* This usually comes up with subjective evaluations. *See id.*; *see also* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 485–86 (2001) ("[D]ecisions requiring the exercise of individual or collective judgment that are highly unstructured tend to reflect, express, or produce biased outcomes. This bias has been linked to patterns of underrepresentation or exclusion of members of nondominant groups." (footnote omitted)).

157. *See* David K. McGraw, Note, *Sexual Harassment in Cyberspace: The Problem of Unwelcome E-Mail*, 21 RUTGERS COMPUT. & TECH. L.J. 491, 492 (1995).

158. *See id.* ("E-mail users are often blunt and direct; they are less concerned with the possible impact their speech may have. The words they choose are more harsh or crude than those used in other contexts.").

159. *See* Cherry, *supra* note 155, at 976–77; *see also* Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 W. VA. L. REV. 307, 346 (2010) (discussing research on stereotype and bias "lessening" through various "interventions" and "debiasing" tactics).

Additionally, socioeconomic factors will influence how we present ourselves and view coworkers online.[160] Videoconferencing allows snooping coworkers a rare opportunity to glimpse into our private lives. For example, white upper-middle-class and wealthy employees might be able to showcase a spacious, glamorous home that was inherited from generations of wealth that accrued because of racial privilege. By contrast, minority lower-middle-class employees might be living with multiple extended family members in a more "nontraditional" family setting. Additionally, visuals such as a child running around the house of a young African American female employee might trigger the stereotypical image of the African American single mother.[161]

People of color working in white-dominated professions might also not be able to engage in "code-switching" with their colleagues as easily as they would be able to in a traditional office setting.[162] Code-switching is a tactic that some members of minority groups utilize in order to overcome stereotypes.[163] It includes "adjusting their speech, appearance, and behaviors to optimize the comfort of others with the hopes of receiving fair treatment, quality service, and opportunities."[164] Moreover, members of religious minority groups who might otherwise refrain from wearing religious dress—such as yarmulkes or hijabs—in the workplace might be inclined to wear such garb while at home.[165]

All these changes to workplace interactions present rife opportunities for labeling because when employees cannot separate their professional personas from their private identities, cultural stereotypes can fill in the gaps as they interact with one another.[166] As a consequence of our implicit biases and stereotyping, employees might develop overly negative views of coworkers, depending on how they present themselves in the virtual workplace. In fact, the virtual workplace might even accelerate our tendency to stereotype because our implicit biases guide us in creating "schemas" in which we assign a set of beliefs as to the "typical"-[insert protected class] man or the "typical"-[insert protected class] woman.[167] The law must demonstrate elasticity to address these problems.

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160. *See* Stidvent, *supra* note 9.

161. Laura Morgan Roberts & Courtney L. McCluney, *Working from Home While Black*, HARV. BUS. REV. (June 17, 2020), https://hbr.org/2020/06/working-from-home-while-black [https://perma.cc/7CHJ-5J5M].

162. *Id.*

163. *Id.*

164. *Id.*

165. For an excellent discussion of Title VII religious discrimination claims based on religious dress, see Sadia Aslam, Note, *Hijab in the Workplace: Why Title VII Does Not Adequately Protect Employees from Discrimination on the Basis of Religious Dress and Appearance*, 80 UMKC L. REV. 221, 222 (2011) ("While some employers do not seem to pay much attention to the dress or appearance of potential employees, appearance and dress codes are a deciding factor for other employers.").

166. *See* Cherry, *supra* note 155, at 977.

167. *See* Krieger, *supra* note 82, at 1190 (discussing "schema theory," which posits that we "construe or make predictions about an event or situation" and "[o]nce activated, the schema

Title VII doctrine as it currently stands does not yet account for the idiosyncrasies of remote work, but broader consideration of implicit bias theory and using *Kimble* as a guidepost will allow courts to hit the ground running in the post-COVID employment law arena. The *Kimble* framework—coupled with a more lenient and permissive standard of admitting implicit bias expert testimony—will allow the law to harness and develop a greater understanding of the notion that we associate an individual's salient features—their race, age, and gender—with stereotypes such as intelligence and trustworthiness.[168] Further, we can gain greater understanding that these biases are "triggered" when we *notice* those salient traits and characteristics.[169] These two considerations—coupled together—will allow for the modernization of Title VII doctrine in the context of a rapidly evolving workplace dynamic.

Adopting *Kimble* would allow courts to afford due weight to other important statistical findings in relevant literature and data. For example, a permissive standard for consideration of implicit bias evidence would allow courts to better assess how the absence of nonverbal conduct—something that we could more readily assess in a traditional office setting—affects how we perceive potentially discriminatory messaging from our peers.[170] Nonverbal cues make up the bulk of our communications—or at least aid our understanding of what it is that our peers are actually saying.[171] So even with the luxury of seeing a coworker *as if* they are in the same environment as us,

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influences the interpretation, encoding, and organizing of incoming information and mediates the drawing of inferences or the making of predictions about the schematized object or event").

168. *See* Kimberly D. Elsbach & Ileana Stigliani, *New Information Technology and Implicit Bias*, 33 ACAD. MGMT. PERSPS. 185, 186 (2019).

169. *Id.*

170. For example, courts could consider literature and data such as Professor Albert Mehrabian's well-known work on the "7-38-55 percent rule." *See* ALBERT MEHRABIAN, NONVERBAL COMMUNICATION 178–82 (1972). Mehrabian's studies suggested that nonverbal cues carry a far greater influence on how people perceive and absorb messages from other people. *See id.* Mehrabian concluded that when people interact, only 7 percent of their perception of the interaction is communicated through the actual verbal words from the conversation, 38 percent comes from vocal cues, and the remaining 55 percent comes from nonverbal indicators. *See id.* If Mehrabian's study provides a reasonable baseline for assessing the typical workplace interaction, then we can assume that the 7 percent figure that we would normally assign to communications in the workplace might be approaching near 100 percent of what we perceive when interacting in the virtual workplace, where we might miss those vocal cues and nonverbal indicators. For example, most electronic communications cannot convey tone, and we cannot easily read facial expressions and body movements when communicating via videoconference. We are simply left with either cold words on paper (or email) or other similarly static communications. For example, even if coworkers intend to make eye contact with one another, the angling of a camera might prevent that from happening. *See* Aaron Haas, *Videoconferencing in Immigration Proceedings*, 5 PIERCE L. REV. 59, 67–68 (2006) (contending that, in video-mediated communication, "[t]he viewer will respond to the lack of eye contact from the image in front of him the same way that he would respond to lack of eye contact from a person actually in front of him—that is, he will believe the person is being evasive"). Other nonverbal cues that are critical to essential communication but at risk of being lost through video communication are voice pitch, posture, and hand movements. *See id.* at 70–71. The loss of nonverbal cues can also make group tasks far more difficult than they otherwise would be. *See id.* at 73.

171. *See* Haas, *supra* note 170, at 69–70.

we lose out on the full interactive experience.[172] Title VII jurisprudence does not yet account for this distinction, which creates an even greater need for judicial consideration of implicit bias in deciding such cases.

There are also, of course, nonjudicial remedies that could help address the myriad problems likely to permeate the virtual workforce. Employers *could*, for example, establish virtual workplaces that mimic actual offices.[173] This approach would potentially allow employers to *overcommunicate* with their remote workers, which might provide employers with the opportunity to counteract the relative independence and solitary nature of remote work.[174] Indeed, surveys conducted in the spring of 2020 indicated that when going remote, employees missed "being able to spontaneously walk to a coworker's desk and discuss an issue" and engage in "social gatherings at work."[175] These considerations, however, are outside the scope of this Essay and of implicit bias issues more generally. Nevertheless, employers should consider them as well.

CONCLUSION

The American social structure has geared Americans to automatically group themselves through three variable categories—race, gender, and age.[176] Those categories could very well make up the full complement of the ways in which we view our coworkers in the virtual workplace. Although we do not typically urge courts to introduce rapid change to the law, we believe that the current times—and the imminent long-term changes to the workforce—require prudent modifications. We cannot predict exactly what

172. *Compare* Shari Seidman Diamond, Locke E. Bowman, Manyee Wong & Matthew M. Patton, *Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions*, 100 J. CRIM. L. & CRIMINOLOGY 869, 900 (2010) ("Similarly, studies in educational settings suggest that some nonverbal behaviors by teachers, such as facial expression, tone of voice, and eye gaze, influence how students evaluate the teacher."), *with* Brendan R. McDonald, Robert D. Morgan & Patrick S. Metze, *The Attorney-Client Working Relationship: A Comparison of In-Person Versus Videoconferencing Modalities*, 22 PSYCH. PUB. POL'Y & L. 200, 206 (2016) (reviewing studies that "are consistent with a growing body of literature indicating that the quality of professional services delivered via videoconference is no better or worse than services delivered in person").

173. *See* Grose, *supra* note 4 (discussing an instance in which the manager of a new employee made himself more available during the pandemic because the employee was missing out on things that she "might pick up through osmosis in the office").

174. *See id.*

175. Adriana Dahik, Deborah Lovich, Caroline Kreafle, Allison Bailey, Julie Kilmann, Derek Kennedy, Prateek Roongta, Felix Schuler, Leo Tomlin & John Wenstrup, *What 12,000 Employees Have to Say About the Future of Remote Work*, BOS. CONSULTING GRP. (Aug. 11, 2020), https://www.bcg.com/publications/2020/valuable-productivity-gains-covid-19 [https://perma.cc/NE6B-FMYD].

176. *See* Elizabeth Weingarten, *Why Pretending You Don't See Race or Gender Is an Obstacle to Equality*, SLATE (May 23, 2017, 8:45 AM), https://slate.com/human-interest/2017/05/youre-not-blind-to-race-and-gender-but-your-hiring-process-can-be.html [https://perma.cc/L2U4-DJQ3] (quoting a group of researchers at Yale University as stating that "even when members are seemingly included within a larger group or organization, they are vulnerable to subtle, often unconscious bias [as] a result of their membership in a lower-status social group").

all of the new hostile work environment claims will look like, but we know they are coming soon and coming fast.[177] Accordingly, courts need to generate principles that can best address concerns about stereotyping and implicit bias in the new normal. We believe that *Kimble* best provides that test, and we encourage courts to consider its holding—and implicit bias data in general—when addressing hostile work environment claims in the virtual workplace.

177. A court docket search at the time of this writing reveals that virtual workplace claims implicating Title VII are only just beginning to arise. *See, e.g.*, Kao v. Onyx Renewable Partners L.P., No. 654411/2021, 2022 WL 705640, at *3 (N.Y. Sup. Ct. Mar. 8, 2022) (discussing whether allegedly sarcastic statement of "Happy International Woman's Day" to lone female employee on videoconference amounted to sex discrimination); Complaint at 6, Austin v. Phone2Action, Inc., No. 21-CV-00491 (E.D.N.Y. Jan. 29, 2021), ECF No. 1 (alleging that male supervisor "dismissed a female colleague's remarks on a company-wide call as sounding 'like my mother'—and claimed that he could not even listen to her female hectoring").