ABA Section of Civil Rights and Social Justice:
The #MeToo Reckoning: How Far We’ve Come & Where We Go from Here

The #MeToo Mandate: Reforming Antidiscrimination Law to Deter and Remedy Sexual Harassment

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I. Introduction

When the #MeToo movement emerged in October 2017 in the wake of the Harvey Weinstein scandal, its revelations prompted a nationwide reckoning with the epidemic of sexual harassment, sexual assault, and abuse – largely of women – in the workplace that could no longer be denied. The Civil Rights Act of 1964 has prohibited many forms of sexual harassment for over 50 years, providing crucial protections for millions of American workers. As #MeToo makes clear, however, abusive, hostile work environments are still very much part of the 21st century workplace. The movement has brought long overdue attention to both the importance and power of the law to protect workers, and some of its dramatic failures to prevent and remedy widespread harassment thus far.

At its core, sexual harassment rests on entrenched imbalances and abuses of power, and truly meaningful, lasting change will only come when the overall power structures of the American workplace have shifted. Practically speaking, such systemic change cannot come from individual legal action alone, or even primarily; its costs are simply too high and its reach too limited, particularly for low-wage workers. Collective action is necessary to transform working conditions on a wide scale. Gender equality is central to fair employment and there are already signs that the labor movement has been galvanized by #MeToo, recognizing the interrelation of sex discrimination and other exploitative labor practices. In September 2018, for instance, a union-backed strike of McDonald’s workers in 10 cities protested the rampant sexual harassment that many employees face, as part of a broad campaign for a living wage and other worker

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protections. This historic event hints at the massive potential for bringing collective action to bear on sexual harassment, delivering safer working conditions for the most vulnerable workers like nothing else can.

In looking to substantive reform, a half century of Title VII doctrine and insights from the #MeToo movement have raised a unique opportunity to assess the shortcomings of antidiscrimination law. For too long, the law has been out of touch with how sexual harassment operates, the obstacles that victims face in reporting, and the impact that discrimination has on victims’ personal and professional lives. The law must adapt across a wide range of issues concerning terms of employment, legal settlements, and the provisions of Title VII, to become more grounded in the reality of the workplace and more effective in significantly reducing harassment.

First, mandatory arbitration agreements for sexual harassment claims must be prohibited as a condition of employment. These employer-biased agreements block the path to the courthouse for approximately 28 million women in non-union private sector jobs, and drastically impair access to justice. Second, the risks and benefits of confidentiality provisions in employment agreements and non-disclosure agreements for harassment settlements must be carefully examined, and victims given the option for either disclosure or confidentiality where it serves their remedial interest.

Turning to Title VII, the law must widen its scope to reach sexual harassment where and how it actually occurs, with robust standards for prevention and remediation that deliver real equality to workers. There are six major areas where the law is falling short and must be amended to close the gaps that fostered the harassment epidemic. First, at the broadest level, the “severe or pervasive” test for sexual harassment needs firmer definition and more uniform application across jurisdictions to reduce judicial discretion that sanctions sexist attitudes and abusive behavior in the workplace. Second, the law must expand to cover independent contractors and non-traditional employment. This sector of the workforce is growing, and millions of employees have been relegated to a legal no-man’s land where they lack basic protections against sexual harassment (in addition to other well-established employment benefits). Third, Title VII must establish a legal duty for employers to do more to prevent harassment through mandatory training programs that actually work. Fourth, federal law must follow the lead set by a number of states in establishing personal liability for harassers under Title VII to provide victims with an important tool in settlement negotiations and litigation, and to serve as a powerful deterrent to would-be harassers. Personal liability for harassment and those who aid and abet discrimination is an appropriate remedy for the highly personal harms that result from harasser’s misconduct. Fifth, Congress must act to amend Title VII to reverse the holding in Vance v. Ball State, which established an unrealistically narrow definition of “supervisor” that allows employers to avoid vicarious liability in many cases. Finally, legislation is urgently needed to update Title VII’s outdated damage caps, which have fallen drastically behind inflation since their establishment 28 years ago.

Taken together, these reforms can fundamentally shift the status quo that has kept harassment in place for generations. As the #MeToo movement has shown, sexual harassment is an extremely complicated personal and institutional phenomenon, and the law must take a realistic, holistic approach to combat entrenched attitudes and deliver real change.

II. Mandatory Arbitration

Over the past 20 years, American employers have increasingly required employees to pursue workplace claims, including sexual harassment, through mandatory arbitration. According to a 2017 study by the Economic Policy Institute, between 1995 and 2017, the percentage of employees subject to mandatory arbitration clauses increased seven-fold, with 56% of non-union private sector workers now covered by these so-called “agreements.” Researchers have extrapolated that around 61 million non-union workers are barred from litigating employment matters, leaving approximately 28 million women with no forum other than arbitration for pursuing their sexual harassment complaints.

The arbitration process has numerous built-in disadvantages for complainants, some of which have a particularly negative impact on harassment victims. At the outset, arbitration provides employers with the “repeat player advantage,” which studies show strongly favors parties who appear more often before arbitrators over one-time participants. The process further disadvantages victims by limiting their access to legal representation. Research shows and practitioner experience confirms that attorneys are much less likely to accept a client whose claim is subject to arbitration than one who can pursue litigation.

In addition to these systemic flaws, which affect all workers forced into arbitration as a condition of employment, arbitration has a uniquely harmful impact on the deterrence and remediation of sexual harassment. As the #MeToo movement has made clear, victims are highly unlikely to report misconduct in real time when they feel they are alone in their experiences and the 2016 EEOC Select Task Force Report confirms that approximately 70% of victims never

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4 Id.; Dept. of Labor, Women of Working Age - Labor force by sex, race and Hispanic ethnicity: 2016 annual averages and 2024 projections, https://www.dol.gov/wb/stats/NEWSTATS/latest/demographics.htm#three (reporting that women make up 49.8% of the total workforce).


report harassment to their employer. The confidential nature of arbitration conceals both the severity and frequency of prior harassment, denying workers notice of misconduct and leaving management unaccountable for its response. Confidential proceedings also prevent potential witnesses from learning of claims and coming forward to testify on behalf of victims or to join group action. This secrecy enables predatory harassers, like Roger Ailes, to target women for decades without the risk of public exposure. It was only when Gretchen Carlson made a savvy litigation decision to file suit against Ailes personally in state court, circumventing Fox News’s arbitration clause, that the public became aware of his decades of sexual harassment of women, leading to his ouster and Bill O’Reilly’s departure nine months later. As we saw again with Harvey Weinstein and reported confidential settlements at CBS under the leadership of accused harasser Les Moonves, legally binding victims to silence empowers harassers and assailants to continue their predation and allows them to victimize women with impunity.

The systemic disadvantages of mandatory arbitration have a predictable effect – few victims engage in the process, and those that do see remedies that fall short of recovery in open court. Arbitration complainants recover on average just 16% of awards won in federal courts and 7% of those in state courts. The fundamental unfairness and inadequacy of mandatory arbitration for addressing sexual harassment is evident by one shocking fact: in the midst of the epidemic made undeniable by the voices of #MeToo, the American Arbitration Association only received a total of around 100 sexual harassment claims in both 2016 and 2017.


10 Stone and Colvin, The Arbitration Epidemic, supra note 4 at 19. As discussed in Part VI below, litigation awards for sexual harassment claims are themselves egregiously low under Title VII’s outdated damage caps.

11 Jacob Gershman, As More Companies Demand Arbitration Agreements, Sexual Harassment Claims Fizzle, Wall St. Journal (Jan. 25, 2018) (reporting that the AAA stated there were “around 100” sexual harassment claims submitted in 2016). Data for 2017 have not yet been published, but the AAA has confirmed to the authors by email that the figure did not significantly change.
Despite their harmful effect on employees and the vindication of federal rights, courts have repeatedly upheld the validity of mandatory arbitration clauses under broad readings of the substantive and preemptive scope of the Federal Arbitration Act (FAA). Just last summer the Supreme Court reiterated its commitment to an expansive FAA in Epic Systems Corporation v. Lewis, bolstering its reach yet again by upholding mandatory arbitration clauses that bar employee class action claims under state and federal law. Given FAA precedent, limitations on mandatory arbitration clauses will only come through congressional action, and there are some small but hopeful signs of bi-partisan support for reform. In the specific context of mandatory arbitration for sexual harassment complaints, for example, Democrat Kirsten Gillibrand and Republican Lyndsey Graham introduced the Ending Forced Arbitration of Sexual Harassment Act of 2017 in the Senate in late 2017, to address the unique drawbacks of arbitration for these claims.

While there has been no action the bill, the Senate Judiciary Committee recently held a hearing on the general use of mandatory arbitration clauses that indicated some bi-partisan interest in limiting the reach of the FAA.

As legislative efforts move forward, the #MeToo movement has acted as an effective lever for limited change already, prompting a number of high-profile employers to voluntarily abandon mandatory arbitration for sexual harassment claims. In December 2017, for example, Microsoft announced that it would eliminate mandatory pre-dispute arbitration for its employees and publicly endorsed the Gillibrand-Graham bill. In May 2018, Uber and Lyft also announced they would no longer require arbitration for harassment complaints, and would instead permit employees to access mediation, arbitration, or litigation for resolution of their claims.

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12 See, e.g., AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011) (FAA preempted state’s authority to prohibit waivers of class-wide arbitration).


17 Laharee Chatterjee, Uber, Lyft Scrap Mandatory Arbitration for Sexual Assault Claims, Reuters (May 15, 2018); https://www.reuters.com/article/us-uber-sexual-harassment/uber-lyft-scrap-mandatory-arbitration-for-sexual-assault-claims-idUSKCN1IG1I2. A number of large law firms have also responded to public pressure, rescinding mandatory arbitration clauses for their own employees. See Meghan Tribe, Will Law Firms Bow to Pressure to End Mandatory Arbitration?, The American Lawyer (May 24, 2018),
Uber’s General Counsel Tony West stated when announcing the rescission of mandatory arbitration provisions at Uber, “sexual predators often look for a dark corner,” and companies “need to turn the light on” by giving victim control over their claims.\textsuperscript{18}

Voluntary reform by industry leaders is important progress but falls far short of comprehensive protection - tens of millions of American workers remain subject to legal agreements that eviscerate their right to be free from sex discrimination. Mandatory arbitration embodies many of the worst forces that have led to pervasive sexual harassment and assault in the American workplace. It burdens victims by limiting their access to legal assistance and reducing their compensation for emotional and professional injuries that can be life-altering. It also reinforces the pernicious practice of valuing corporate secrecy over the well-being and legal rights of employees. Perhaps most harmfully, mandatory confidential arbitration enables harassers to continue their patterns of abuse with no meaningful accountability.

III. Non-disclosure Agreements

In addition to mandatory arbitration, the #MeToo movement has brought attention to the use of non-disclosure agreements more generally. The movement itself has illustrated the transformative power of disclosing harassment that has long been kept in the shadows, and it is perhaps unsurprising that some advocates have argued that confidentiality in these cases is inherently harmful.\textsuperscript{19} Categorical bans on non-disclosure agreements for harassment claims ignore the reality of harassment and its impact on victims, however, and falsely lay the blame for subsequent abuse on these victims rather than the party legally responsible for maintaining a harassment-free workplace – employers. In the real world, non-disclosure agreements function in different ways at different stages of the employment relationship and are sometimes crucial to protecting victims and encouraging reports of wrongdoing. Put simply, confidentiality is harmful or beneficial to the degree that it respects the rights and autonomy of victims.

Abusive confidentiality agreements include non-disparagement provisions in employment contracts that are intended to prevent an employee from making negative statements about the employer or workplace conduct in perpetuity.\textsuperscript{20} As part of a job offer, these provisions


\textsuperscript{20} The Trump presidential campaign, for example, reportedly barred employees from demeaning or disparaging Trump, his family members, or the company. \textit{See, e.g., READ: 2016
are effectively non-negotiable, and they put the employee on notice from the very start of employment that the company values its reputation above accountability for misconduct. Such terms can and do have a chilling effect when an employee later encounters harassment because they establish an existing legal duty to stay silent. Even though non-disparagement clauses have no legally binding effect on the right to file a claim of discrimination, they create an atmosphere hostile to open discussion of abusive behavior and can suppress reporting.

Threatening provisions about disclosure of workplace information that are presented in legalese are intended to intimidate employees into silence, and they do. In one recent high-profile case, a restaurant group’s non-disparagement clause prohibited statements regarding the “personal and business lives” of the celebrity chef owner, his family, business associates, and others, and imposed a $500,000 penalty for each breach. Employees later reported their reluctance to speak out about harassment that they experienced or witnessed, for fear that doing so would expose them to catastrophic legal liability. Most employees who have no access to affordable legal services make the same calculation – lacking resources to face legal action if their employer chooses to enforce draconian provisions of the employment contract, silence is the rational choice and victims are coerced into forfeiting their rights. Employers do have a reasonable interest in protecting intellectual property and trade secrets. Enforcing comprehensive gag-rules on employees serves no legitimate purpose, however; its primary effect is to actively muzzle employees and obstruct employment law.

In contrast to these preemptive, pre-dispute employer-drafted confidentiality provisions, settlement-related non-disclosure agreements are long-standing, traditional components of pre-litigation negotiations for claims that have already been raised, and these provisions can have enormous value to harassment victims. Often portrayed as “buying someone’s silence,” settlements in fact occur only where both parties agree that litigating a particular claim would not


22 Id.
be in either’s interest. Employers do routinely insist on non-disclosure, often to protect their reputations. But as plaintiffs’ attorneys know well, employees can also benefit from mutual confidentiality and clients often demand such provisions.

Many victims do not want their former employer to be able to share details about an experience that was highly personal and traumatizing; they may be embarrassed by the events or simply want to start fresh with new employment. There are also serious professional and personal costs to disclosure of a sexual harassment claim, particularly in the internet age when information is readily available and nearly impossible to remove from the public sphere. Retaliation is real. Studies show that the majority of prospective employers engage in “cyber vetting,” which makes online disclosures about prior employment disputes a serious potential risk to victims’ job opportunities, regardless of the merits of their legal claims; this indirect retaliation can change a victim’s career path indefinitely.23 Victims also may want to avoid being associated with their harassment for emotional reasons; the permanence and accessibility of the internet can make closure about the event more difficult. The victim’s interest in privacy, particularly after an experience of sexual harassment, should be respected and prohibiting settlement non-disclosure agreements would almost certainly deter many people from coming forward at all.

In addition to the importance of giving victims optional protection against employer disclosures, forcing harassment settlements into public view has the paradoxical effect of singling victims out for less negotiating power than a typical civil litigant. Nearly all settlements of civil claims – including other kinds of harassment, personal injury, and contract disputes – include non-disclosure provisions, and the term is often an essential condition for the parties’ agreement. Without this leverage, sexual harassment victims are dramatically less likely to secure settlements and receive fair compensation for their injuries. Imposing a unique burden on victims of sexual harassment who come forward to notify their employers of unlawful behavior and receive the compensation they are entitled to by law is misguided.

New York has recently adopted a flexible and victim-centered regulatory approach that serves as a positive model. Effective July 2018, New York employers are prohibited from requiring non-disclosure provisions in harassment settlements, and employees must be given 21 days to determine whether they will voluntarily enter a confidentiality agreement.24 There is an additional seven-day rescission period to further protect workers who, for whatever reason, reconsider their decision.25 This framework recognizes that silence can be coercive or protective,

23 See, e.g., Press Release, Career Builder, Number of Employers Using Social Media to Screen Candidates at All-Time High, Finds Latest CareerBuilder Study (Jun. 15, 2017), https://www.prnewswire.com/news-releases/number-of-employers-using-social-media-to-screen-candidates-at-all-time-high-finds-latest-careerbuilder-study-300474228.html (reporting that 69% of surveyed employers used online search engines such as Google to vet job applicants).


25 Id.
depending on the context, and that victims should ultimately have the right to determine whether their narratives become public.  

The law can and should target institutional cover-ups and systemic complicity that enable victimization of employees, while also respecting the privacy interests of individuals who have faced abuse. Non-disclosure agreements can, in some cases, provide the security that victims need to come forward with allegations of sexual harassment, and holding employers accountable for discrimination should not come at the expense of victims’ right to control whether and how their stories are told.

IV. Reforming Title VII

In addition to prohibiting mandatory arbitration and abusive confidentiality agreements, Title VII itself requires a wide range of reforms to better serve its deterrent and remedial goals. As everyday legal practice and the accounts of #MeToo have shown, the current law is too narrow both on its face and as applied by courts, leaving millions of workers without meaningful protection against discrimination.

A. The “Severe or Pervasive” Standard

In a line of case law over the past 30 years or so, the Supreme Court has held that “sexual harassment is actionable under Title VII only if it is so severe or pervasive as to alter the conditions of the victim’s employment and create an abusive working environment.” Psychological injury is not required to establish a hostile work environment, so long as the environment would, in the totality of the circumstances, “reasonably be perceived, and is perceived, as hostile or abusive.”

Despite Title VII’s express prohibition on sex discrimination, the severe and pervasive standard reveals the Court’s deep ambivalence about real equality in the workplace. Rather than establishing a robust, affirmative duty to provide an environment free of harassment, the Court has repeatedly warned in holdings and dicta alike that Title VII should not go ‘too far,’ sending

26 California’s 2018 overhaul of its sexual harassment law included new regulation of non-disparagement and confidentiality agreements, as well. Employers are now prohibited from requiring an employee to sign a “nondisparagement agreement or other document that purports to deny the employee the right to disclose information about unlawful acts in the workplace, including, but not limited to, sexual harassment.” Cal. Gov’t Code § 12964.5(a)(2)(A). The bar does not apply to “negotiated settlement agreements” that are “voluntary, deliberate, and informed,” on the employee’s part. Cal. Gov’t Code § 12964.5(c).


28 Harris v. Forklift Sys., Inc., 510 U.S. 17, 22 (1993). Factors may include “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.” Id. at 23.
the implicit message that overregulation of harassment is a more significant problem than underenforcement of civil rights law.  

The severe or pervasive test is flexible to a fault, allowing judges to project their own biases about acceptable treatment of victims – overwhelmingly women – in ways that simply mirror the sexist attitudes that drive harassment itself. In one illustrative case, a male firefighter unleashed a vulgar, demeaning invective on a female lieutenant at a public meeting, repeatedly referring to her as a “f*cking cunt,” commenting that she had not been promoted because she wasn’t good enough at oral sex, and refusing to apologize. A federal judge in Connecticut granted summary judgment to the employer on the plaintiff’s hostile work environment claim, finding that the single incident was not severe or pervasive enough to alter the conditions of her employment. While the ruling was ultimately reversed by the Second Circuit Court of Appeals, it provides a chilling example of how strictly some trial judges apply the severe or pervasive test, and how divorced from the real-world effects of abusive language and conduct they can be.

Title VII’s bar on discriminating “with respect to… conditions of employment” does not mandate an extreme standard for sexual harassment, nor should it. As #MeToo shows, harassment is nearly always grounded in the abuse of power, and conduct does not have to be extreme to have a major impact on equal treatment, equal opportunity, and the realistic fear of retaliation. Establishing a clearer, less onerous national standard for a hostile work environment would create better incentives for employers to prevent harassment, and better protections for victims who face the harmful practical effects of sex discrimination.

29 The clearest example of this is the unsubstantiated anxiety, expressed even by progressive judges, over Title VII becoming a “general civility code” if its scope is drawn too wide. See, e.g., Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) (“These standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a ‘general civility code.’”) (quoting Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998)).

30 Howley v. Town of Stratford, 217 F.3d 141, 148 (2d Cir. 2000).


32 California’s recent sexual harassment reforms provide a model for a robust, affirmative commitment to antidiscrimination. Current law now specifies that “harassment creates a hostile, offensive, oppressive, or intimidating work environment and deprives victims of their statutory right to work in a place free of discrimination when the harassing conduct sufficiently offends, humiliates, distresses, or intrudes upon its victim, so as to disrupt the victim’s emotional tranquility in the workplace, affect the victim’s ability to perform the job as usual, or otherwise interfere with and undermine the victim’s personal sense of well-being.” Cal. Gov’t Code § 12923(a). It also expressly provides that a single incident may constitute a hostile work environment; comments made by non-decision makers and/or made outside the employment context may be circumstantial evidence of discrimination; the legal standard for discrimination may not vary by workplace; and harassment cases are “rarely appropriate for summary judgment.” Cal. Gov’t Code § 12923(b)-(e). The New York State Legislature also recently passed bills reforming sexual harassment law, including provisions that explicitly reject the severe or pervasive standard. Under the new law, currently awaiting signature by the Governor,
B. Non-traditional Employment

In addition to the limited scope imposed by the severe or pervasive standard, Title VII’s scope is further limited to only those workers who qualify as “employees,” a category that does not include independent contractors. Contractors already make up a significant sector of the workforce – 6.9% in 2017 – and non-traditional employment in the “gig economy” only continues to grow.\(^{33}\) Title VII’s limitation to traditional employees increasingly reflects an outdated concept of employment that leaves many workers exposed to harassment while they earn a living.

To determine whether an individual is an employee under Title VII, courts generally look to the non-exhaustive Reid factors:

- the hiring party’s right to control the manner and means by which the product is accomplished;[;] ... 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 party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.\(^{34}\)

While the Reid factors and common law agency principles allow for some flexible interpretation, they still fail to capture the dynamics that are most relevant to discrimination – power over the


\(^{34}\) *Knight v. State Univ. of New York at Stony Brook*, 880 F.3d 636, 639 (2d Cir. 2018) (quoting *Community for Creative Non–Violence v. Reid*, 490 U.S. 730, 751–52 (1989)).
economic and professional fate of the victim. The typical independent contractor is still dependent on her clients to stay in business, and today’s gig economy “independent contractors” are often in their positions because of less financial independence than a traditional employee, not more.

Employers can exploit independent contracting exceptions to Title VII and other employment-related legal duties in myriad ways to maximize profit at the expense of worker security, and this practice creates unique risks for sexual misconduct. The flexibility touted as a major benefit of today’s gig economy is, in fact, a known risk factor for sexual harassment. Non-traditional employees who work with little or no access to procedures that can prevent, identify, and address abuse are inherently more vulnerable to harassment by clients and customers, and minimal connections to management make reporting and remediation exceptionally difficult. Increased risk can also flow the other way, with gig economy employers failing to protect clients and customers from their employees. In April 2018, CNN reported that at least 103 Uber drivers and 18 Lyft drivers have been arrested, issued warrants, or named in civil suits for sexual assault of passengers. Incidents of less severe misconduct must surely be high, as well, considering the ubiquitousness of sexual harassment in work settings more generally.

Closing the gap in discrimination protections for non-traditional employees will take a multi-pronged approach. First, the existing criteria for categorizing employees should be properly enforced, ensuring that the current protections under Title VII reach all eligible workers. Looking beyond enforcement priorities, which are subject to drastic changes under different administrations, federal law must be amended to redefine “employees” to include all workers whose conduct is within the economic control of an employer. Without a fundamental


38 In certain industries, such as entertainment and the media, sexual harassment is particularly pervasive during pre-employment interactions, when individuals are seeking work. With #MeToo shining harsh light on the long-standing practice of the “casting couch” and other abusive practices, California amended its definition of sexual harassment in 2018 with arguably the most expansive scope in the country. The state now defines unlawful harassment as unwelcome and severe or pervasive conduct based on sex where “[t]here is a business, service, or professional relationship between the plaintiff and defendant or the defendant holds himself or herself out as being able to help the plaintiff establish a business, service, or professional
redefinition of the employment relationship, non-traditional workers will remain doubly vulnerable to harassment – more exposed to harm, and less empowered to secure any meaningful relief.

C. Mandatory Harassment Training

As civil rights practitioners know well, employers and employees alike are often unaware of how to report and properly address sexual harassment complaints. Title VII has no express provision requiring employers to provide training related to employment discrimination, and courts have created only indirect incentives for employers to do so. Under the Faragher-Ellerth affirmative defense, employers can avoid liability for unlawful harassment when no tangible negative employment action was taken against a victim if they can show that they “exercised reasonable care to prevent and correct any harassing behavior,” and the employee “unreasonably failed to take advantage of the preventive or corrective opportunities” that were provided.39 Established in 1998, this defense has prompted many employers to adopt some form of harassment training to limit potential liability.

In the absence of a clear legal duty to educate employees, however, federal law provides no real standards for this crucial aspect of deterrence, and only a handful states have established their own provisions. Maine passed the nation’s first mandatory training law in 1991, requiring employers with 15 or more employees to provide basic information to all new hires.40 The following year, Connecticut mandated that employers with 50 or more employees train all supervisors in sexual harassment policies.41

More recent legislative action has established or updated mandatory training programs in California and New York. In 2017, California expanded its existing mandatory training law, which required employers with 50 or more employees to train supervisors every two years, to expressly require training related to gender identity, gender expression, and sexual orientation discrimination.42 Further amendment in 2018 broadened the statute even further - California

relationship with the defendant or a third party.” Cal. Gov’t Code § 51.9. The statute goes on to enumerate a non-exhaustive list of persons with whom such a relationship might exist, including a director or producer. Id.

39 Vance v. Ball State University, 570 U.S. 421, 424 (2013). For co-worker harassment, employers are liable under a negligence standard, which also creates some indirect incentives for harassment training and reporting systems. See id. at 448–49 (“Assuming that a harasser is not a supervisor, a plaintiff could still prevail by showing that his or her employer was negligent in failing to prevent harassment from taking place. Evidence that an employer did not monitor the workplace, failed to respond to complaints, failed to provide a system for registering complaints, or effectively discouraged complaints from being filed would be relevant.”).

42 Cal. Gov’t Code § 12950.1(c).
employers with five or more employees, including seasonal and temporary workers, are now required to train all employees in anti-discrimination policies.\(^{43}\)

New York, the epicenter of the Weinstein scandal, has taken an even more robust approach to mandatory training - effective October 2018, all employers must provide annual harassment training to all employees.\(^{44}\) Standards for the training are explicit and thorough, specifying that employers must “provide examples of prohibited conduct,” provide a standard complaint form, state clearly that engaging in or knowingly permitting harassment is misconduct that will be sanctioned, and expressly prohibit retaliation.\(^{45}\)

While there is some evidence that certain forms of training worsen attitudes towards preventing harassment, most forms of training appear to improve awareness of what constitutes harassment and encourage victims to report misconduct.\(^{46}\) Practitioner experience confirms these findings – in all too many cases, employees facing harassment have no clear framework for understanding what constitutes unlawful conduct, no clear path to report complaints (particularly when the harasser is a direct supervisor), and no accurate sense of their employer’s obligation to address abuse. While mandatory programs may elicit groans as a ‘waste of time,” the fact remains that victims can only bring harassment to light if they know what the law prohibits and to whom violations should be reported.

To that end, effective training must involve all employees and be specific, clear, and accessible, leaving no doubt that misconduct and retaliation will be taken seriously. In many accounts brought to light by #MeToo, women endured months, even years, of harassment because they lacked basic information about their rights and how to assert them. Effective mandatory training prevents employers from evading their responsibility to prevent and remedy misconduct, establishing a baseline for the entire workplace.

Most importantly, effective mandatory training must be directed at and available to all levels of employees. While supervisor-oriented interventions, like those mandated in Connecticut and California, are better than nothing, this approach ignores the reality of harassment at the supervisory level. Indeed, it is harassment by supervisors, managers, and executives that is most common and most difficult to confront, and leaves employees most vulnerable to retaliation. Prolific serial harassers like Roger Ailes and Bill O’Reilly at Fox News, Harvey Weinstein at The Weinstein Company, Charlie Rose at CBS, and John Lasseter at Pixar – to name a high-profile few – illustrate the importance of providing an alternative chain of command to address harassment that comes from the very highest levels.

D. Personal Liability

Despite the highly personal nature of sexual harassment, Title VII provides no cause of action against a harasser in his or her personal capacity. While holding employers accountable is crucial to addressing the systemic framework for sex discrimination, individual liability is

\(^{43}\) Cal. Gov’t Code § 12950.1(a).


\(^{45}\) Id.

\(^{46}\) EEOC Report 2016, supra note 7 at 44.
equally important to prevent and remedy harassment in a number of ways. First, when combined with effective training, it provides a significant deterrent to would-be harassers. A major revelation from the #MeToo reckoning has been the fact that the threat of discipline and termination standing alone do nowhere nearly enough to prevent abuse. Harassment flourishes in environments of low or no accountability, and corporate-only liability for harassment protects abusers from direct consequences for their actions. Personal liability raises the “costs” of harassment by increasing the personal risks associated with opportunistic, exploitative conduct. This is especially important when a harasser wields great power in the workplace and his employer is unlikely to impose any meaningful sanctions. In the case of Roger Ailes, for example, it was New Jersey’s personal liability provision that enabled Gretchen Carlson to bring an action against him in his individual capacity, circumventing the corporate protections that had otherwise shielded Ailes for decades.

Second, individual liability gives victims much-needed leverage for legal claims and decreases the chance that an employer will sweep harassment under the rug to protect an abusive employee. For extremely high-worth individuals, personal liability might not act as an effective deterrent - Bill O’Reilly, for example, reportedly paid $45 million to settle harassment claims from multiple victims while continuing to secure massive contracts with Fox News, and Harvey Weinstein also reportedly reached high-figure settlements with eight women while maintaining his leadership of his company. In the vast majority of cases, however, employers are less likely to shield employees who can face, or have faced, personal legal action for their unlawful harassment.

Finally, personal liability for sexual harassment makes a powerful symbolic statement about the very personal nature of the harm it inflicts on victims. The effects of harassment can radiate far beyond the workplace itself – it can derail professional development, sometimes for decades; create significant emotional and psychological injuries; negatively impact physical health; and affect personal and family relationships. #MeToo has vividly illustrated that abusive, hostile work environments shape the arc of women’s lives. A basic principle of our legal tradition holds that individuals must be responsible for the harms they knowingly cause to others – sexual harassment should be no exception. Title VII’s imposition of corporate liability is necessary but not sufficient to establish meaningful accountability for discrimination, and the law should more accurately reflect the personal impact of this harm.

In the absence of a federal provision for individual liability, state statutory and common law provide an important avenue for relief in some cases. While all states recognize tort actions that encompass some harassing conduct, such as intentional infliction of emotional distress, these claims often set unattainable standards for plaintiffs in even the most egregious cases of discrimination. More useful for the vast majority of victims is the specific recognition of

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personal liability for sexual harassment, which a number of states have adopted. Massachusetts, Michigan, Missouri, Montana, New Mexico, Washington, and the District of Columbia all provide for recovery against supervisors who engage in sexual harassment. Under California, Iowa, and Vermont law, harassers may be held personally liable for their conduct, regardless of whether their victims are subordinates. In the face of the national sexual harassment epidemic, a piecemeal, state-level approach to personal liability for sexual harassment is simply inadequate – federal protections are needed to establish a fair, comprehensive baseline for workers across the country.

E. Vicarious Liability

In addition to providing for personal liability for sexual harassment, Congress should also act to reverse the Supreme Court’s limiting construction on the definition of “supervisor” under Title VII, set out in 2013’s Vance v. Ball State University. The supervisor distinction is crucial to enforcement of the law, as it determines whether employers have vicarious liability for discrimination or are subject to the lesser negligence standard. Vance resolved a circuit split over defining “supervisor” by holding that the category is limited to individuals who can carry out “tangible employment actions against the victim, i.e., to effect a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.” This narrow, technical definition does not reflect the reality of the workplace. For many workers, particularly those in lower wage positions, supervisors who lack the authority to make official employment decisions still hold tremendous power over the daily atmosphere on the job. By exercising the power to set schedules, make task assignments, mediate complaints, distribute awards and punishments, and assert other intangible forms of authority, these employees act as agents of the employer and can shape everyday conditions that create a hostile work environment.

A major theme of the #MeToo movement has been the need to recognize how power operates “on the ground” to perpetuate abusive practices. The formalistic supervisor doctrine set


49 Id.


51 Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 761-62, 764; accord Faragher, 524 U.S. at 803, 807 (holding that employers are strictly liable when supervisors take unlawful tangible employment actions against an employee; where no tangible action is taken, the employer may avoid liability by showing that it took reasonable care to prevent or correct the discrimination and the employee failed to reasonably avail herself of help or avoid harm.); Vance, 570 U.S. at 448-49 (negligence standard applies to employer liability for non-supervisor harassment).

52 Vance, 570 U.S. at 431 (internal quotation marks and citation omitted).
out in *Vance* is an example of how the Supreme Court has narrowly construed Title VII to the detriment of victims in the real world. Holding employers fully accountable for providing work environments free from harassment requires the law to recognize the full spectrum of authority within which harassment occurs. Reversal of *Vance*, through an amendment to Title VII that defines supervisors as individuals with the power to determine the practical working conditions of other employees, is central to that effort.

**F. Damage Caps**

Finally, meaningful liability for sexual harassment must also include amending egregiously out-of-date damage caps that further erode the remedial impact of federal law. For those employees who are not subject to mandatory arbitration and its exceptionally meager recovery for harassment, Title VII sets unjustly low limits even in litigation. Unchanged since 1991, caps for compensatory and punitive damages range from $50,000-$300,000, depending on the size of the employer.53 Stagnant for 28 years, these caps have diminished in real value by nearly 50% over time and do not provide victims with just relief.54 Establishing liability for individual as well as corporate wrongdoers and providing victims with effective compensation are both necessary to address the comprehensive harms of sexual harassment.

**V. Conclusion**

The #MeToo movement is forcing society to see the gaps between the promises of our laws and the realities of individual interactions, face to face, in the workplace. Through unfair conditions of employment, limiting constructions of statutory language, a narrow focus on traditional employees, low standards for harassment prevention, limited liability doctrines, and anemic damage caps, Title VII’s ability to prevent and remedy sexual harassment has been significantly weakened. The #MeToo movement illustrates the immense cost of that failure. The law must become more responsive to the real-world needs for equal protection, or inequality will only become further entrenched – if we are truly committed to combating discrimination, nothing short of comprehensive reform is required. Sustained collective action that places gender equality at the very heart of fair working conditions is the best hope for bringing these systemic reforms to every corner of the American economy, delivering fairness and dignity to all.

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