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Esports and Harassment: Analyzing Player Protections in a Hostile Work Environment

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ESPORTS AND HARASSMENT: ANALYZING PLAYER PROTECTIONS IN A HOSTILE WORK ENVIRONMENT

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INTRODUCTION

In 2008, Rumay “Hafu” Wang,¹ a professional gamer, entered a *World of Warcraft*² tournament³ where one of the competing team’s name was “Gonna Rape Hafu At Regionals.”⁴ To Wang’s shock, the tournament organizers permitted the team’s name, allowing the team to compete alongside Wang.⁵ Unfortunately, Wang’s situation is one of many instances where female esports competitors, and professional esports players alike, are subject to harassment. Online gamers can expect to be subject to a slew of taunts, trash-talking, sexually and racially charged expletives, statements, and other harassing comments.⁶

Esports’ rapid change from being a casual hobby to a professional career opportunity fostered an environment ripe for harassment.⁷ Millions of fans tune in to watch esports competitions, watching in fixation similarly to conventional sports. In 2019, *League of*

1. See *G2 Esports Welcomes Hafu*, G2 ESPORTS (Aug. 15, 2019), <https://g2esports.com/2019/08/15/g2-esports-welcomes-hafu/?r=US> (Wang is a veteran competitive gamer and is well known as a *World of Warcraft* professional. She is also known for her dominance in games like *League of Legends*, *Hearthstone*, and *Teamfight Tactics*).

2. *World of Warcraft* is a massively popular multiplayer online role-playing game that allows players to create characters, explore a sprawling universe, and participate in various quests, battles, and missions to unlock rewards and valuable items, which are used to improve one’s character. *World of Warcraft*, ENCYC. BRITANNICA (June 10, 2016), <https://www.britannica.com/topic/World-of-Warcraft>.

3. See Andrés Aquino, *G2’s Hafu Recounts Horrific Story of WoW Esports Team Harassing Her While Competing*, GINX ESPORTS TV (Sept. 25, 2020), <https://www.ginx.tv/en/twitch/hafu-retells-horrific-story-of-a-professional-esports-team-harassing-her-while-competing>.

4. *Id.*

5. *Id.*

6. See *Online Harassment Gets Real For Female Gamers*, NPR (Aug. 8, 2012, 1:00 PM), <https://www.npr.org/2012/08/08/158433079/virtual-harassment-gets-real-for-female-gamers>.

7. See *Esports Market Size, Share & Trends Analysis Report By Revenue Source (Sponsorship, Advertising, Merchandise & Tickets, Media Rights), By Region, And Segment Forecasts, 2020 - 2027*, GRAND VIEW RSCH. (June 2020) [hereinafter *Esports Market Size*], <https://www.grandviewresearch.com/industry-analysis/esports-market>.

Legends,⁸ arguably the most popular competitive video game in the world, brought in more than 100 million unique viewers during its world championship event.⁹ That same year, only 98.2 million viewers watched the 2019 NFL Super Bowl.¹⁰ Despite a continuous rise in viewership and revenue, the swell in esports popularity results in an interesting array of legal questions. Issues of player unionization,¹¹ intellectual property,¹² player doping,¹³ and sports betting¹⁴ have generated scholarship. One area that has not been fully explored in the esports industry is hostile work environment claims due to harassment. This Comment examines harassment in esports—

8. *League of Legends* is a free-to-play team-based game in which each team is responsible for both guarding their base and attacking their opponent's base. Ryan Gilliam, *The Complete Beginner's Guide to League of Legends*, RIFT HERALD (Sept. 29, 2016, 11:18 AM), <https://www.riftherald.com/2016/9/29/13027318/lol-guide-how-to-watch-play-intro>.

9. Kevin Webb, *More Than 100 Million People Watched the 'League of Legends' World Championship, Cementing its Place as the Most Popular Esport*, BUS. INSIDER (Dec. 18, 2019, 9:09 AM), <https://www.businessinsider.com/league-of-legends-world-championship-100-million-viewers-2019-12>.

10. Lucy Handley, *Super Bowl Draws Lowest TV Audience in More Than a Decade, Early Data Show*, CNBC (Feb. 5, 2019, 5:38 AM), <https://www.cnbc.com/2019/02/05/super-bowl-draws-lowest-tv-audience-in-more-than-a-decade-nielsen.html>.

11. This was the fewest number of viewers in eleven years. See Hunter A. Bayliss, *Not Just a Game: The Employment Status and Collective Bargaining Rights of Professional Esports Players*, 22 WASH. & LEE J. C.R. & SOC. JUST. 359, 368, 383 (2016) (providing an analysis of what counts as an employee under California law and federal law to determine if *League of Legends* esports players can qualify for unionization); Kelsey F. Ridenhour, *Traditional Sports and Esports: The Path to Collective Bargaining*, 105 IOWA L. REV. 1857, 1860 (2020) (discussing how esports players can follow the examples of traditional professional sports players' unions to improve conditions for all esports league competitors).

12. See James Gatto & Mark Patrick, *Overview of Select Legal Issues with eSports*, 6 ARIZ. ST. SPORTS & ENT. L.J. 427, 442–45 (2017) (discussing intellectual property issues in the esports industry).

13. See generally Colby Stivers, *The First Competitive Video Gaming Anti-Doping Policy and Its Deficiencies Under European Union Law*, 18 SAN DIEGO INT'L L.J. 263, 265–66 (2017) (discussing anti-doping policies in the esports industry).

14. See generally Matthew R. Tsai, *Fantasy (e) Sports: The Future Prospect of Fantasy Sports Betting Amongst Organized Multiplayer Video Game Competitions*, 6 U.N.L.V. GAMING L.J. 393, 396–418 (2016) (discussing the structure of traditional sports betting laws and their impacts on esports).

and the video game industry more broadly—and discusses the importance of creating a more tolerant gaming environment.

Part I of this Comment discusses the rise of esports by providing a brief explanation of what the esports industry is and exploring the recent monumental increase in esports popularity. Part II examines the current employment status of esports players, outlining relevant labor laws and concluding that esports players are employees rather than independent contractors. Part III explores harassment in the video game industry, emphasizing esports players are protected as employees under Title VII of the Civil Rights Act of 1964 (Title VII).¹⁵ Part IV discusses difficulties associated with bringing a hostile work environment claim and examines the impacts of workplace harassment, reiterating the detrimental ramifications that will result if the esports industry fails to affirmatively combat harassment. Part V proposes solutions that the esports industry can adopt to address harassment and protect players. Finally, this Comment concludes by emphasizing that creating a more tolerant, hostile-free gaming environment is essential to esports' ability to grow as an industry.

I. THE NATURE & INCREASING POPULARITY OF ESPORTS

To grasp the importance of addressing harassment in esports, one must first understand the increasing popularity of esports. Esports not only resembles traditional organized sports in many respects,¹⁶ but the industry also occupies an increasingly important, independent role within society.

A. What is Esports?

In its most basic form, esports is competitive gaming, entailing “professional video game matches where players compete against

15. See 42 U.S.C. § 2000e-2.

16. See generally Danielle Boyd, *Similarities Between Sports & Esports*, SPORTS TECH. GRP. (Aug. 2, 2018), <https://www.sportstechgroup.co/stggauge/similarities-sports-esports> (exploring how esports and sports are similar in regard to team vs. individual play, as well as competitive vs. recreational play).

other players before an audience,” whether in person or online.¹⁷ Esports is a subsection of the electronic video gaming, sports, and entertainment industries.¹⁸ Events are competitive video game tournaments that pit individual players or teams against one another.¹⁹ Generally, each video game publisher hosts its own event, and players or teams compete for cash prizes,²⁰ ranging up to \$100 million.²¹

These tournaments, combined with accompanying commentary, merchandising, and ticket sales, comprise the total revenue brought in by the esports industry.²² Audiences around the world watch games via live-stream, and can later watch reruns and highlights on other services.²³ Additionally, viewers watch pre- and post-game interviews with players, unofficial matches involving their favorite players, and how-to guides and other videos made by players discussing strategic in-game decisions.²⁴ “In many ways, the e[s]ports industry is similar to the traditional sports from which it derives its name: it is an entertainment industry built around competition, fan loyalty, and spectatorship.”²⁵

17. Katherine E. Hollist, *Time to Be Grown-Ups About Video Gaming: The Rising eSports Industry and the Need for Regulation*, 57 ARIZ. L. REV. 823, 825 (2015). See Juho Hamari & Max Sjöblom, *What Is Esports and Why Do People Watch It?*, 27 INTERNET RSCH. 211, 211 (2020) (“[E]sports commonly refers to competitive ... video gaming that is often coordinated by different leagues, ladders and tournaments, and where competitors customarily belong to teams or other ‘sporting’ organizations who are sponsored by various business organizations.”).

18. These industries also include popular games such as *League of Legends*, *Counterstrike*, *Overwatch*, *Call of Duty*, and *Fortnite*. Abid Ahmed & Jonathan Tong, *Esports: The Next Billion Dollar Industry*, MILLER THOMPSON 2 (2019), <https://www.millerthomson.com/wp-content/uploads/2019/09/Esports-The-Next-Billion-Dollar-Industry.pdf>.

19. *Id.*

20. See, e.g., *Largest Overall Prize Pools in Esports*, ESPORTS EARNINGS, <https://www.esportsearnings.com/tournaments> (last visited Nov. 11, 2020).

21. Epic Games, the publisher of the exceptionally popular *Fortnite*, committed a \$100 million prize pool in 2019 for esports competitors. Kevin Hitt, *The Top 10 Esports of 2019 by Total Prize Pool*, ESPORTS OBSERVER (Dec. 27, 2019), <https://esportsobserver.com/biggest-esports-2019-prize-pool/>.

22. Hollist, *supra* note 17, at 826.

23. *See id.*

24. *Id.*

25. *Id.* at 826–27.

B. The Rise of Esports

Esports began to embark on its billion dollar climb in the early 2000s²⁶ when two major international esports tournaments launched: the World Cyber Games and the Electronic Sports World Cup.²⁷ In 2002, Major League Gaming (MLG) launched, further contributing to the increasingly popular esports industry by becoming the first televised esports tournament in North America.²⁸ Today, the esports market continues to grow.²⁹ Not surprisingly, in 2019, esports revenue surpassed \$950 million³⁰ and had an audience of over 443 million people.³¹ Moreover estimates predict esports revenue to reach \$1.6 billion and viewership to surpass 646 million by 2023.³²

One factor contributing to esports's popularity in North America is the industry's adoption of the traditional sports model.³³ Similar to traditional sports, select esports organizations purchase slots in a league for their city-based teams, which compete throughout a season to win a title.³⁴ Additionally, esports follows a relegation and promotion system popular in international soccer leagues.³⁵ For example, to promote competition, top performing teams from lower leagues are promoted to higher leagues and the worst performing teams in a season are relegated to lesser leagues.³⁶ Esports leagues

26. See generally Tyler F.M. Edwards, *Esports: A Brief History*, ADANAI (Apr. 30, 2013), <http://adanai.com/esports/>.

27. These tournaments continue to be held every year. *Id.*

28. *Id.*

29. See Remer Rietkerk, *Newzoo: The Global Esports Audience Will Be Just Shy of 500 Million This Year*, NEWZOO (Feb. 25, 2020), <https://newzoo.com/insights/articles/newzoo-esports-sponsorship-alone-will-generate-revenues-of-more-than-600-million-this-year/>.

30. A 22.4% increase from the year prior. *Id.*

31. *Id.*

32. *Id.*

33. Ahmed & Tong, *supra* note 18.

34. *Id.*

35. Max Miceli, *How the Franchising Model Shook Up North American Esports in 2018*, ESPORTS OBSERVER (Jan. 28, 2019), <https://esportobserver.com/franchising-north-america-2018/>.

36. *Id.*

further implement the American franchising model by selling franchise slots to participants.³⁷

Due to the increase in popularity of gaming tournaments, impressive prize pools, streaming revenues, and one-to-one sponsorships, esports is now considered a professional career.³⁸ In an effort to meet the growing professional demand of esports, more than one hundred United States high schools implemented esports programs,³⁹ and many universities and colleges have a dedicated esports curriculum.⁴⁰ For example, Ohio State University is the first state university to offer a bachelor of science program in game studies and esports.⁴¹ Recognizing the rise in popularity and the professional potential, academic institutions like the University of California Irvine also offer esports scholarships to players.⁴²

II. EMPLOYMENT STATUS OF ESPORTS PLAYERS

In order to enjoy protection under employment-related statutes, individuals must qualify as “employees” rather than independent contractors.⁴³ Title VII protects employees from discrimination based on their race, color, religion, sex or national origin,⁴⁴ making it “an unlawful employment practice for an employer . . . to discriminate

37. The most prominent examples include franchising in the *Overwatch League*, *League of Legends Championship Series*, and the *Call of Duty League*. *Id.*

38. *Esports Market Size*, *supra* note 7.

39. *Id.*

40. *Id.*

41. See, e.g., Greta Anderson, *Roses and Thorns*, INSIDE HIGHER ED. (Nov. 5, 2019), <https://www.insidehighered.com/news/2019/11/05/institutions-introduce-undergraduate-degree-programs-esports> (Shenandoah University, Becker College, Boise State University, Full Sail University and Harrisburg University of Science and Technology have all created programs focused on the digital gaming and entertainment industry).

42. *Esports Market Size*, *supra* note 7. See also Aubri Juhasz, *As Esports Take Off, High School Leagues Get In The Game*, NPR (Jan. 24, 2020, 1:13 PM), <https://www.npr.org/2020/01/24/798172352/as-esports-take-off-high-school-leagues-get-in-the-game> (explaining that more than 170 colleges and universities participate in esports-related curriculum, and there are collectively more than \$16 million in college scholarships available for esports programs).

43. See 42 U.S.C. § 2000e-2(a).

44. See *id.*

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.”⁴⁵ However, Title VII only protects workers who are applying to be, are, or have been employees.⁴⁶ The statute does not extend to independent contractors.⁴⁷ Thus, professional esports players should be categorized as employees to receive Title VII protection from harassment at work.

A. The Economic-Realities Test

The exponential rise in esports’s popularity highlights labor and employment concerns. One important concern is whether esports players are independent contractors or employees of their teams under the Fair Labor Standards Act of 1938 (FLSA) and derivative state laws.⁴⁸ Under the FLSA, an employee is “any individual employed by an employer.”⁴⁹ Employ means “to suffer or permit to work,”⁵⁰ and an employer is “any person acting directly or indirectly in the interest of an employer in relation to an employee.”⁵¹ Courts apply a multi-factored economic-realities⁵² or common law right-to-control tests⁵³ to determine whether the worker is economically dependent

45. *Id.*

46. Alexis Ronickher, *Feature, Sex Discrimination and Employment Law in the #MeToo Era*, 32 GPSOLO 25, 26 (2020).

47. *Id.*

48. See generally Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201–19.

49. 29 U.S.C. § 203(e)(1).

50. 29 U.S.C. § 203(g).

51. 29 U.S.C. § 203(d).

52. See *Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 32 (1961) (explaining that the economic-realities test is used to test whether there is an employment relationship).

53. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323–24 (1992) (among the other factors relevant to the analysis are: “the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring

upon another's business because the statute is unclear in defining who qualifies as an employee for purposes of this law.⁵⁴ While courts consider several factors and various tests,⁵⁵ the question is ultimately one of control.⁵⁶ Similar framework also applies in determining whether a worker is an employee for purposes of Title VII protection.⁵⁷

The Supreme Court stated there is "no definition that solves problems as to the limits of the employer-employee relationship."⁵⁸ Determining the employee-employer relationship cannot be based on isolated factors,⁵⁹ and instead courts analyze whether the individual worker is economically dependent on the employer.⁶⁰ Pursuant to the economic-realities test, courts generally look at the following six factors:

- (1) the degree of control exerted by the employer over the worker; (2) the worker's opportunity for profit or loss; (3)

party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.”).

54. *Id.* at 322.

55. The difficulty in managing a multitude of factors has led some states, such as California, to adopt a new test when determining whether a worker is an employee or an independent contractor. The California Supreme Court case *Dynamex Operations W. v. Superior Court* created a presumption that a worker who performs services for a hirer is an employee for purposes of claims for wages and benefits. *Dynamex Operations W. v. Superior Court*, 4 Cal. 5th 903, 958–62 (2018). (Part A of the test considers whether “the worker is free from the control and direction of the hiring entity in the performance of the work, both under the contract for the performance of the work and in fact.” Part B considers whether “the worker performs work that is outside the usual course of the hiring entity’s business.” Finally, Part C considers whether “the worker customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed” for the hiring entity.)

56. See Michael Arin, *Esports & Employment After Dynamex*, ESPORTS BAR ASS’N (2019), <https://esportsbar.org/journals/2019/10/esports-and-employment-after-dynamex>.

57. See generally 42 U.S.C. § 2000e-2.

58. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 (1947).

59. *Fair Labor Standards Act Advisor*, U.S. DEP’T OF LABOR, <https://webapps.dol.gov/elaws/whd/flsa/docs/contractors.asp> (last visited Mar. 13, 2021).

60. *Baker v. Flint Eng’g & Constr. Co.*, 137 F.3d 1436, 1440 (10th Cir. 1998).

the worker's investment in the business; (4) the permanence of the working relationship; (5) the degree of skill required to perform the work; and (6) the extent to which the work is an integral part of the alleged employer's business.⁶¹

B. Esports Players Are Employees Under the Economic-Realities Test

Under the economic-realities test, esports players are employees.⁶² In applying the economic-realities test, the principal factor considers the degree of control exerted by the employer over the worker.⁶³ Esports organizations exert a great amount of control over their players in a variety of ways,⁶⁴ including booking player travel, requiring players to use sponsor provided equipment, promoting team sponsors, and requiring players to be active on social media accounts.⁶⁵ Esports organizations often control the players' practice schedules,⁶⁶ apparel, and often require players to live in a gaming house.⁶⁷ Additionally, esports organizations exert control over players by contracting them to perform additional services through advertising, branding, and interviews.⁶⁸

The second factor courts consider is the worker's opportunity for profit or loss.⁶⁹ Esports players' opportunities for profit or loss are

61. *Id.*

62. See John T. Holden & Thomas A. Baker III, *The Econtractor? Defining the Esports Employment Relationship*, 56 AM. BUS. L.J. 391, 413 (2019); Bayliss, *supra* note 11, at 393; Brian D. Murphy, *eSports Raise Labor Law Issues for Teams and Players*, L.J. NEWSLS. (Jan. 2018), <https://www.lawjournalnewsletters.com/2018/01/01/esports-raise-labor-law-issues-for-teams-and-players/> (applying the economic realities test to esports players would likely lead to the conclusion that players are employees).

63. Baker, 137 F.3d at 1440.

64. *Are Esports Players Actually Independent Contractors?*, QUILLES L. (Apr. 17, 2015), <https://www.esports.law/blog/are-esports-players-actually-independent-contractors>.

65. *Id.*

66. See Graham Ashton, *What is the Optimum Training Time for Esports Players?*, ESPORTS OBSERVER (Dec. 28, 2017), <https://esportsoobserver.com/optimum-player-training-time/>.

67. See Arin, *supra* note 56.

68. *Id.*

69. Baker, 137 F.3d at 1440.

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minimally based on their skill⁷⁰ and performance during competitions.⁷¹ In addition, esports players receive salaries along with competition earnings.⁷² Notably, there are additional revenue opportunities available to esports players outside of their traditional esports salaries and competition earnings.⁷³ For example, many professional players have turned to the lucrative streaming market on websites such as YouTube and Twitch.⁷⁴ Through streaming, additional revenue opportunities include: donations from fans, paid subscriptions, ad revenue, and independent sponsorship deals.⁷⁵ However, it is unclear whether courts would consider a player's opportunity for profit or loss through streaming the same as it would for professional esports competition and tournament earnings.⁷⁶

70. Esports players' in-game actions and cooperation with teammates are how the players can profit by winning matches and tournaments. *Are Esports Players Actually Independent Contractors?*, *supra* note 64.

71. See McKenna Parris, *Esports Teams Should Owe a Fiduciary Duty to Their Players*, RUTGERS J.L. & PUB. POL'Y (May 8, 2018), <https://rutgerspolicyjournal.org/esports-teams-should-owe-fiduciary-duty-their-players> (stating a player will be paid a salary regardless of team performance, but the team's profits vary significantly depending on team performance).

72. While an esports team's overall profits or losses depends on how well the team places in tournaments. *Id.*

73. See Aaron Alford, *The Average 2020 LCS Player Salary is Reportedly \$410,000*, DOT ESPORTS (May 27, 2020, 4:19 PM), <https://dotesports.com/league-of-legends/news/the-average-2020-lcs-player-salary-is-reportedly-410000> (explaining that the average professional *League of Legends* player makes a salary of \$410,000 per year).

74. See Devon Delfino, *'What is Twitch?': Here's What You Need to Know About the World's Leading Live-Streaming Platform for Gamers*, BUS. INSIDER (June 11, 2020, 8:58 AM), <https://www.businessinsider.com/what-is-twitch> (explaining that Twitch is a live-streaming platform geared towards gamers that allows viewers to watch gaming broadcasts); see, e.g., Tae Kim, *Tyler 'Ninja' Blevins Explains How He Makes More than \$500,000 a Month Playing Video Game Fortnite*, CNBC (Mar. 19, 2019, 4:18 PM), <https://www.cnbc.com/2018/03/19/tyler-ninja-blevins-explains-how-he-makes-more-than-500000-a-month-playing-video-game-fortnite.html>.

75. See Pavle Marinkovic, *Esports Pro Gamers: How Much Do They Earn?*, MEDIUM (July 8, 2020), <https://medium.com/super-jump/esports-pro-gamers-how-much-do-they-earn-f03a1d047190> (discussing revenue avenues for esports players on Twitch, including donations and Twitch Prime subscriptions).

76. See Arin, *supra* note 56.

The third factor in this framework analyzes the worker's investment in the business: if the worker's investment is low, it is likely that worker is an employee.⁷⁷ Often, esports organizations provide players with the necessary gaming equipment to train and perform,⁷⁸ minimizing the player's own material investment. Additionally, esports organizations often supply apparel and provide living arrangements, such as team houses.⁷⁹ Importantly, an esports team's investment is much higher than their players' investments.⁸⁰ Courts are likely to weigh this factor in favor of finding an employment relationship between players and their esports organizations.

Regarding the fourth factor, courts consider the permanence of the working relationship.⁸¹ The analysis for this factor is often fact-specific and depends on the contract or agreement between the player and the esports team.⁸² The longer or more permanent a player's contract is, the more likely the player is an employee and not an independent contractor.⁸³ Some player contracts only last the duration of a game's season, while other contracts are more permanent in nature.⁸⁴ Further, as the exclusivity of an esports player's contract increases, so does the chance of a court determining players to be employees for the esports teams they represent.

The fifth factor in this framework considers the degree of skill required to perform the work.⁸⁵ "If the essential functions of the position require a high degree of skill or specialization," courts are more likely to find the worker is an independent contractor.⁸⁶

77. Baker v. Flint Eng'g & Constr. Co., 137 F.3d 1436, 1441 (10th Cir. 1998).

78. Murphy, *supra* note 62.

79. See, e.g., Thomas Santos, *100 Thieves Reveal Newest Content House*, GAME HAUS (Mar. 7, 2020), <https://thegamehaus.com/league-of-legends/100-thieves/100-thieves-reveal-newest-content-house/2020/03/07/>.

80. Employers of Esports professionals minimize the player's investment by providing them with the necessary equipment. Murphy, *supra* note 62.

81. Baker, 137 F.3d at 1442.

82. Murphy, *supra* note 62.

83. *Are Esports Players Actually Independent Contractors?*, *supra* note 64.

84. Murphy, *supra* note 62.

85. Baker, 137 F.3d at 1442.

86. Jesse Walstad, *Economic Reality Check: Is Your Independent Contractor an Employee in Disguise?*, HR DAILY ADVISOR (Feb. 21, 2020),

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Arguably, “the work [an esports player performs] is a specialized skill, as playing video games competitively is considered a skill.”⁸⁷ However, when organizations provide the necessary training to develop the skills, courts weigh this factor in favor of finding an employee relationship.⁸⁸ Many esports teams require rigorous training schedules monitored by esports coaches and managers to develop and enhance the player’s skills.⁸⁹ Because esports organizations provide this necessary training to develop these skills, courts are likely to weigh this factor in favor of finding that esports players are employees.⁹⁰

Finally, the sixth factor courts consider is whether the worker’s job is integral to the employer’s overall business.⁹¹ Major esports organizations and their websites generally promote three things: (1) innovative partnerships; (2) recruitment and development of renown talented players; and (3) fan engagement.⁹² Esports players are the foundation of the industry because they generate revenue through sponsorship sales⁹³ or competition earnings, which heavily depend on the players’ talent and in-game success.⁹⁴ Additionally, without players there would be no viewership or fan engagement. Many fans have a favorite team or player and watch to see their favorite players

<https://hrdailyadvisor.blr.com/2020/02/21/economic-reality-check-is-your-independent-contractor-an-employee-in-disguise/>.

87. Parris, *supra* note 71, at 7.

88. Walstad, *supra* note 86.

89. See, e.g., Harrison Jacobs, *Here’s the Insane Training Schedule of a 20-something Professional Gamer*, BUS. INSIDER (Maya 11, 2015, 10:05 AM), <https://www.businessinsider.com/pro-gamers-explain-the-insane-training-regimen-they-use-to-stay-on-top-2015-5> (discussing the players of Team Liquid, practice for a minimum of 50 hours per week, and most players play far more).

90. Walstad, *supra* note 86 at 2.

91. Flint Eng’g & Constr. Co., 137 F.3d 1436, 1442 (10th 1998).

92. These partnerships include sponsorships. See Arin, *supra* note 56.

93. See, e.g., Hauk Nelson, *The Esports Ecosystem Part 6: Fans*, KEMPER LESNIK, <https://www.kemperlesnik.com/2019/12/the-esports-ecosystem-part-6-fans/> (last visited Nov. 11, 2020) (once an esports team successfully turns a viewer into a fan, the reward can be immense. For example, Puma’s sponsorship of esports team Cloud 9 generated 73% positive sentiment on social media: 700% higher than the traditional sports norm).

94. See Arin, *supra* note 56.

and gaming personalities compete for cash prizes and world titles.⁹⁵ Moreover, if a team's brand resonates with a fan in one game, it often transfers over to other games. For example, a fan who supports professional esports team Cloud 9 in *League of Legends* is more likely to support Cloud 9's teams in other games like *Fortnite* or *Counterstrike*.⁹⁶ Thus, a single player or team competing under an organization's name provides services central to the business of innovative partnerships, player development, and fan engagement.⁹⁷ Because esports players provide integral services to the organization, courts will likely weigh this factor in favor of finding an employer-employee relationship.

III. TITLE VII & THE HOSTILE NATURE OF ONLINE GAMING

While an esports player's employment status may be important for a variety of reasons, one significant consequence relates to the player's ability to acquire protection from workplace harassment. Because harassment is a pervasive problem within the gaming industry as a whole, it is important to find legal protections against harassment for esports players.

A. Title VII of the Civil Rights Act of 1964: Hostile Work Environment

The Supreme Court recognizes workplace harassment as an actionable claim under Title VII.⁹⁸ The Court intended for Title VII to cover economic barriers to workplace equality as well as psychological and physical injuries.⁹⁹ Additionally, enduring a hostile work environment can, in some circumstances, constitute such a psychological barrier to workplace equality. Thus, for workplace harassment to be hostile "it must be sufficiently severe or pervasive

95. See Nelson, *supra* note 93.

96. *Id.*

97. See Arin, *supra* note 56.

98. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 63 (1986) (finding that workplace harassment based on an individual's race, color, religion, sex, or national origin is actionable under Title VII of the 1964 Civil Rights Act).

99. *Id.* at 64.

‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’”¹⁰⁰

Harassment takes many forms like “offensive jokes, slurs, epithets or name calling, physical assaults or threats, intimidation, ridicule or mockery, insults or put-downs, offensive objects or pictures, and interference with work performance.”¹⁰¹ Moreover, harassers can also take many forms like the victim’s supervisor, a supervisor in another area, a co-worker, or a non-employee.¹⁰² Additionally, victims can be anyone affected by the offensive conduct.¹⁰³ Examples of hostile work environments include an employee experiencing harassing phone calls with “kissing noises,”¹⁰⁴ or a single incident where a supervisor grabbed an employee’s breast, commenting that her breasts were huge.¹⁰⁵ Under Title VII, racial harassment claims based on pervasive racial jokes, rather than offensive teasing, in the workplace can be actionable.¹⁰⁶ Moreover, the Equal Employment Opportunity Commission (EEOC) noted the use of the “n-word” in the workplace could be a “single, extremely serious incident of harassment . . . sufficient to constitute a Title VII violation.”¹⁰⁷

100. *Id.* at 67 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (1982)) (acknowledging that the harassment must also be unwelcome).

101. *Harassment*, EEOC, <http://www.eeoc.gov/harassment> (last visited May 2, 2021).

102. *Id.*

103. *Id.*

104. See *Cook v. Entergy Nuclear Operations, Inc.*, 948 F. Supp. 2d 40, 44 (D. Mass. 2013) (showing harassment is considered sufficient to state a claim against the employer for hostile work environment based on sex). *But see Guerrero v. Lowe’s Home Ctrs., Inc.*, 462 F. Supp. 2d 399, 402, 408 (W.D.N.Y. 2006) (supervisor’s comment to employee that she needed to lose weight and that she was “being a fucking bitch” for not sharing a sandwich were offensive, but not sufficiently severe or pervasive to create a hostile work environment).

105. *Reid v. Ingerman Smith LLP*, 876 F. Supp. 2d 176, 185 (E.D.N.Y. 2012) (harassment is sufficiently severe enough to constitute a hostile work environment).

106. See, e.g., *Swinton v. Potomac Corp.*, 270 F.3d 794, 818 (9th Cir. 2001) (highly offensive language directed at employee, coupled with failure of the employer to combat the harassment, constituted reprehensible conduct justifying a significant punitive damage award).

107. EEOC, EEOC COMPLIANCE MANUAL: SECTION 15: RACE AND COLOR DISCRIMINATION, at 15–37 (2006); see also *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 577, 579 (D.D.C. 2013) (Kavanaugh, J., concurring) (arguing that a vice president shouting at the plaintiff “to get out of my office[]N-word] was sufficient to establish

B. Title VII Harassment & the Virtual Workplace Environment

In an increasingly virtual world, the workplace environment may expand employee protections under Title VII.¹⁰⁸ Although harassment can occur in the traditional face-to-face setting,¹⁰⁹ an esports player's workplace is not the traditional work environment because it is almost exclusively online.¹¹⁰ As part of their rigorous training schedules, esports players practice with teammates or against other professional teams in "scrimms" twelve to fourteen hours a day, six days a week.¹¹¹ As a result, esports players may be subject to the hostilities found in online gaming. This harassment may lead some

a hostile work environment); Rodgers v. W.-Southern Life Ins. Co., 12 F.3d 668, 675 (7th Cir. 1993) ("Perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as [n-word] by a supervisor in the presence of his subordinates.").

108. Jeremy Gelms, *High-Tech Harassment: Employer Liability Under Title VII for Employee Social Media Misconduct*, 87 WASH. L. REV. 249, 259–63 (2012) (stating that while the Fifth and Tenth Circuits held defendants liable only when the behavior at issue took place while the parties were working, "[t]he First, Second, Seventh, and Eighth Circuit Courts of Appeals have expressly indicated that harassment conducted *outside the physical walls* of the workplace is part of the totality of the circumstances for purposes of a hostile work environment claim.") (emphasis added).

109. See, e.g., Kimzey v. Wal-Mart Stores, 107 F.3d 568, 573 (8th Cir. 1997) (male supervisors engaged in numerous incidents of offensive conduct severe enough to establish a hostile work environment by making sexually abusive comments and gestures towards a female employee's rear with a screwdriver); Baker v. John Morrell & Co., 382 F.3d 816, 828 (8th Cir. 2004) (a female employee suffered years of sexual harassment by male coworkers, which included physical threats and name calling so severe and pervasive as to create an objectively hostile and abusive work environment under Title VII).

110. *But see Team Houses and Why They Matter*, ESL MAG. (Jan. 6, 2014), <https://www.eslgaming.com/article/team-houses-and-why-they-matter-1676> (team house allows professional players to bond together in ways that are simply impossible over the internet).

111. Arijeta Lajka, *Esports Players Burn Out Young as the Grind Takes Mental, Physical Toll*, CBS NEWS (Dec. 21, 2018, 12:14 AM), <https://www.cbsnews.com/news/esports-burnout-in-video-gaming-cbsn-originals/>. See *What are Scrims?*, PRO SETTINGS, <https://www.prosettings.com/scrims/> (last visited Nov. 12, 2020) (derived from the word "scrimmage," a scrim is an online competitive practice game professional esports players participate in against other professional players or teams to practice in unranked matches).

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players to find their work environment permeated with hostility, creating abusive working conditions. Under Title VII, players would be entitled to pursue hostile work environment claims against their harassers provided the employer knew or should have known of the misconduct and failed to act.¹¹²

Players may also be entitled to pursue hostile work environment claims regarding social media harassment: “[S]ocial media use in the employment realm creates more portals for employees to communicate with each other—inevitably resulting in more communication, and thus, more harassment.”¹¹³ An employer’s liability depends on whether social media use is sufficiently connected to the workplace.¹¹⁴ Courts should include evidence of social media harassment in considering the totality of the circumstances for Title VII claims: “[Particularly] when the employer has derived a ‘substantial benefit’ from the social media source on which the harassment occurs.”¹¹⁵ When determining whether the employer derived a “substantial benefit” from social media, courts consider “whether the social media was sufficiently integrated into the employer’s business operations to qualify as a logical extension of the workplace.”¹¹⁶

Social media intimately intertwines with esports because teams derive substantial benefits from social media in a variety of ways. For example, esports teams often have official social media accounts for

112. 29 C.F.R. § 1604.11(d) (2020). See *Perry v. Ethan Allen*, 115 F.3d 143, 149 (2d Cir. 1997) (quoting *Karibian v. Columbia Univ.*, 14 F.3d 773, 780 (2d Cir. 1994) (finding that “when harassment is perpetrated by the plaintiff’s coworkers, an employer will be liable if the plaintiff demonstrates that ‘the employer either provided no reasonable avenue for complaint or knew of the harassment but did nothing about it.’”); *Hewitt v. BS Transp. of Ill., LLC*, 355 F. Supp. 3d 227, 236 (E.D. Pa. 2019) (an employer may be held liable for an employee’s claim of a hostile work environment based on conduct by a non-employee).

113. Kristen N. Coletta, *Sexual Harassment on Social Media: Why Traditional Company Sexual Harassment Policies are Not Enough and How to Fix It*, 48 SETON HALL L. REV. 449, 4590 (2018) (discussing the rise of social media resulting in more online communication and harassment).

114. Gelms, *supra* note 108, at 251 (exploring the question of when harassment that occurs on social media should be included in the “totality of the circumstances” for a Title VII sexual harassment claim).

115. Coletta, *supra* note 113, at 461.

116. Gelms, *supra* note 108, at 273; Coletta, *supra* note 113, at 461.

their organizations.¹¹⁷ These accounts promote team news and information, allowing fans to stay up to date with their favorite professional team. Esports players also utilize social media platforms, like Twitter, YouTube, and Twitch, to connect with their fans, share gaming highlights, and stream live gameplay.¹¹⁸ Often, esports teams require players to display team insignias, banners, or other team-identifying markers on their personal social media accounts to promote the team and expand the organization's fanbase.¹¹⁹ Therefore, if a player engaged in harassing behavior via social media, that would be sufficiently integrated to the employer's business operations and courts may consider such acts in the totality of the circumstances for a Title VII claim. Under this approach, players can receive protection from workplace harassment under Title VII while using social media.

C. Harassment in Casual Gaming

Online video game players know of, or have experienced, harassment in online gaming.¹²⁰ According to a 2019 study from the

117. See, e.g., 100Thieves (@100Thieves), TWITTER, <https://twitter.com/100Thieves> (last visited Mar. 13, 2021); FaZe Clan (@FaZeClan), TWITTER, <https://twitter.com/FaZeClan> (last visited Mar. 13, 2021); TSM (@TSM), TWITTER, <https://twitter.com/TSM> (last visited Nov. 12, 2020); Cloud9, YOUTUBE, <https://www.youtube.com/user/C9ggTV> (last visited Mar. 13, 2021); NRG Esports, YOUTUBE, <https://www.youtube.com/NRGEsports> (last visited Mar. 13, 2021).

118. See Jenn In, *How Gamers Use Social Media and How to Reach Them Through Game Marketing*, JUICER BLOG (Nov. 12, 2019), <https://www.juicer.io/blog/how-gamers-use-social-media-and-how-to-reach-them-through-game-marketing>; see also Cody Luongo, *Team Liquid Partners with Zoomph to Measure Social Media Impact*, ESPORTS INSIDER (Aug. 18, 2020), <https://esportsinsider.com/2020/08/team-liquid-zoomph/> (discussing how Team Liquid has partnered with a social media analytics company to measure the impact of its brand deals and provide insight into its audiences).

119. Saskia Leopold, *Not Just a Logo on a T-Shirt-Sponsoring Esports*, <https://cms.law/en/mex/publication/not-just-a-logo-on-a-t-shirt-sponsoring-esports> (last visited Mar. 13, 2021).

120. See Jesse Marczyk, *Online Games, Harassment, and Sexism: The Interaction of Player Skill, Gender, and Yelling*, PSYCHOL. TODAY (Nov. 26, 2017), <https://www.psychologytoday.com/us/blog/pop-psych/201711/online-games-harassment-and-sexism>.

Anti-Defamation League (ADL), “65% of players have experienced severe harassment while playing games online, which includes physical threats, stalking and sustained harassment.”¹²¹ Among those who experienced harassment, 53% reported being targeted based on their race, religion, ability, gender, gender identity, sexual orientation, or ethnicity.¹²² An alarming 29% of online video game players had their personal information publicly exposed, a practice known as “doxing.”¹²³ Harassment in the online video game world is real, pervasive, and harmful.

ADL’s survey, focusing on identity-based harassment, revealed gender and sexual orientation are often the basis for harassment with 38% of women and 35% of LGBTQ+ players reporting they suffered from identity-based harassment.¹²⁴ Additionally, approximately 78% of players experienced harassment because of their race or ethnicity.¹²⁵ Additionally, ADL’s survey found players had been exposed to extremist ideologies and hateful propaganda.¹²⁶ Importantly, some games where players reported experiencing the

121. *Two-Thirds of U.S. Online Gamers Have Experienced Severe Harassment, New ADL Study Finds*, ANTI-DEFAMATION LEAGUE (Jul. 25, 2019) [hereinafter *Online Gamers*], <https://www.adl.org/news/press-releases/two-thirds-of-us-online-gamers-have-experienced-severe-harassment-new-adl-study>.

122. *Id.*

123. *Id.* See Andrew Quodling, *Doxing, Swatting and the New Trends in Online Harassment*, THE CONVERSATION (Apr. 21, 2015, 4:11 PM), <https://theconversation.com/doxxing-swatting-and-the-new-trends-in-online-harassment-40234> (as a harassment tactic, doxing serves two purposes: it intimidates the people targeted by invading and disrupting their expectations of privacy; and it provides an avenue for the perpetuation of that person’s harassment by distributing information as a resource for future harassers to use).

124. *Free to Play? Hate, Harassment, and Positive Social Experiences in Online Games*, ANTI-DEFAMATION LEAGUE [hereinafter *Free to Play?*], <https://www.adl.org/free-to-play> (last visited Nov. 12, 2020).

125. *Id.* (breaking down harassment by demographics, a quarter to a third of players who were Hispanic/Latinx (24%), black or African American (31%), and Asian-American (23%) experienced harassment because of their race or ethnicity).

126. See *Online Gamers*, *supra* note 121 (ADL’s survey found that online gamers were also targeted because of their religion: 19% of both Jews and Muslims report being harassed because of their religious viewpoints while players were also exposed to discussions about white supremacy, Holocaust denial, and disinformation about the September 11 terror attacks, among other topics).

most harassment included some of the top and most popular esports games—*Counterstrike*, *Overwatch*, and *League of Legends*.¹²⁷

Psychological research shows the anonymity of online gaming limits social accountability and leads to harassment.¹²⁸ Part of the online experience is that many games rely on teamwork, often between strangers connected only via avatars and the sounds of one other's voices.¹²⁹ Thus “[t]he anonymity of the avatars can provide a perfect shield for comments that people otherwise would not make in a real-world setting.”¹³⁰ The anonymity of online gaming fosters the growth of hostile behavior among gamers.¹³¹

Another theory regarding the existence of hostility in online gaming is that most video games are violent in nature.¹³² There is substantial literature surrounding the link between violent video game exposure and antisocial or hostile behaviors.¹³³ Specifically, recent research indicates violent video game exposure is also associated with increased aggression¹³⁴ and suggests a link between violent video

127. See *Free to Play?*, *supra* note 124.

128. John T. Holden et al., *The #E-Too Movement: Fighting Back Against Sexual Harassment in Electronic Sports*, 52 ARIZ. ST. L.J. 1, 9 (2020) [hereinafter Holden et al., *E-Too Movement*].

129. See Marczyk, *supra* note 120.

130. Holden et al., *E-Too Movement*, *supra* note 128, at 8.

131. See *id.* at 9; see also Rebekah Valentine, *One-Third of UK Women Gamers Report Abuse or Discrimination from Male Gamers*, GAMESINDUSTRY.BIZ (June 5, 2018), <https://www.gamesindustry.biz/articles/2018-06-04-one-third-of-uk-female-gamers-report-abuse-or-discrimination-from-male-gamers> (discussing one study that found one-third of female gamers reported abuse or discrimination by male gamers, while 10% of female gamers claiming to have been threatened with rape by male players during online play).

132. Douglas A. Gentile et al., *The Effects of Violent Video Game Habits on Adolescent Hostility, Aggressive Behaviors, and School Performance*, 22 J. ADOLESC. 5, 7 (2004).

133. See, e.g., Yao Mengyun et al., *Violent Video Games Exposure and Aggression: The Role of Moral Disengagement, Anger, Hostility, and Disinhibition*, 45 AGGRESSIVE BEHAVIOR 662–70 (2019).

134. Douglas A. Gentile et al., *Violent Video Game Effects on Salivary Cortisol, Arousal, and Aggressive Thoughts in Children*, 70 COMPUT. HUM. BEHAVIOR 39–43 (2017). But c.f., Assoc. Press, *No, There's Still No Link Between Video Games and Violence*, L.A. TIMES, <https://www.latimes.com/world-nation/story/2019-08-06/video-games-violence-studies> (last visited Nov. 12, 2020) (discussing no link between violent video games and increased aggression).

game exposure and isolated behavioral traits.¹³⁵ Importantly, “research in this area has found that violent video games . . . decrease empathic feelings and helping behaviors.”¹³⁶ Thus, some argue that violent video game exposure cultivates hostility and harassment towards others in online gaming.

Similarly, the video game industry is male-dominated and playing video games continues to be regarded as a male activity.¹³⁷ In gaming culture, women experience more harassment because other players perceive them as an outside, intrusive minority.¹³⁸ As a result, male players are the most common perpetrators of harassment in online video games.¹³⁹ Additionally, the majority of players are White, with Black player representation on major esports teams being abysmal.¹⁴⁰ While there is research about the lack of diversity and inclusion within the gaming profession, platforms like PlayStation, Xbox and Twitch do not release statistics on their users’ demographics or harassment claims.¹⁴¹ This makes it difficult to monitor any progress regarding people of color in online gaming, as well as the harassment they endure. The lack of representation of women and Black people in the video game and esports industries may serve as additional catalysts which fosters an environment ripe for harassment in online gaming.

135. These isolated behavioral traits include verbal aggression, anger, and hostility. Mengyun, *supra* note 133, at 664.

136. Mengyun, *supra* note 133, at 663.

137. See generally Halley Bondy, *The Esports Industry is Booming, and it’s Seeking Female Applicants*, NBC NEWS (Feb. 26, 2020, 8:53 AM), <https://www.nbcnews.com/know-your-value/feature/esports-industry-booming-it-s-seeking-female-applicants-ncna1143406>.

138. Wai Yen Tang et al., *Investigating Sexual Harassment in Online Video Games: How Personality and Context Factors are Related to Toxic Sexual Behaviors Against Fellow Players*, 46 AGGRESSIVE BEHAVIOR 127, 128 (2019).

139. See *id.* (discussing that sexual harassment behaviors include sexist comments and insults, comments regarding a player’s physical appearance, and rape jokes).

140. Latoya Peterson, *Why Aren’t More Black Kids Going Pro in Esports?*, THE UNDEFEATED (Mar. 27, 2018), <https://theundefeated.com/features/why-arent-more-black-kids-going-pro-in-esports/>.

141. *Exploring an Equity & Inclusivity Problem: Gender & Ethnic Diversity in Video Games*, ARTS MNGT. & TECH. LAB. (Oct. 24, 2019), <https://amt-lab.org/blog/2019/10/gender-and-ethnic-diversity-in-video-games-exploring-core-games-inclusivity-problem>.

D. Harassment in Professional Gaming

Harassment in professional video gaming is also well documented. One notorious example involves the only transgender woman, Maria “Remilia” Creveling, to compete in the *League of Legends* Champion Series.¹⁴² Creveling’s professional esports career was cut short after harassers “flooded comment sections on live-stream feeds with sexist and transphobic statements about her appearance and gender identity.”¹⁴³ Another example is the all-female Team Dignitas, a *Counterstrike* team. Despite being the first all-female professional team to receive backing from professional American sports teams, they faced persistent harassment related to their looks.¹⁴⁴

Not only do professional players face harassment by fans, but there are also examples of esports managers and other team members engaging in this abhorrent behavior against players.¹⁴⁵ Miranda “Super_Yan” Pakozdi’s team’s coach, Aris Bakhtanians, subjected

142. Jake Seiner, “*You’re a Girl, You’re Being Targeted*”: *Women in Esports Navigate Toxicity, Other Barriers*, DENVER POST (Jan. 3, 2019, 8:15 AM), <https://www.denverpost.com/2019/01/03/esports-women-navigate-toxicity-barriers/>.

143. Holden et al, *E-Too Movement*, *supra* note 128, at 12.

144. Sam Cooke, *Heather Garozzo - Team Dignitas - From Shame to Pride*, ESPORTS OBSERVER (Aug. 16, 2017), <https://www.esportsinsider.com/2017/08/heather-garozzo-team-dignitas-shame-pride/>. See Shlomo Sprung, *Meet Team Dignitas CS:GO Fe, The All-Female Gaming Team Taking The Esports World By Storm*, FORBES (July 3, 2019, 2:45 PM) <https://www.forbes.com/sites/shlomosprung/2019/07/03/meet-team-dignitas-csgo-fe-the-all-female-gaming-team-taking-the-esports-world-by-storm/> (the five-woman unit has won two *Counterstrike* female division world championships, under the umbrella Harris Blitzer Sports & Entertainment, the majority stakeholders in the NBA’s Philadelphia 76ers and the NHL’s New Jersey Devils).

145. See, e.g., Cody Peterson, *Method Accused of Protecting Player Facing Multiple Abuse Allegations*, SCREEN RANT (Jun. 29, 2020), <https://screenrant.com/method-methodjosh-accusation-sexual-harassment-abuse-esports/> (discussing how professional esports team Method has been accused of protecting a player after the player was accused by several people of sexual harassment, some of whom were underage girls at the time of the reported misconduct); Hongyu Chen, *Edward Gaming Faces Backlash for Handling of Sexual Harassment Allegation*, ESPORTS OBSERVER (Sept. 16, 2020), <https://esportobserver.com/edg-sexual-harassment-allegation/> (discussing a former employee of a professional esports team coming forward with sexual harassment allegations against the organization’s official photographer).

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her, on camera, to an onslaught of inappropriate and sexually charged comments, including badgering questions about her bra size.¹⁴⁶ Bakhtaians then took over control of the tournament's camera and focused it on Pakozdi's breasts, buttocks, feet, and legs, shooing people away when they blocked his view.¹⁴⁷

Fans and managers are not the only ones to blame. There are various instances where professional esports players perpetuate harassment. For example, Timo "Taimou" Kettunen from Team EnvyUs¹⁴⁸ stated he would "explore the interview girl's thighs" after a woman interviewed him.¹⁴⁹ Taimou further exhibited harassing behavior by using homophobic and racist slurs on his personal Twitch stream.¹⁵⁰ During a livestream on his personal Twitch channel, Félix "xQc" Lengyel made derogatory, anti-gay comments toward another openly gay, esports player.¹⁵¹ Then, there is Matt "Dellor" Vaughn who used the "n-word" sixty times in a 2017 professional *Overwatch* match.¹⁵² Former FaZe Clan player Turner "Tfue" Tenney also had

146. See Amy O'Leary, *In Virtual Play, Sex Harassment is All Too Real*, N.Y. TIMES (Aug. 1, 2012), <https://www.nytimes.com/2012/08/02/us/sexual-harassment-in-online-gaming-stirs-anger.html>.

147. Jason Schreier, *This Is What A Gamer's Sexual Harassment Looks Like*, KOTAKU (Feb. 2, 2012, 4:45 PM), <https://kotaku.com/this-is-what-a-gamers-sexual-harassment-looks-like-5889415>.

148. Taimou has many harassment related experiences. See, e.g., Jacob Wolf, *No Response from Overwatch League to Taimou's Use of Gay Slurs on Stream*, ESPN (May 4, 2018) [hereinafter Wolf, No Response], https://www.espn.com/esports/story/_/id/22626466/despite-anti-gay-slurs-made-stream-timo-taimou-kettunen-faces-no-punishment-overwatch-league.

149. *Does Esports Have a Sexual Harassment Problem?*, ESPORTS (Nov. 9, 2018), <https://www.esports.net/news/industry/esports-sexual-harassment-problem/>.

150. Wolf, *No Response*, *supra* note 148.

151. Jacob Wolf, *Dallas Fuel Suspend xQc for Anti-Gay Slurs; Overwatch League Fines Player*, ESPN (Jan. 19, 2018), https://www.espn.com/esports/story/_/id/22156350/dallas-fuel-suspends-felix-xqc-lengyel-following-use-anti-gay-slurs-stream. See also *Can Esports Overcome Its Racism Problem?*, ESPORTS (Dec. 24, 2018) [hereinafter Overcome], <https://www.esports.net/news/industry/esports-overcomimg-racism/> (describing an incident when xQc "repeatedly used a racially insensitive emote" during a stream while "the Overwatch League's African American host . . . was on-screen.").

152. *Overcome*, *supra* note 151.

two notable instances involving racial slurs.¹⁵³ While these isolated incidences may be insufficient to constitute a viable Title VII claim by other team members, these examples demonstrate the prominence of targeted harassment in esports and the need for workplace regulation.

IV. THE IMPACT OF HARASSMENT

Harassment aftereffects extend to individual players and the esports industry as a whole. These impacts may hamper a professional player's decision to pursue a hostile work environment claim. Thus, if harassment in esports is not properly addressed, longstanding negative consequences will result.

A. Harassment-Related Consequences

One notable consequence of harassment is the emotional, physical, and psychological harm individual players may experience.¹⁵⁴ Studies indicate exposure to harassment is associated with poorer mental health, "including sleep disorders, depression, anxiety, post-traumatic stress disorder . . . and psychological distress."¹⁵⁵ Evidence of harassment early in one's career has also been associated with long-term effects on depressive symptoms in adulthood.¹⁵⁶ Based on the top-ranking male and female esports players of 2020, the average age is twenty-four for males and twenty-seven for females.¹⁵⁷ Exposure to harassment at such a young age will likely contribute to poor long-term mental health.¹⁵⁸

153. Bijan Stephen, *Fortnite Star Tfue Used a Racial Slur Again, and Twitch Won't Talk About It*; VERGE (Sept. 4, 2019, 2:19 PM), <https://www.theverge.com/2019/9/4/20849429/fortnite-streamer-tfue-racial-slur-twitch-silence>. See generally Tfue, *Banned on Twitch for 30 Days (Explanation)*, YOUTUBE (May 17, 2018), <https://www.youtube.com/watch?v=Vw5HnU5N9nw> (Tfue's explanation regarding his use of the racial slur).

154. See generally Sara Gale et al., *The Impact of Workplace Harassment on Health in a Working Cohort*, 10 FRONTIERS PSYCHOL. 1181 (May 24, 2019).

155. *Id.*

156. Jason N. Houle et al., *The Impact of Sexual Harassment On Depressive Symptoms During the Early Occupational Career*, 1 SOC'Y & MENTAL HEALTH 89 (2011).

157. George Miller, *Revealed: What Does it Take to Become an Esports Star?*, EUR. GAMING INDUS. NEWS (Sept. 14, 2020),

In addition to the mental and physical toll harassment takes on players, there are economic and productivity costs associated with harassment.¹⁵⁹ Harassment can create substantial costs for companies, including legal fees and costs related to lower productivity, motivation, commitment, and team disruption.¹⁶⁰ While the amount of financial payments for sexual harassment settlements are normally kept confidential—making it difficult to estimate the total legal costs related to harassment—the EEOC reported \$68 million in sexual harassment settlements in 2019.¹⁶¹ If harassment in esports does not cease, esports organizations may bear significant legal costs. Regarding loss of productivity, motivation, and commitment, teamwork in esports is vitally important. Esports players practice and compete as a collective team in tournaments to win money, world titles, and notoriety.¹⁶² Motivation to practice, commitment to training, and a pledge to work as a team are needed to win tournaments. If harassment in esports goes unaddressed, the organization's productivity will be significantly hampered.

Finally, targeted harassment in esports will also impact esports' ability to grow as an industry.¹⁶³ Specific to individual esports teams, there can be long-lasting damage to reputation, resulting in various

<https://europeangaming.eu/portal/latest-news/2020/09/14/77582/revealed-what-does-it-take-to-become-an-esports-star/> (noting some players are as young as sixteen). See generally *Average Age in Esports vs. Major Sports*, ESPN (Sept. 17, 2017), https://www.espn.com/esports/story/_/id/20733853/the-average-age-esports-versus-nfl-nba-mlb-nhl.

158. See Houle, *supra* note 156 at 92.

159. ELYSE SHAW ET AL., INST. WOMEN'S POL'Y RSCH., SEXUAL HARASSMENT AND ASSAULT AT WORK: UNDERSTANDING THE COSTS 5 (2018), https://iwpr.org/wp-content/uploads/2020/09/IWPR-sexual-harassment-brief_FINAL.pdf.

160. *Id.*

161. *Charges Alleging Sex-Based Harassment (Charges filed with EEOC) FY 2010 - FY 2019*, EEOC [hereinafter *Charges*], <https://www.eeoc.gov/statistics/charges-alleging-sex-based-harassment-charges-filed-eeoc-fy-2010-fy-2019> (last visited Nov. 12, 2020).

162. See Nelson, *supra* note 93.

163. Lindsey Darvin et. al, *The Playing Experiences of Esport Participants: An Analysis of Treatment Discrimination and Hostility in Esport Environments*, 2 J. ATHLETE DEV. & EXPERIENCE 36 (2020) (“The negative outcomes and associations with hostility and hostile participant environments undoubtedly will have a negative influence over the potential growth of the industry . . .”).

issues for teams, such as driving away potential investors and emerging talent.¹⁶⁴ Further, “research suggests that a single sexual harassment claim can be enough to dramatically shape public perception of a company and elicit perceptions of structural unfairness.”¹⁶⁵ Thus, esports’ future growth depends on its ability to increase inclusion and diversity.¹⁶⁶

B. The Difficulties of Bringing a Harassment Claim

Despite the possible consequences resulting from a failure to affirmatively combat harassment in esports, there are many difficulties impacting the likelihood esports players would bring claims under Title VII. For example, esports players may refrain from pursuing a Title VII claim out of fear of retaliation. Although the EEOC reported over 7,500 charges of workplace misconduct in 2019,¹⁶⁷ most harassment-related incidents go unreported and unfiled. Players refrain from reporting due to fear of losing their job, being denied salary bonuses,¹⁶⁸ or being sidelined for competitions. These fears are justified, “as 68% of sexual harassment allegations . . . also include a charge of employer retaliation with the EEOC.”¹⁶⁹

Additionally, players may worry that reporting harassment may not remain confidential.¹⁷⁰ As a result, esports players who are victims of harassment may fear speaking out will have negative consequences with their teammates or managers. Esports players may also feel embarrassed to speak up and report the harassment because

164. INT'L CTR. FOR RSCH. ON WOMEN, THE COSTS OF SEXBASED HARASSMENT TO BUSINESSES: AN IN-DEPTH LOOK AT THE WORKPLACE 8 (2018), https://www.icrw.org/wp-content/uploads/2018/08/ICRW_SBHDonorBrief_v5_WebReady.pdf.

165. Serena Does et al., *Research: How Sexual Harassment Affects a Company’s Public Image*, HARV. BUS. R. (June 11, 2018), <https://hbr.org/2018/06/research-how-sexual-harassment-affects-a-companys-public-image>.

166. Darvin et al., *supra* note 163, at 41.

167. See *Charges*, *supra* note 161.

168. See Neta Meidav, *Why Workers Don’t Report Misconduct in the Workplace*, VAULT PLATFORM (Feb 17, 2020), <https://vaultplatform.com/why-workers-dont-report-misconduct-in-the-workplace/>.

169. *Id.*

170. See *id.*

reporting this behavior may make an individual feel self-conscious and uncomfortable. Victims of harassment often feel they could have done something to stop the harassing behaviors and that they will not be believed.¹⁷¹

Similarly, “many employees fail to report workplace misconduct because of the lack of redress by employers when incidents are filed.”¹⁷² Players may feel that nothing will be done regarding the misconduct, and that the workplace and industry culture may not support them.¹⁷³ Specifically, players may feel reluctant to report incidents of harassment for fear of jeopardizing their reputation because the esports industry is a unique sector with a relatively small, tight-knit professional community.¹⁷⁴ Esports can implement proactive measures to combat these limitations, encourage tolerance among players, limit harassment in esports, and decrease the chances a player pursues a hostile work environment claim.

V. SOLUTIONS FOR COMBATTING HARASSMENT IN ESPORTS

Although a player may find it difficult to bring forth a harassment claim, there are meaningful, non-legal solutions that can diminish the prominence of targeted harassment in the esports industry. Esports organizations—and the video game industry more broadly—should take steps to combat harassment to create a more inclusive, accepting, and tolerant gaming environment. The quickest and easiest means to address hostility and harassment in esports and online gaming “is for game-makers [and publishers] . . . to start implementing aggressive and proactive . . . mechanisms for change.”¹⁷⁵ These changes can occur in a variety of ways. First, game-makers should commit to diversifying their workplace and giving women meaningful opportunities to hold leadership positions.¹⁷⁶ Vast gender inequity remains the current norm in game-making companies with only 24%

171. *Id.*

172. *Id.*

173. *See id.*

174. *Id.*

175. Holden et al, *E-Too Movement*, *supra* note 128, at 33.

176. *Id.* at 36.

of game developers identifying as women.¹⁷⁷ To change this inequity, game developers can bring more women into creative and leadership roles.¹⁷⁸ By creating a more welcoming environment, game companies can lessen the prominence of online harassment.¹⁷⁹ Moreover, having more women in leadership roles may encourage other women to enter this line of work.¹⁸⁰

Additionally, there should be harsher penalties imposed on players who violate a game's code of conduct. Generally, each player must agree to a game's Terms of Use, End User License Agreement, or Community Rules before playing the game.¹⁸¹ These agreements provide the rules, regulations, acceptable behaviors, and penalties players may face for violating the game's guidelines. Currently, many games impose sanctions against players who use racist or homophobic language towards others in online texts or chats.¹⁸² Sanctions include

177. Avivah Wittenberg-Cox, *Gaming Industry: Please Wait...Gender Balance Loading*, FORBES (Aug. 28, 2020, 6:57 AM), <https://www.forbes.com/sites/avivahwittenbergcox/2020/08/28/gaming-industry-please-waitgender-balance-loading/>.

178. See generally Crystal Mills, *Women in Esports Committee Pushes for Further Inclusivity*, ESPORTS INSIDER (Apr. 14, 2020), <https://esportsinsider.com/2020/04/women-esports-inclusivity/> (explaining that the number of women playing or working professionally in esports is estimated to be about 5%). See also Drew Welch, *Gender Equality Sells: Women in the Games Industry*, USC GAMES (Nov. 23, 2018), <https://games.usc.edu/news/gender-equality-sells-women-in-the-games-industry/>.

179. Welch, *supra*, note 178.

180. See generally Jessica Fink, *Gender Sidelining and the Problem of Unactionable Discrimination*, 29 STAN. L. & POL'Y REV. 57, 93 (2018) (discussing gender-sidelining and the negative impact it has on the work environment, and how the appointment of a women into positions of power can provide legitimacy for other women to step into leadership positions).

181. See, e.g., Devin Connors, *Rocket League Code of Conduct*, ROCKET LEAGUE (Oct. 23, 2020), <https://www.rocketleague.com/news/rocket-league-code-of-conduct/>.

182. See, e.g., Johnny Cullen, *Online Gaming Has a Harassment Problem - But the Industry is Fighting Back*, GAME DAILY.BIZ (Oct. 3, 2018, 2:12 PM), <https://gamedaily.biz/article/287/online-gaming-has-a-harassment-problem-but-the-industry-is-fighting-back> (explaining how the game *Rainbow Six Siege* has issued bans against abusive players, without warning, for using racist or homophobic language in text chat; however, after two suspensions, a third will warrant an investigation where the account in question could end up permanently banned from playing the game).

reducing the player's ability to engage in text or voice chat with other players or issuing temporary or permanent bans from playing the game.¹⁸³ Game publishers, however, can impose even harsher penalties on players who promulgate harassing behavior by prohibiting them from playing in any subsequent games. By imposing such a penalty, players would likely be deterred from harassing behavior for fear of retribution.

Game publishers should also partner with elite and respected esports players and teams in the industry to denounce harassment.¹⁸⁴ These esports players and teams can raise awareness regarding the prominence of harassment in the industry and can further become advocates for ending it. If “[s]ocial norms can be changed by leaders within societies,”¹⁸⁵ then well-respected esports figures can identify and acknowledge harassment as a growing problem in the industry and work together to build a harassment free gaming environment. Moreover, if notable esports players denounce harassment, other celebrity esports competitors and teams may join the mission to denounce harassment as well.¹⁸⁶

Another non-legal solution to ending harassment is implementing institutional and structural change at the esports competition level by imposing fines and penalties.¹⁸⁷ As noted above, video game publishers generally host their own esports events for players and teams to compete against one another.¹⁸⁸ To discourage harassment, game publishers should impose harsh fines and other monetary penalties on players who engage in harassing behavior.¹⁸⁹ Likewise, game publishers can penalize esports organizations through fines, or

183. *See id.*

184. *See generally* Holden et al, *E-Too Movement*, *supra* note 128, at 42.

185. *Id.* at 42.

186. *Id.*

187. *Id.* at 43.

188. *See generally* *Largest Overall Prize Pools in Esports*, *supra* note 20.

189. *See, e.g.*, Jeremy Peel, *League of Legends Pro Fined Over “One of the Highest Harassment Scores” in LCS History*, PC GAMES (Sept. 16, 2014), <https://www.pcgamesn.com/leagueoflegends/league-legends-pro-fined-over-one-highest-harassment-scores-history-lcs> (discussing how Riot Games, the publisher of *League of Legends*, fined a professional esports player \$1,000 for his in-game harassment, verbal abuse and in-game toxicity).

by revoking the team's license to compete.¹⁹⁰ By disqualifying teams from tournaments and competitive matches, game publishers can discourage harassment and promote a more inclusive gaming environment at the competition level.

Esports organizations should also implement player handbooks outlining appropriate player behaviors and condemning harassing conduct. These handbooks should reiterate the organization's core values, including a commitment to equality as a core foundational principle.¹⁹¹ Importantly, these handbooks should have a social media use policy that addresses inappropriate and offensive conduct. The policy should make it clear that social media conduct that violates a company policy, harms the organization's reputation, or includes inappropriate or offensive content may result in consequences, including termination.¹⁹²

Finally, esports organizations should educate players on harassment through prevention and sensitivity trainings. Sensitivity trainings can foster inclusivity, helping players become more tolerant and accepting of other players.¹⁹³ While states such as California require employers to provide one hour of sexual harassment and abusive conduct prevention training to employees once every two years,¹⁹⁴ esports organizations should implement trainings above the

190. Players must abide by official tournament rules and are often prohibited from engaging in violent, threatening or harassing behavior in any competitive game setting. See, e.g., 2020 Season Official Rules, CALL OF DUTY (July 14, 2020), https://www.callofduty.com/content/dam/atvi/callofduty/esports-new/2020-rules/Challengers_Official_Rules.pdf (penalties for violating the rules include a ban for current or future matches, prize, game, and match forfeiture as well as tournament disqualification).

191. Jocelyne Frye, *How to Combat Sexual Harassment in the Workplace*, Center for American Progress, AM. PROGRESS (Oct. 19, 2017, 9:02 AM), <https://www.americanprogress.org/issues/women/news/2017/10/19/441046/combat-sexual-harassment-workplace/>.

192. Katrina Grider et al., *Social Media Posts During Turbulent Times: FAQs on Employee Rights and Employer Responsibilities*, 10 NAT'L L. REV. 306 (June 22, 2020).

193. *How to Implement Sensitivity Training in the Workplace (and Why it Matters)*, THE JUB, <https://www.thejub.com/employer-resource-blog/how-to-implement-sensitivity-training-in-the-workplace> (last visited Nov. 12, 2020).

194. *Sexual Harassment Prevention Training*, CAL. DEP'T FAIR EMP'T & HOUS., <https://www.dfeh.ca.gov/shpt/> (last visited Nov. 12, 2020).

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minimum statutory requirements because of the pervasive nature of harassment in the industry. Providing frequent, regularly scheduled harassment prevention trainings may assist with reducing harassment in esports organizations. Specifically, these trainings should educate players on how to identify harassment when it occurs so that it can be reported. By implementing policies which raise tolerance-awareness among employees, esports organizations can foster a safe work environment and create a workplace free of harassment.

CONCLUSION

The impact of harassment in esports can be long-lasting. Esports' ability to mitigate those impacts depends heavily on implementing proactive harassment-prevention measures and raising tolerance-awareness.¹⁹⁵ If harassment in esports is not curtailed, there are psychological, productivity, financial, and reputational consequences that will result.¹⁹⁶

Although esports is a burgeoning multi-billion-dollar industry on its way to becoming more popular than traditional sports,¹⁹⁷ harassment is a pervasive part of the online gaming industry. Part of ending this harassment requires recognizing competitive esports players as employees, rather than independent contractors. As employees, esports players are granted protection under many employment-related statutes, including Title VII and are entitled to pursue hostile work environment claims.

Esports organizations must go further than recognizing competitive esports players' employment status as employees to end harassment in the industry. This includes esports organizations implementing measures such as pledging to commit to inclusivity, implementing player handbooks, and conducting sensitivity trainings. However, adopting these measures are just the beginning. To further create an environment which denounces harassment, the video game industry must commit to institutional and structural change by placing more women in leadership roles and imposing fines or penalties for violations. The industry's failure to address harassment may derail

195. See discussion *supra* Section V.

196. See discussion *supra* Section IV.

197. See generally Holden & Baker III, *supra* note 62, at 399.

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eSports's bright future and impact its ability to reach both its full financial and social potential.

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