

PROACTIVE VERSUS REACTIVE RESOLUTION MECHANISMS FOR SEXUAL
HARASSMENT: AN ARGUMENT TO EXTEND OSHA PROTECTION

By

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THESIS ABSTRACT

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Title: Proactive Versus Reactive Resolution Mechanisms for Sexual Harassment: An Argument to Extend OSHA Protection

Sexual harassment in the workplace is ultimately connected to the overall health and safety of workers. Thousands of workers file sexual harassment charges each year under Title VII, the federal anti-discrimination law with the Equal Employment Opportunity Commission. These claims include conduct such as verbal threats, confinement, coercion, and assault, either categorized as quid pro quo or as creating a hostile work environment. There are currently no specific federal workplace safety and health standards to address problems of sexual harassment, despite OSHA's precedent. If OSHA recognized sexual harassment as an explicit workplace safety issue where the risk of violence or injury are significant, its General Duty Clause would require the employer to take feasible steps to minimize those risks. Social science supports this proposal as growing research demonstrates the connections between sexual harassment and worker safety and health.

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I. INTRODUCTION

Sexual harassment has become the subject of a national dialogue. The Me Too hashtag became viral in less than six months, bringing local grassroots work to global attention by highlighting the impact of sexual violence on individuals in the workplace. This created a movement of support for survivors of sexual violence and their allies by connecting survivors to resources, sharing stories for visibility, offering community resources, pursuing ‘me too’ policies in workplaces, and collecting sexual violence research. The movement has built a blend of organizational collaboration to interrupt sexual harassment through digital platforms to create a space to connect with survivors. It has further affirmed empowerment for targets through empathy and community-based action and has allowed survivors to lead the work to match the needs of different communities.

The Me Too movement was never simply about firing those in the workplace who had power. It was, and still is, about raising awareness of the impacts of sexual harassment and violence. It is about creating change. The movement has led to reform on a state level and as well as in individual workplaces.¹ States have begun banning nondisclosure agreements that prevent sexual harassment survivors from speaking out.² They have also begun introducing protections for more workers – beyond employees, expanding to independent contractors.³

While sexual harassment is largely underreported across most industries, companies encourage employees to report being subjected to sexual harassment through internal mechanisms in order to avoid liability.⁴ This is supported by the public policy idea that courts

¹ See Natalie Dugan, *#TimesUp on individual litigation reform: Combatting sexual harassment through employee-driven action and private regulation*, 53(2) COLUMBIA J. LAW & SOC. PROBLEMS, 247-281 (2020).

² *Id.*

³ *Id.*

⁴ See Carly McCann & Donald T. Tomaskovic-Devey, *Most Sexual Harassment at Work Unreported - and Few Benefit Among Those Who Do Report*, 34 (38) ROCHESTER BUS. J., 30 (2018).

emphasize: if companies can handle these matters internally in an appropriate manner, there is no need to involve the legal system.

Exposure to sexual harassment may have detrimental repercussions on the productivity of a workplace, the professional lives and careers of employees, and mental health of affected employees.⁵ Oftentimes allowing the problem to persist creates systemic issues in the entirety of the organization in which it takes place.⁶

Methodology

The research approach first reviewed all existing remedies, including administrative, statutory and common law, for sexual harassment workplace claims. From there, a review of social science literature on the health impacts of workplace sexual harassment was completed. Then national and state bar association conferences, CLEs, committee meetings, and advocacy group legislative work were researched to determine the feasibility of proposed remedies. Finally, OSHA coverage is explored as a possibility to address systemic sexual harassment in the workplace.

Disclaimers

When discussing gender, I recognize that gender is largely a social construct and gender and sex are often two different things. Much of the literature that exists about sexual harassment uses binary terms of “men” and “women,” and current research does not have an extensive amount of information on transgender and non-binary employees who are subjected to sexual harassment. In addition, sexual harassment can impact employees of all gender identities. With this restriction noted, current data shows sexual harassment in the workplace is predominantly

⁵ Harvey, M., Heames, J., Richey, R., & Leonard, N., *Bullying: From the Playground to the Boardroom*, 12(4) J. LEADERSHIP & ORGANIZATIONAL STUD. 1, 1–11 (2006).

⁶ *Id.*

perpetrated by men and most frequently affects women. Lastly, many individuals affected by sexual harassment or assault consider themselves to be survivors instead of victims. As I refer to victims in relation to literature, case law, or statutory language, I recognize that some individuals prefer to empower themselves by disowning the word victim and using the word “survivor.” Throughout this paper, I will use the term “target” to refer to victims or survivors of sexual harassment.

II. LITERATURE REVIEW

A. What is Sexual Harassment?

Sexual harassment can generally be described as unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature.⁷ The Equal Employment Opportunity Commission (EEOC) expands on this definition, further describing sexual harassment in the workplace as taking place when:

- Submission to such conduct is a term or condition of an individual's employment (explicit or implicit);
- Submission to or rejection of the conduct being a basis for employment decisions;
- Conduct of a sexual nature having the purpose or effect of unreasonably interfering with work performance; and
- Conduct of a sexual nature creating an intimidating, hostile, or offensive working environment.⁸

The Equal Employment Opportunity Commission (EEOC) emphasizes that the defining characteristic is that it is *unwanted* and encourages workers to let offenders know that actions are *unwelcome* (emphasis added).⁹ Beyond the legal definition, there are several kinds of sexual harassment, according to the American Psychological Association, including gender harassment, seductive behavior, sexual bribery, sexual coercion, and sexual imposition.¹⁰ The most common behavior in the American workplace is gender-based harassment, which includes “[g]eneralized sexist statements and behavior that convey insulting or degrading attitudes about women or men.”¹¹ This conduct can escalate to additional occurrences, such as “unwanted, inappropriate and offensive sexual advances.” Or, occurrences of sexual coercion, sexual assault, sexual

⁷ *Sexual Harassment*, EEOC, <https://www.eeoc.gov/sexual-harassment> (last visited November 1, 2021).

⁸ *Id.*

⁹ Harvey, at 10 (2006).

¹⁰ *Id.*

¹¹ *Id.*

imposition, or sexual bribery can happen without prior behavior. What social science defines as sexual harassment differs widely from the legal standard that creates liability.

Under Title VII of the Civil Rights Act of 1964, the law generally prohibits discrimination in the workplace.¹² The Supreme Court interprets this statute to prohibit specific forms of harassment, including sexual harassment, in a landmark case approximately two decades after Title VII had passed.¹³ It most importantly established the standard now known as “severe or pervasive,” requiring a plaintiff to prove the harasser’s conduct is sufficiently “severe or pervasive” such that a reasonable person would find the conduct to be objectively hostile or abusive. Since that decision, courts have built up significant case law to establish legal standards for determining when offensive conduct amounts to a Title VII violation and when an employer is liable. The first legally recognized kind of sexual harassment is *quid pro quo*, “this for that,” when a tangible employment decision is based upon the employee’s acceptance or rejection of the unwelcome sexual advances or requests for sexual favors.¹⁴ The second is a hostile work environment—the unwelcome conduct of supervisors, co-workers, customers, contractors, or anyone else that the target interacts with on the job, and the unwelcome conduct renders the workplace atmosphere intimidating, hostile, or offensive.¹⁵

The current remedial scheme for addressing sexual harassment in the workplace is insufficient for several reasons. First, when sexual harassment occurs in the workplace, an employee is usually required to approach an employer and/or the harasser so they know the conduct is *unwelcome*.¹⁶ Most organizations that provide resources and support to targets

¹² Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, <http://www.eeoc.gov/laws/statutes/titlevii.cfm> (last visited Oct. 11, 2020).

¹³ See *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

¹⁴ Workplace Harassment, U.S. DEPT. OF LABOR, <https://www.dol.gov/agencies/oasam/centers-offices/civil-rights-center/internal/policies/workplace-harassment/2012> (last visited Nov. 1, 2021).

¹⁵ *Id.*

¹⁶ EEOC, *supra* note 7.

encourage the employee to notify the offender and/or the employer that the conduct is unwelcome. This places the burden on an employee to notify their employer and hope that internal mechanisms address the issue. These internal mechanisms so often fail, as described below. The second is that employees are often left on their own to navigate the issue, as union membership continues to shrink and individual legal representation becomes harder to find.¹⁷ Unions themselves also fail to address issues of sexual harassment, often facing political issues when the offender is a member of the union themselves. The third is that many legal remedies have procedural restrictions, such as limiting the amount of time you have to file a claim, allowing employers affirmative defenses that often leave employees without recourse, and administrative agencies that rarely investigate and issue findings of liability.¹⁸ Finally, sexual harassment is treated philosophically as an issue that primarily imposes legal obligations after the harm has occurred. In reality, sexual harassment is no different than any other workplace safety issue and proactive mechanisms need to be implemented as a result.

B. Why Do Internal Workplace Mechanisms So Often Fail?

One of the positive effects of the #Me Too movement is that more people are now realizing that what we have [in place] doesn't work.

— *Professor of Sociology Frank Dobbin*

Despite the longstanding recognition of harassment as a major problem, it persists. Employers have instituted training in response to decisions in Supreme Court cases like *Ellerth* and *Faragher* but failed to reduce claims related to the systemic issue, even with zero-tolerance harassment policies.¹⁹

¹⁷ *Workplace Justice Newsletter*, NAT'L WOMEN'S L. CTR., at 4 (Nov. 2016).

¹⁸ EEOC Investigating Fewer Workplace Discrimination Claims, Cross Law Firm, <https://www.crosslawfirm.com/blog/2019/06/eecoc-investigating-fewer-workplace-discrimination-claims/> (last visited Nov. 14, 2021).

¹⁹ Margaret Stockdale et al., *Coming to Terms with Zero Tolerance Sexual Harassment Policies*, 4 J. FORENSIC PSYCH. PRAC. 65, 66-67 (2003); Robert Perkovich & Anita M. Rowe, "What Part of 'Zero' Don't You Understand?":

In the *Faragher-Ellerth* decisions, the Supreme Court held that under Title VII, employers are liable for workers who sexually harass subordinates, even if the harassed employee does not face any adverse job consequences.²⁰ It also established that employers can make affirmative defenses in certain cases. Employers are provided with a safe harbor from vicarious liability from sexual harassment claims against a supervisory employee.²¹ The employer needs to satisfy two elements to successfully assert this defense: (1) the employer exercises reasonable care to prevent and promptly correct any sexually harassing behavior, and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.²²

Study of these anti-harassment policies reveals them to fall into two categories. The first is an “absolutist approach,” which bars any conduct even remotely related to sexual harassment and mandates discharge.²³ The second is “symbolic,” where sexual harassment is communicated as something that “will not be tolerated,” but leaves flexibility in determining what constitutes harassment and what the appropriate discipline is for the particular conduct at issue.²⁴

New research demonstrates that many of these efforts are unsuccessful and harassment is still obstructing career growth for women.²⁵ In 2019, Frank Dobbin and Alexandra Kalev published their findings on the “effectiveness of harassment grievance procedures and training

The Arbitration of Sexual Harassment Discipline and 'Zero-Tolerance' Policies, 36 WILLAMETTE L. REV. 749, 781 (2000).

²⁰ See *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); see also *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

²¹ *Id.*

²² *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); see also *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 765 (1998).

²³ Ann C. Hodges, *Strategies for Combating Sexual Harassment: The Role of Labor Unions*, 15 TEX. J. WOMEN & THE L. 183, 184 (2006), <https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1228&context=law-faculty-publications>.

²⁴ *Id.*

²⁵ Frank Dobbin & Alexandra Kalev, *The Promise and Peril of Sexual Harassment Programs*, PNAS 116, 25 (June 3, 2019).

programs” over a period of thirty years.²⁶ During this time period, researchers collected survey data from over 800 companies and annual census figures on the demographics of private sector works from the EEOC.²⁷ An unsurprising finding is that women tend to grow within a company, often leading to manager roles, if they are within a supportive work environment.²⁸ Dobbin states women who file grievances²⁹ most often “face retaliation and have to leave their jobs because they find their workplaces so toxic.”³⁰ Workplace cultures can demonstrate a measurable improvement when a particular group achieves “significant increases in the numbers . . . in management ranks.”³¹

According to the study, “98 percent of surveyed employers had established grievance procedures for harassment by 2002, while 82 percent had manager training [regarding recognition of harassment] and 64 percent had employee training [regarding the prevention of harassment].” Only 18 percent of the employers had implemented all three.³² The implemented grievance procedures and training that focused on preventing illegal or negative behavior actually were followed by decreases in the numbers of women in management.³³ On the other hand, trainings that allow management to better recognize and understand incidents of harassment were followed by increases of women in leadership roles.³⁴ This training was especially helpful in elevating Black, Hispanic, and Asian American women in company hierarchy.³⁵

²⁶ *Id.* at 25.

²⁷ *Id.*

²⁸ *Id.* at 26.

²⁹ *Id.*; In referring to grievances, the article means complaints made formally within a company.

³⁰ *Id.* at 28.

³¹ *Id.*

³² *Id.*

³³ A. Smith, *Sexual Harassment Training Should Be Separate for Managers and Rank and File*, Society for Human Resource Management (2017).

³⁴ Dobbin & Kalev, at 26.

³⁵ *Id.*

The theory behind the outcomes when there are more women in management is that in general, “women respond more positively to training than men do, and, following training, are less likely to blame the target. Men in general are more likely to blame the target [if approached with complaints].”³⁶ If there is less of a gender disparity in company management, complaints or discussions of harassment are more likely to be taken seriously; targets of harassment are ultimately less likely to leave their jobs and companies will prevent employee turnover and promote a healthier workplace culture.

However, the study cautions that growing the numbers of women managers isn’t the “silver bullet” for preventing harassment.³⁷ As the overall share of women in leadership roles rose above 15 percent, harassment training for managers tend to have an “adverse effect[,] reflect[ing] resistance by a dominant group to the perceived encroachment . . . into their sphere of power.”³⁸ Men can begin to resist the addition of more women to the management team, resulting in retaliation.³⁹

The U.S. Department of Education suggests actions that employers can take internally if they are concerned about the consequences from harassment and how it impacts their workplace environments.⁴⁰ Employers can implement anti-harassment provisions within their codes of conduct, with help from federal agencies like the EEOC for training materials. Monitoring harassment complaints within human resource departments will assist with preventing against retaliatory causes of actions. Finally, taking decisive action against those who are bullying in the

³⁶ *Id.*

³⁷ *Id.*

³⁸ Buchanan, Settles, Hall & O’Connor, *A review of organizational strategies for reducing sexual harassment: Insights from the U. S. military*, J. SOC. ISSUES 70, 687–702 (2014).

³⁹ *Id.*

⁴⁰ Workplace Harassment, U.S. DEPT. OF LABOR, <https://www.dol.gov/agencies/oasam/centers-offices/civil-rights-center/internal/policies/workplace-harassment/2012> (last visited Nov. 1, 2021).

workplace will contribute to an employer saving costs and creating more engaging, trusting, safe, and satisfying workplaces.

Dobbin and Kalev suggest alternatives to the typical training and grievance models that increase employee engagement and diminish victim-blaming.⁴¹ They point to the growing use of mechanisms independent from the company itself, such as “independent ombudspersons, who offer a confidential, third-party resource for people to report harassment and think through feasible and appropriate solutions.”⁴² The EEOC also recommends a model similar to an ombudsperson, as it frequently “mitigate[s] the possibility of retaliation and provides the complainant with an ally.”⁴³ An ombudsperson is typically a dedicated neutral or impartial practitioner of conflict resolution that specializes in providing confidential and informal assistance to visitors.⁴⁴ Typically, an ombudsperson within an organization could assist those employees with their issues or concerns in a private, protected manner. The ombudsperson, unlike human resources, is not obligated to provide information or details on incidents to the organization itself.⁴⁵ Oftentimes, an ombudsperson will write reports about general areas of concern within an organization to demonstrate where the organization should focus in support for its employees or changes within its workplace culture.⁴⁶ In addition, the quality of harassment training itself is inconsistent and often substandard.⁴⁷ Companies create materials and training in-house, rarely mentioning what Dobbin and Kalev think is one of the most promising avenues of

⁴¹ Frank Dobbin & Alexandra Kalev, *The Promise and Peril of Sexual Harassment Programs*, PROCEEDINGS OF THE NAT'L ACAD. OF SCI. (June 2019), <https://www.pnas.org/content/116/25/12255/tab-article-info>.

⁴² Frank Dobbin & E. Kelly, *How to stop harassment: The professional construction of legal compliance in organizations*, AM. J. SOCIOL. 112, 1203–1243 (2007).

⁴³ *Id.*; *Select Task Force on the Study of Harassment in the Workplace*, EEOC (2016).

⁴⁴ *What is an Organizational Ombudsman?*, INT'L OMBUDSMAN ASS'N, <https://www.ombudsassociation.org/what-is-an-organizational-ombuds> (last visited Nov. 13, 2021).

⁴⁵ *See id.*

⁴⁶ *Id.*

⁴⁷ *Fixing Watches with Sledgehammers: The Questionable Embrace of Employee Sexual Harassment Training by the Legal Profession*, 24(1) THE BEN J. ALTHEIMER SYMPOSIUM: THE IMPACT OF SCI. ON L. DECISIONS, 149 (2016).

education: bystander intervention training.⁴⁸ Bystander training has been adopted in places like the military and higher education with “positive results.”⁴⁹ The training is different from the model that current companies use. Bystander intervention is not accusatory but starts out by trying to get people on the side of the person who is being harassed or at risk of further harassment. By putting someone in the position of the third party observing a situation, people can scrutinize and reflect on their own behavior. This often shifts blame from the target and spreads the burden of promoting a workplace free of sexual harassment among all its employees.⁵⁰

The study also highlighted the importance of collecting and analyzing a company’s own data on harassment and workplace safety; most employers do not track or even share the information on related complaints. Employers should collect more data so they can diagnose and address the problems they have. And without any individual data that companies are tracking, it is nearly impossible to understand the larger picture of how vast of an impact sexual harassment has in the American workplace. Surveys designed by psychologists, such as the “Sexual Experiences Questionnaire,” can enable employers to collect more data on how harassment presents itself in their workplaces. Nevertheless, companies are resistant to collecting or monitoring their own complaints, which Dobbin says is because “if [companies] collect more data, they might get into trouble in court . . . for allowing a culture of harassment to persist.”⁵¹

When the harassed employee does not receive internal support and the offender is not disciplined, the target often takes time off (or leaves the company altogether) and employees

⁴⁸ *Id.*

⁴⁹ S. J. Potter, M. M. Moynihan, *Bringing in the bystander in-person prevention program to a U.S. military installation: Results from a pilot study*, *Mil. MED.* 176, 870–875 (2011).

⁵⁰ *Id.*

⁵¹ Aggarwal-Schifellite, *supra* note 11.

across the organization use company time to address claims in court.⁵² In addition to anecdotal stories of women in the workplace, research produced an analysis demonstrating that between 2003 and 2005, 80% of women who reported experiencing harassment changed jobs.⁵³ At the same companies, out of the women who witnessed harassment occurring but were not targeted for harassment themselves, 54% changed jobs.⁵⁴ The EEOC's findings solidify that internal mechanisms are failing, as 75% of workplace harassment claims are estimated to go unreported due to shame or fear.⁵⁵ And 75% of those who do speak up experience retaliation.⁵⁶

C. Failure by Unions to Effectively Address Workplace Sexual Harassment

The increase of women in the labor force between the 1930s and the mid-1970s brought about two generally observed simultaneous reactions.⁵⁷ The first was a sharp uptick in discriminatory treatment of women in the workplace. For example, even still today, union environments in which either the membership or the leadership is predominantly male, behavior viewed by women members as harassing and unwelcome may be perceived as normal or acceptable to the majority, or to those deciding where to allocate resources. In these instances, women received lesser-valued job assignments, lack of promotions, lower pay, and harassment to cause embarrassment and humiliation.⁵⁸ The second reaction was to exploit or fetishize the presence of women through pressure for sexual favors and submission to behaviors as conditions

⁵² *Id.*

⁵³ *Key Findings of the Select Task Force on the Study of Harassment in the Workplace*, EEOC (2017), https://www.nsvrc.org/sites/default/files/publications_nsvrc_research-translation_key-findings-select-task-force-study-harassment-in-the-workplace.pdf.

⁵⁴ *Id.* at 54.

⁵⁵ *Id.*

⁵⁶ *Id.* at 75.

⁵⁷ PETROCELLI, *supra* note 135; Janet Yellen, *The History of Women's Work and Wages and How It Has Created Success For Us All*, BROOKINGS (May 2020), <https://www.brookings.edu/essay/the-history-of-womens-work-and-wages-and-how-it-has-created-success-for-us-all>.

⁵⁸ *Id.*

of employment, and to keep from being fired, demoted, or otherwise experiencing an adverse employment action.⁵⁹

In 2018, the Bureau of Labor Statistics estimated that 10.5% of American workers were members of unions, the lowest rate of membership since the early 1980s.⁶⁰ The drop has been “particularly steep” in the private sector, with only 6.4% of workers unionized. The overall decline is partially a result of changing composition of available jobs, “right-to-work” legislation, and the rise of contract-based jobs.⁶¹ Recent research also demonstrates that the decline of unions has a causal link to income inequality over the last few decades.⁶² Union workers have typically made about 20% more than similarly situated workers because they exert “collective power” for those who have little to no bargaining power.⁶³

The unionized workplace, despite its greater protection for workers, is not immune from harassment issues.⁶⁴ Scholars argue that unions should be on the forefront of the battle against harassment, including taking a proactive role in addressing the problem.⁶⁵ Research shows that union’s records in dealing with harassment is inconsistent.⁶⁶ Unions are sometimes reluctant to pursue harassment claims on behalf of a union member, for example, when the harasser is also a union member.⁶⁷ Unions are also hesitant to pursue the full grievance process in cases that are

⁵⁹ *Id.*

⁶⁰ Economic News Release on Union Membership, U.S. BUREAU OF LABOR STATISTICS (Jan. 22, 2021).

⁶¹ *Id.* at T1.

⁶² *Id.*

⁶³ *Id.* at T3.

⁶⁴ Hodges, *supra* note 9.

⁶⁵ *Id.*

⁶⁶ See Crain & Matheny, *supra* note 3, at 1546-51 (describing the union's decidedly mixed role in dealing with harassment at Mitsubishi).

⁶⁷ *Id.*

more difficult to prove due to limited resources.⁶⁸ Workers will also sometimes seek outside legal counsel to assist them, at the encouragement of their union.⁶⁹

Poignantly, the primary purpose for many workers in joining unionization efforts is to gain protection from arbitrary and discriminatory actions.⁷⁰ Even so, combating sexual harassment may not be a priority for the union or its members. It may generate controversy, and risk-avoiding union members may conclude that any action or campaign against sexual harassment is not perceived as acceptable to the majority. Because unions are organizations in which officers are elected, pushing an agenda or taking action that may be divisive in a workplace may lead to officers losing their position in the next election. And worse, the union may be subject to decertification efforts from dissatisfied members. The more severe and pervasive the harassment is, “the more likely it is that at least some employees are participants or at least do not oppose it.”⁷¹ Accordingly, the union will have to confront employer efforts to discipline employee harassers.

Fighting against sexual harassment “fits squarely what unions are all about: promoting dignity, equality, and respect.”⁷² It is past time for unions to commit greater effort to eliminate workplace harassment.

D. Addressing Sexual Harassment is an Issue of Gender Equity

“We’re seeing a growing recognition that workplace sexual harassment isn’t a side issue when it comes to gender equity; it’s one of the central issues. . . . There are long-term negative career consequences for women who face harassment and try to do something about it and for women who face harassment and don’t do anything about it.”

— *Professor of Sociology Frank Dobbin*

⁶⁸ Marion Crain, Women, Labor Unions and Hostile Work Environment Sexual Harassment: The Untold Story, 4 TEX. J. WOMEN & L. 9 (1995).

⁶⁹ *Id.*

⁷⁰ Hodges, *supra* note 9.

⁷¹ Hodges, *supra* note 9.

⁷² *Id.*

Empirical research demonstrates that men and women experience and are exposed to harassment differently. Furthermore, those women that do experience harassment and report it are likely to be subject to retaliation.⁷³ Sexual harassment has been described as the “manifestation of power relations” between sexes, an underlying cause of the phenomenon.⁷⁴ Oftentimes, that relationship between sexes includes a considerable amount of violence against women.⁷⁵ Within the United States, data indicates that one in every ten women are raped or sexually assault during their lives, and more than half of all women living with men have experienced a battering or similar incident of domestic violence.⁷⁶ This violence by men against women was introduced into the workplace, and scholars suggest male hostility towards women in the workplace is “closely connected to male attitudes about [gender] role[s] . . . in society.”⁷⁷

Catherine MacKinnon, a legal scholar, was one of the first to draw a connection between sex discrimination and sexual harassment.⁷⁸ Superiors can deprive women of financial security, independence, and other economic clout; power dynamics which helps make resistance to these pressures challenging. Sex discrimination is often the systemic reason for women being forced into lower-paying jobs and disrupting their career paths.

The impact of sexual harassment extends beyond the women’s current role at work. Often, men are reminding women of their “vulnerability, creating tensions that make [] jobs more difficult . . . making [them] hesitant to seek higher paying jobs where [they] may perceive

⁷³ *Id.*

⁷⁴ WILLIAM PETROCELLI & BARBARA KATE REPA, *SEXUAL HARASSMENT ON THE JOB: WHAT IT IS & HOW TO STOP IT* (4th ed. 1998).

⁷⁵ *Id.* at 47.

⁷⁶ *Id.*

⁷⁷ SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* (1991).

⁷⁸ *See* CATHARINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 312 (Yale University Press, 1979).

the tension as even greater.”⁷⁹ These gender dynamics create a climate of oppression and intimidation, and women experience processes of victimization as one who has experienced other gender-related crimes, blaming themselves and doubting their self-worth. Women in traditional male fields are particularly challenged, such as construction, medicine, or finance.⁸⁰ They often suffer more intense harassment.

Women of color in professional settings are faced with more challenges of both racism and sexism.⁸¹ Kimberlé Crenshaw defined the term for people living at the intersection of multiple marginalized identities as “intersectionality” and described how distinct the unique forms of discrimination are.⁸² The forms of discrimination faced by women of color is distinct from the discrimination faced by white women, and it cannot be explained by sexism or racism alone.⁸³ Additional research indicates these additional factors adversely affect women in various occupations through “stifled leadership opportunities, the ongoing persistence of specific forms of sexual harassment, and subtle but pervasive doubts about competence[.]”⁸⁴ Patterns in corporate culture thwart Black women’s mobility in organizations, especially, and are left to struggle harder to access and advance in their professions.⁸⁵ Wage disparities and occupational underrepresentation support these findings.⁸⁶

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1(8) UNIV. OF CHICAGO LEGAL FORUM 139 (1989).

⁸² *Id.* at 141.

⁸³ *Id.* at 145-146.

⁸⁴ Adia Harvey Wingfield, *Women are Advancing in the Workplace, but Women of Color Still Lag Behind*, BROOKINGS (Oct. 2020), <https://www.brookings.edu/essay/women-are-advancing-in-the-workplace-but-women-of-color-still-lag-behind>.

⁸⁵ *Id.*

⁸⁶ *See Black Women Aren’t Paid Fairly, and that Hits Harder in an Economic Crisis*, LEAN IN, <https://leanin.org/data-about-the-gender-pay-gap-for-black-women> (last visited April 1, 2021).

III. DISCUSSION

E. Proactive & Reactive Theory in Workplace Policies

Workplace conflicts can spark businesses to make change, especially if the problems are systemic in nature and carry possible legal ramifications.⁸⁷ Changes may take place in order to respond to a new opportunity or avoid a threat to the company. For example, training on sexual harassment awareness has been introduced widely across companies in the United States. Regardless of the reason, change can be difficult for all involved. Both management and employees can struggle with change that impacts the workplace environment or culture.⁸⁸ One of the major issues with managing systemic change is discussing proactive versus reactive approaches. Typically, proactive responses focus on actively attempting to make alterations to the workplace and its practices.⁸⁹ It also includes planning for the future, taking into consideration potential problems in the orders of processes, recognizing future threats, and planning to prevent problem or conflict escalation.⁹⁰ Reactive responses, on the other hand, manage the issues once they emerge, without appropriate arrangements on how, what, when, and whom to report.⁹¹ Responding to something after it has occurred is neither a plan, nor a strategy.

It is undisputed that planning for potential problems will help save time, costs, and effort used for responding to actual problem occurrences. If these issues are left unaddressed by companies for too long, escalation may lead to the attention of legislators on a state or national

⁸⁷ Marcia J. Simmering, *Reactive vs. Proactive Change*, REFERENCE FOR BUS., <https://www.referenceforbusiness.com/management/Pr-Sa/Reactive-vs-Proactive-Change.html> (last visited March 2, 2021); Beckhard, R.F., and R.T. Harris, *Organizational Transitions: Managing Complex Change*, MA: Addison-Wesley (1987).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Proactive vs Reactive: Which Approach is Better to Attain Quality*, QUALITYZE, <https://www.qualityze.com/proactive-vs-reactive-approach-better-attain-quality> (last visited February 2, 2021).

⁹¹ *Id.*

level. Companies are also motivated to enact change if legal liability is created.⁹² The resources that are used in response to conflicts occurring in the context of sexual harassment are shared between the companies themselves and the legal system. Internal mechanisms include training, human resources complaints and grievance processes. External mechanisms involve agencies like state Bureaus of Labor and Industries, the EEOC, and lengthy and extensive litigation in the courts system.

These existing mechanisms function as a reaction to the problem of sexual harassment. However, there needs to be an appraisal of the social and economic costs of sexual harassment. In lawsuits themselves, the average cost of a harassment claim settled out of court will typically run anywhere from \$75,000 to \$125,000.⁹³ The EEOC records a cost of \$195 million paid out by private companies between 2010 and 2017.⁹⁴ Another development in response to increasing claims is for employers to take out Employment Practices Liability Insurance.⁹⁵ Companies spend over \$2.2 billion on these insurance policies per year.⁹⁶ One of the largest expenses that is under researched is the social and financial costs of absences, losing employees, lower productivity, and missing the benefits of a diverse workforce.⁹⁷ The last study on this was conducted in 1988, estimating that the average Fortune 500 company loses \$6.7 million per year due to sexual harassment.⁹⁸

⁹² *Id.*

⁹³ Jemima Lovatt, *The Cost of Sexual Harassment is Much Higher than You'd Think*, ONE YOUNG WORLD (Feb. 7, 2018), https://medium.com/@OneYoungWorld_/the-cost-of-sexual-harassment-is-much-higher-than-you-d-think-e538cc962c89.

⁹⁴ *Id.*

⁹⁵ Study on Cost, EEOC (2015), <https://www.eeoc.gov/select-task-force-study-harassment-workplace-report-co-chairs-chai-r-feldblum-victoria-lipnic#:~:text=Last%20year%2C%20EEOC%20alone%20recovered,the%20tip%20of%20the%20iceberg.>

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

In reflecting upon the above costs, sociological research points out that businesses and government need to be implementing preventative strategies in order to preserve resources.⁹⁹ A cultural shift in how companies deal with the problem is transitioning from spending millions on lawsuits or insurance to spending a much smaller amount of money educating the workforce and putting checks in place to prevent harassment in the first place.

F. Limitations of Legal Remedies

a. Access to Justice

It is more difficult for low wage workers to address problems directly with their employer. First, low-income workers are often operating barely within their budget with respect to things like food and childcare.¹⁰⁰ These basic needs are powerful incentives tolerate severe harassment rather than jeopardizing their employment.¹⁰¹ Second, there are very few options for low or modestly paid workers to obtain affordable legal advice and representation, should they choose to pursue an employment relations issue. Hourly attorney's fees are often beyond the means of these workers because they are unable to afford ongoing representation at rates of hundreds of dollars an hour. And contingency fee structures mean attorneys shun cases where there are not high damages and a strong likelihood of settling. Meanwhile at providers such as Legal Aid, there is a critical shortage of counsel willing and able to engage with clients on a daily basis, particularly in rural areas or regions.

⁹⁹ Feldblum & Lipnic, *Select Task Force on the Study of Harassment in the Workplace: Report of the Co-Chairs of the EEOC*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf.

¹⁰⁰ Stephen Perry, *Access to Justice in the Employment Jurisdiction: A Perspective from Community Law*, https://www.lexisnexis.com.au/en/COVID19_NZ/blogs-and-articles/access-to-justice-in-the-employment-jurisdiction-a-perspective-from-community-law (last visited Jan. 10, 2021).

¹⁰¹ *Id.*

The employment law field as it exists now requires parties to undergo “extensive negotiation towards settlement,” during the earlier stages and commonly in mediation.¹⁰² The intention is to rectify an imbalance that litigation causes. It is difficult for workers to access negotiated outcomes that are comparable to what would be awarded in trial, exacerbating the relationship between inaccessibility to adjudication and imbalance of power between employers and employees. It is not uncommon for employers to ignore or overlook attempts to resolve employment problems, encouraging workers to abandon attempts for resolution given the costs and risk of seeking recourse. In addition, lack of resources impedes low-paid and vulnerable workers in negotiating on their own behalf. Barriers to access to representation and adjudication in employment law are understood across the legal profession and have led to a call for (1) employers to create conditions where problems are less likely to arise in the first place, and adopt better functioning regimes to resolve complaints internally; and (2) redressing power imbalances in the employment relationship.¹⁰³

Procedurally, Federal law also creates a barrier for sexual harassment complaints. Workers must file their complaint with the EEOC within 300 days of the last occurrence of harassment.¹⁰⁴ Further, although not a statutory requirement, agencies advise employees to file within 240 days in their rules.¹⁰⁵ If filing in state court, individual states oftentimes have their own procedural rules or agency that investigates.¹⁰⁶ The administrative process provides workers with an investigation completed on behalf of the employee through Federal or state agencies.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Diane C. Cady, *Workplace Sexual Harassment*, OR. STATE BAR (Jan. 2020), https://www.osbar.org/public/legalinfo/1104_WorkplaceSexualHarassment.htm.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

However, the process is largely skewed in favor of employers.¹⁰⁷ For example, Oregon Bureau of Labor and Industries (BOLI) receives over 3000 complaints per year with the vast majority being dismissed for lack of merit.¹⁰⁸ Their situation may meet the legal standard, but most unrepresented individuals are unskilled and do not know to present their experience in a way that clearly states a violation. A no-cause finding may not necessarily jeopardize any subsequent legal claims, but it may dissuade an employee from seeking counsel. Further, employees may fail to allege the proper claims and then can't assert it in litigation if they later obtain counsel. This is based on a gap in understanding of what parts of their experience they need to emphasize in order to meet the legal standard. And since the easiest way to address this is seeking representation, the problem returns to the challenges in finding a lawyer to represent cases that present as weaker on their face.

b. Severe or Pervasive Standard under Title VII

Under Title VII, a civil harassment case arises when the conduct establishes a hostile work environment for an employee.¹⁰⁹ To determine whether a work environment is hostile or abusive, courts must review all the circumstances of the workplace, including frequency of the discriminatory conduct, the conduct's severity, whether it was physically threatening or humiliating, or whether it interferes with an employee's work performance.¹¹⁰ These cases can lead to large verdicts and have resulted in employers taking additional precautions to train their employees in order to avoid liability, effecting the overall evolution of the workplace.¹¹¹

¹⁰⁷ George Rede, *Aggrieved Oregon Workers, Customers Face Long Waits for Monetary Judgments, Wage Claims*, THE OREGONIAN (Jan. 9, 2019), https://www.oregonlive.com/business/2015/04/aggrieved_oregon_workers_custo.html.

¹⁰⁸ *Id.*

¹⁰⁹ This can involve other types of harassment as well based on Title VII protections. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, <http://www.eeoc.gov/laws/statutes/titlevii.cfm> (last visited Oct. 11, 2020).

¹¹⁰ *See Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).

¹¹¹ In 2018, a jury awarded over \$13 million to the plaintiff in *Mayo-Coleman v. American Sugar Holdings, Inc.* for a sex-based hostile work environment. (1:2014cv00079, S.D.N.Y.); In another hostile work environment claim, a

This legal standard largely turns on how severe *or* pervasive the conduct is.¹¹² This means there are two types of sexual harassment behaviors a court recognizes. The first is that a single instance of harassment could potentially be *severe* enough to meet the standard. This includes a particularly offensive comment or physical touching.¹¹³ However, if a series of less serious offenses occur frequently over a longer period of time, the incidents could be considered *pervasive*. This “severe or pervasive” standard has been critiqued as imposing too high of a burden on plaintiffs by focusing on whether the conduct “was really that bad instead of on whether it ‘undermined equal opportunity.’”¹¹⁴ More recently, several state legislatures have attempted to redraw the line of this severe or pervasive standard or to eliminate it altogether.¹¹⁵

Overall, the inconsistency adds up to judges creating their own rules, like downgrading claims if groping didn’t result in skin contact. One typical case involved a male supervisor harassing a construction worker.¹¹⁶ The supervisor in that case told the plaintiff to come and sit on his lap, talked about his genitals, and mentioned raping the worker multiple times.¹¹⁷ The court dismissed the case, stating that the two-dozen incidents occurred over a 10-day period, too

Black employee who alleged his employer failed to address racist statements and graffiti that he was subjected to was awarded \$25 million. *Turley v. ISG Lackawanna Inc. et al.*, 1:06-cv-00794 (2018).

¹¹² Other elements include whether the plaintiff was subjected to sexual harassment that Title VII protects against, the conduct was unwelcome, the plaintiff perceived the working environment to be abusive or hostile, and a reasonable person in the plaintiff’s circumstances would consider the working environment to be abusive or hostile. Jury instructions for hostile work environment harassment claim. ALI-ABA COURSE OF STUDY MATERIALS, ADVANCED EMP. L. & LITIG. V. 3, SEXUAL HARASSMENT IN THE WORKPLACE (2002).

¹¹³ *Zabkowicz v. West Bend Co.*, 589 F. Supp. 780, 784, 35 EPD ¶ 34, 766 (E.D. Wis. 1984).

¹¹⁴ Katherine Leung, *Microaggressions and Sexual Harassment: How the Severe or Pervasive Standard Fails Women of Color*, 23(1) TX. J. CIV. LIBERTIES & CIV. RIGHTS, 79-102 (2017); Blair Druham, *Severe or Pervasive: an Analysis of Who, What, and Where Matters When Determining Sexual Harassment*, 66(1) VANDERBILT L. REV. 355 (2013); Heather Kleinschmidt, *Reconsidering Severe or Pervasive: Aligning the Standard in Sexual Harassment and Racial Harassment Causes of Action*, 80(4) INDIANA L. J. (BLOOMINGTON) 1119 (2005).

¹¹⁵ This topic could be an entirely separate paper, as at the time of this writing over 13 states are attempting to expand rights for victims of sexual harassment in the workplace. *See generally Progress in Advancing Me Too Workplace Reforms in #20STATESBY2020*, NAT’L WOMEN’S L. CTR., <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/07/20-States-By-2020-report.pdf> (last visited Oct. 11, 2020).

¹¹⁶ Yuki Noguchi, *Sexual Harassment Cases Often Rejected by Courts*, NPR (Nov. 28, 2017, 7:28 AM), <https://www.npr.org/2017/11/28/565743374/sexual-harassment-cases-often-rejected-by-courts>.

¹¹⁷ *Id.*

brief a period of time to qualify as ‘pervasive.’¹¹⁸ However, in other similar cases where incidents occurred over longer periods, judges have said that the conduct was too sporadic to be pervasive.¹¹⁹ Given the legal standard, damage suits to hold employer’s liable for is still not a perfect solution for employees. Court determinations still vary widely on what is severe or pervasive, and judges’ interpretations of what qualifies is out of step with common sense and standard office policies.

The growing cultural consciousness of sexual harassment within legal advocacy, combined with re-evaluating standards for challenging claims under pervasiveness, is likely to lead to an uptick in potential cases.¹²⁰ Times are changing, and with them, society’s views on harassment.

c. Limitations in Employment Law

Targets of sexual harassment may also be able to recover against individual employees outside the scope of employment law under state or local civil rights statutes, through common law tort actions, including intentional infliction of emotional distress, assault, or battery. If they work for public employers, there may also be additional protections from things such as unions.

G. Harassment is A Workplace Safety Problem

a. Introduction to OSHA

The Occupational Safety and Health Act of 1970 was passed to create the Occupational Safety and Health Administration (OSHA) to “ensure safe and healthful working conditions for working individuals by setting and enforcing standards and by providing training, outreach, education, and assistance.”¹²¹ OSHA is a Federal administrative agency that operates under the

¹¹⁸ Noguchi, *supra* note 104; *See also Corbitt v. Home Depot, USA, Inc.*, 560 U.S. 920 (May 20, 2010).

¹¹⁹ Noguchi, *supra* note 104.

¹²⁰ Noguchi, *supra* note 104.

¹²¹ *About OSHA*, OSHA, <https://www.osha.gov/aboutosha> (last visited Jan. 15, 2021).

US Department of Labor. It covers most private sector employers.¹²² OSHA operates a number of programs that are designed to accomplish these goals.

Each employer under OSHA is required to furnish to each of its employees: “employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to their employees.”¹²³ Each employer is also required to comply with occupational safety and health standards that are promoted under the Act.

OSHA encourages workers to understand their rights and protections—that Federal law entitles them to a safe workplace. OSHA’s website instructs workers to understand that their “employer[s] must keep [their] workplace free of known health and safety hazards.”¹²⁴ A safety approach is effective because it, ultimately, is centered to prevent the harm and encourage better employer practices, rather than providing a legal remedy after the fact. Regulations can be applicable to all businesses, and others can depend on the employer’s type of business. For example, every company is required to post OSHA posters that “provide workers with information about their rights regarding health and safety at work.”¹²⁵ Specific industries or sectors are subject to additional regulations.

Workers can make complaints to OSHA if they believe working conditions are unsafe or unhealthful. These complaints can be made confidentially and include requests for inspections.¹²⁶

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*; OSHA lists an extensive number of rights, including the rights to: receive safety and health training in a language one can understand, work on safe machines and equipment, receive safety equipment, protection from toxic chemicals or other harmful substances, request an inspection from OSHA if there is concerns with safety inspectors, the ability to speak with OSHA inspectors, report injuries or illnesses, review records of work injuries and illnesses, and see results of inspections or tests to determine what workplace hazards exist, if any.

¹²⁵ *Id.*

¹²⁶ *Id.*

OSHA encourages workers to let their employers know of their concerns if they can.¹²⁷

Additionally, if workers are afraid of retaliation for filing an OSHA complaint, OSHA provides instructions on how to file a whistleblower complaint.¹²⁸

Certain conditions must be present in order for an employer to be responsible. There are three factors courts should evaluate when considering whether a person familiar with factual circumstances surrounding the allegedly hazardous condition should recognize a hazard: (1) recognition of the hazard, consisting of the actual knowledge employer has and the standard of knowledge in the industry; (2) feasibility of the alternatives for a safer workplace; and (3) whether the hazard is reasonably foreseeable, or a dangerous potential of the activity known generally in the industry or to a particular employer.¹²⁹

Companies that are found to be in violation of these requirements face fines based on severity of up to \$70,000 per violation.¹³⁰ Sometimes findings of minor violations will not result in a fine if the employer can correct or address the situation right away.¹³¹ The dollar amount will increase in proportion to the danger posted by the violation, and failures to correct will lead to higher or repeated fines. There are additional programs that inspect employers repeatedly if they are found guilty of placing workers at risk as a result of “serious, willful, and repeat violations” of requirements.¹³²

Since OSHA’s primary concern is promoting workplace safety, its focus and resources are directed towards providing information to employers to ensure they are operating safely and

¹²⁷ *Id.*

¹²⁸ *Id.*; OSHA’s website states “[i]t is illegal for an employer to fire, demote, transfer or otherwise retaliate against a worker who complains to OSHA and uses their legal rights.”

¹²⁹ *Id.*

¹³⁰ Mary Gormandy White, *What is the Purpose of OSHA?*, https://safety.lovetoknow.com/What_Is_the_Purpose_of_OSHA (last visited May 1, 2021).

¹³¹ *Id.*

¹³² *Id.*

within limits of the law. OSHA offers extensive materials to educate employers on how to comply with the Act. OSHA also publishes tools that can be used to train employees to ensure consistency and compliance.

i. Emotional, Physical & Psychological Manifestations of Sexual Harassment and Sexual Assault

Since 1980, social scientists have termed sexual harassment as a stressor detrimental to physical and mental health. Sexual harassment in the workplace is a chronic stressor because it rarely occurs as a single instance; it puts targeted workers under physical and mental stress in their daily work activities.¹³³ Not only does it impact physical and emotional health, it affects productivity and adds to an organization's health care costs.

Harassment is typically associated with an increased risk of anxiety and depression.¹³⁴ Employees are most commonly experience the psychological impacts of stress, depression, mood swings, loss of sleep, and feelings of shame, embarrassment, guilt, and low self-esteem.¹³⁵ Many employees develop symptoms consistent with post-traumatic stress disorder.¹³⁶

The career-related effects can be directly related to the harassment, such as loss of job or promotion, unfavorable performance evaluations, absenteeism, and decreased job satisfaction.¹³⁷ If the sexual harassment occurs earlier in someone's career, it can cause detrimental long-term effects. There are only a few longitudinal studies that investigate the association between sexual harassment and depressive symptoms over time.¹³⁸ Sexual harassment is a stressor that is

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ GARY NAMIE & RUTH NAMIE, *THE BULLY AT WORK* (2003, rev. ed.).

¹³⁶ *Id.*

¹³⁷ Sexual Harassment, *supra* note 4.

¹³⁸ Jason N. Houle, Jeremy Staff, Jeylan T. Mortimer, Christopher Uggen & Amy Blackstone, *The Impact of Sexual Harassment on Depressive Symptoms During the Early Occupational Career*, 1 SOCIETY & MENTAL HEALTH 2 (2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3227029>.

associated with increased depressive symptoms, but women and men who experience frequent or reoccurring sexual harassment at work (beyond a single instance) have significantly higher levels of depressed mood than non-harassed workers.¹³⁹ A quantitative study controlled for prior harassment and depressive symptoms and found that sexual harassment early in someone's career can have long-term effects on depressive symptoms in adulthood.¹⁴⁰ These are also linked to other aspects of mental health, including self-doubt.

ii. Sexual Harassment is No Different than Other Safety-Related Concerns

The Equal Employment Opportunity Commission's Select Task Force on the Study of Harassment in the Workplace found that there is a link between prevention of sexual harassment and the resulting healthier workplace cultures that promote the safety and well-being of all employees.¹⁴¹ Within a report summarizing these findings, the commission frequently noted the responsibility that employers have to keep their employees safe.¹⁴² Harassment affects not only just the involved parties, but the greater workplace environment as whole.¹⁴³ This is one of the biggest problems with workplace sexual harassment—it is inherently messy, intersecting with and affecting jobs, developments, and growth. Its impact can reach other departments, roles, and responsibilities.

Safety concerns at work were initially about physical injuries.¹⁴⁴ Typically if a concern about workplace safety exists, organizational policies, procedures and practices are designed to

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Key Findings of the Select Task Force on the Study of Harassment in the Workplace*, NSVRC (Oct. 20, 2017), <https://www.nsvrc.org/key-findings-select-task-force-study-harassment-workplace>.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *About OSHA*, OSHA, <https://www.osha.gov/aboutosha> (last visited Jan. 15, 2021).

prevent harm from occurring.¹⁴⁵ If an unsafe condition for an employee is present and results in injury, the organization may be held liable for damages.¹⁴⁶ To illustrate, at worksites where gear such as eye protective equipment is required, a workplace would typically hold a policy (and be required by OSHA regulations) to provide that equipment for its employees. If a workplace failed to provide this to its employees, and an eye injury occurred, that employer would most likely be held liable. The approach to sexual harassment is the same. If an anti-harassment policy is in place but the policies are not followed, when harm occurs, the employer may be held liable.¹⁴⁷

One of the biggest critiques of American approaches to workplace sexual harassment is that the problem is unaddressed until harm has already occurred. Not only does this cost the organization itself, but the individual employees are left to seek remedies in a system that was built to react, not to prevent. These concerns have led worker safety groups to look at existing agency and administrative law to see if sexual harassment prevention fits with other proactive safety rules and regulations.

¹⁴⁵ Allison Vredenburg & Illene Zackowitz, *Sexual Harassment: An Organizational Safety Issue*, PROCEEDINGS OF HUMAN FACTORS & ERGONOMICS SOC. (Sept. 2002); Paludi & Barickman, *Sexual Harassment, Work and Education* 2 N.Y.: STATE UNIV. N. Y. PRESS (1998).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

IV. ARGUMENT

H. Can We Prevent Harassment Before a Remedy is Needed?

a. OSHA's Current Stance on Workplace Violence

OSHA does not explicitly name workplace sexual harassment as a safety issue, but it does provide resources and coverage for workplace *violence prevention* on its website. It defines workplace violence broadly as “*any act or threat of physical violence, harassment, intimidation, or other threatening disruptive behavior that occurs at the work site. It ranges from threats and verbal abuse to physical assaults. . .*” (emphasis added).¹⁴⁸ OSHA also characterizes workplace violence by someone’s intention to injure another. Interestingly, OSHA describes this category as actual violence *or* the threat of violence against workers. Violence or a threat of violence can manifest in many ways, and OSHA expresses growing concern for both employers and employees.¹⁴⁹

OSHA’s instructions for reduction of workplace violence encourage employers to be familiar with and recognize risk factors so that “the risk of assault [or further physical altercations] can be prevented or minimized if employers take appropriate precautions.”¹⁵⁰ It states “[o]ne of the best protections employers can offer their workers” is a “zero-tolerance policy[.]”¹⁵¹ A zero-tolerance policy means a strict enforcement of internal rules and regulations, and if any policy violation occurs, the individual will be terminated from employment. OSHA states that the most effective policies cover not only workers, but patients, clients, visitors, contractors, or anyone else who may come into contact with personnel and put the working environment at risk.

¹⁴⁸ *Id.* (emphasis added).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

OSHA also believes that workplace violence prevention programs should be incorporated into a larger safety and health program within an organization in both private sectors and federal workplaces.¹⁵² The critical piece is ensuring that employees know these policies and will ask their employers to address complaints through internal investigations. If employers fail to remedy, OSHA encourages workers to file a complaint directly with the regional agency to determine if a violation has occurred.

Attorneys at both the EEOC and OSHA have noted OSHA's inconsistency in pursuing cases from complaints of sexual harassment versus sexual assault.¹⁵³ Sexual assault is a form of sexual harassment, and fits under OSHA's definition of workplace violence—but harassment itself is not explicitly covered.¹⁵⁴ The idea of OSHA interpretation of sexual harassment as a workplace safety issue is something that has been discussed at conferences and bar association meetings, but no specific proposals have come forward.

b. International Perspectives

Countries around the world have enacted or are in the process of adopting sexual harassment protections as a safety issue in the workplace.¹⁵⁵ This legislation has shown up in criminal codes, labor law, anti-discrimination and equal opportunity statutes, and human rights legislation.¹⁵⁶ With a growing international collection of judicial and administrative decisions against harassment, both the European Union and the International Labor Organization have acknowledged that sexual harassment is one of the most serious workplace safety problems.¹⁵⁷

¹⁵² *Id.*

¹⁵³ See generally, Bruce Rolfsen, *Sexual Harassment Isn't a Workplace Safety Issue for OSHA*, BLOOMBERG LAW (March 18, 2018), <https://news.bloomberglaw.com/safety/sexual-harassment-isnt-a-workplace-safety-issue-for-osa>.

¹⁵⁴ *Homecare Workplace Violence*, OSHA, https://www.osha.gov/sites/default/files/2018-12/fy10_sh-20861-10_workplaceviolence.pdf (last visited Nov. 13, 2021).

¹⁵⁵ Ellen Pinkos Cobb, *Sexual Harassment Law Evolving Globally*, SHRM (Dec. 3, 2014), <https://www.shrm.org/resourcesandtools/hr-topics/global-hr/pages/sexual-harassment-law-global.aspx>.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

Other European countries passed legislation against harassment. For example, Germany provides that if the conduct violates a worker's health, personality, and/or property and financial interests, it is a violation.¹⁵⁸ The United Nations made a general recommendation to the Convention on the Elimination of all Forms of Discrimination Against Women to define sexual harassment as including "conduct [that] can be humiliating and may constitute a health and safety problem[.]"¹⁵⁹ Another example is Poland, which defines harassment broadly as when an employee is subjected to acts that affect physical or moral health.¹⁶⁰ France has similar language and includes both physical sexual harassment and harassment that may affect physical or mental health, or jeopardize one's professional future.¹⁶¹ Finally, Switzerland included statutory bans on sexual harassment exclusively for employers to protect "mental and physical well-being and health." This legislation includes measures such as additional liability for employers who fail to include anti-harassment procedures in their safety policies, legal intervention by the government where the employer fails to act, and broader definitions of harassment. This takes some of the burden off of the target and widens the scope of protection for employees.

Other countries have passed legislation focusing on prevention and educational measures. South Korea added an amendment to its Equal Employment Act in 2014 to require executives and managers to receive sexual harassment training.¹⁶² It also requires businesses to provide sexual harassment awareness and prevention education to their employees at least once per year.¹⁶³ Finally, Japan introduced new guidelines to support the target employee of harassment,

¹⁵⁸ *Id.*

¹⁵⁹ *Sexual Harassment in Different Countries*, WHAT IS HR, <http://www.whatishumanresource.com/sexual-harassment-different-countries> (last visited May 1, 2021).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Pinkos Cobb, *supra* note 110.

¹⁶³ Pinkos Cobb, *supra* note 110.

such as providing consulting with occupational health staff or mediation by an independent institution.¹⁶⁴

c. Arguments to Extend OSHA Protection

There are two distinct arguments for why workplace sexual harassment should be covered under OSHA's General Duty clause.

First, sexual harassment can be categorized under the umbrella of workplace violence. Workplace violence is a named violation of the General Duty Clause in the OSH Act. OSHA defines this workplace hazard broadly, being made up of "non-fatal assaults" and "homicides[.]"¹⁶⁵ In the period between 1993 and 1999, approximately 1.7 million violent assaults occurred per year against individuals who were at work or on duty.¹⁶⁶ Those violent occurrences included "rape and sexual assault, robbery, aggravated assault, and simple assault."¹⁶⁷ OSHA categorizes all of the above as workplace violence.

OSHA's suggestions to counter risk of workplace violence are very similar to what the EEOC and other national sexual harassment prevention groups publish as efficient mechanisms. OSHA states that successful prevention programs have seven elements: (1) management commitment, (2) employee participation, (3) worksite analysis; (4) hazard prevention and control, (5) safety and health training, (6) recordkeeping, and (7) ongoing program evaluation.¹⁶⁸ In addition to the EEOC promoting anti-harassment and bystander intervention trainings, it encourages employers to consider adopting stricter policies. Where things differ between the recommendations is whether to encourage employers to adopt a zero-tolerance policy. In the case

¹⁶⁴ Pinkos Cobb, *supra* note 110.

¹⁶⁵ *Workplace Violence*, OSHA Archives, <https://www.osha.gov/archive/oshinfo/priorities/violence.html> (last visited April 1, 2021).

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Guidelines for Preventing Workplace Violence*, OSHA, <https://www.osha.gov/sites/default/files/publications/osh3148.pdf> (last visited Nov. 1, 2021).

of workplace violence, especially employee on employee violence, zero-tolerance is recommended by OSHA.¹⁶⁹ In the context of sexual harassment, not all organizations and agencies believe zero-tolerance policies are effective.¹⁷⁰ Members of the EEOC believe that zero tolerance policies can make it harder for employers to address harassment because it may “chill reporting.”¹⁷¹ A truly effective policy communicates the idea that there is “zero tolerance for any form of unwelcome behavior in the workplace. An employee should understand that it does not mean that every type of conduct will result in the same consequence, for example, termination.”¹⁷²

In addition, OSHA sets guidelines for employers to record workplace violence-related hazards, including the resulting illnesses, injuries, and lost worktime, medical treatment, restriction of work or motion, loss of consciousness, or transfer to another job. Giving OSHA jurisdiction over sexual harassment would address the issue that most employers do not track or even share information on sexual harassment. These guidelines are similar to, and inclusive of, the EEOC’s suggestions for employers to keep track of sex or gender-based discrimination (which includes incidents of sexual harassment).

As demonstrated, sexual assault is clearly included in OSHA’s definition of workplace violence. However, sexual assault refers to physical conduct and is only one kind of sexual violence. There are many kinds of sexual violence, including but not limited to, assault, abuse, harassment, and coercion.¹⁷³ As discussed earlier in this paper, sexual harassment includes verbal statements such as sexual comments, requests or demands for sexual behavior. So, the gray area

¹⁶⁹ DV Johns, *Action Should Follow Words: Assessing the Arbitral Response to Zero-Tolerance Workplace Violence Policies*, OHIO ST. J. DISP. RES. 263-290 (2008-2009).

¹⁷⁰ David Sparkman, *Is Zero Tolerance the Best Way to Stop Sexual Harassment?*, MH&L (Sept. 2018).

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Types of Sexual Violence*, PEACE OVER VIOLENCE, <https://www.peaceoverviolence.org/i-types-of-sexual-violence> (last visited Feb. 20, 2021).

is whether verbal statements and other manifestations of sexual harassment that do not fit under the category of assault are covered by OSHA's protections from workplace violence under.

Another way that OSHA's protections logically extend to sexual harassment is the precedent under which OSHA previously cited employers for failing to protect employees from escalating conduct that was sexual in nature. For example, in 1991, an employer "received an OSHA citation after an employee was raped at work."¹⁷⁴ More specifically, the home health care provider employer ignored multiple employees' complaints about comments, gestures, and other non-physical conduct that were sexual in nature by the same person.¹⁷⁵ OSHA found that the employer willfully failed to address the hazard because it could have implemented proactive measures to protect employees, such as buddy systems in situations where an employee was required to work alone, or giving employees a panic button or other emergency device.¹⁷⁶

As discussed earlier in this paper, sexual harassment includes verbal statements such as sexual comments, requests or demands for sexual behavior. While sexual assault is clearly included in OSHA's definition of workplace violence, other kinds of sexual violence like harassment and coercion are not. The question is whether verbal statements and other manifestations of sexual harassment are covered by OSHA's protections from sexual violence.

Auspiciously, OSHA defines workplace violence to include conduct without physical contact, such as threats or intimidating gestures. Therefore, sexual threats, gestures, demands, and even suggestive comments that do not include physical contact would also seem to merit coverage as part of OSHA's protection from workplace violence.

¹⁷⁴ Workplace Violence, PLC Labor & Employment 7-505-7511, 2 (2014).

¹⁷⁵ *Id.* at 3.

¹⁷⁶ *Id.*

Instead of trying to fit sexual harassment under hazards that are “likely to cause death or serious physical harm,” the second method is for OSHA to interpret its General Duty clause to include psychological harm. This would force employers to look at the issue prospectively and require specific hazard assessments, instead of many of the laws that result in employers reviewing things after the fact.¹⁷⁷ Because OSHA does not have an employee minimum threshold as does Title VII, OSHA’s requiring employers to have a preventative program in place would significantly expand the number of organizations which would have to address the possibility of sexual harassment in their culture.

In addition, carving out a new named hazard would require OSHA to determine what behavior is foreseeable. OSHA may look to existing case law, but it may also draw new lines that may expand with what has developed through litigation. This is because OSHA requires employee involvement in hazard assessments, as well as the implementation of the plan. This equitable process allows low-income and front-line employees to participate and gives a more accurate reflection of what is happening throughout the culture of an organization.

Harassment in the workplace can also be considered an occupational risk, closely connected to work-related stress, and with consequences for workers’ physical and mental health. The safety concerns cause both a physical and psychological impact. The well-being of workers affected by this stress has also been shown to affect co-worker productivity and overall business growth.

The truth is, without agency involvement as a proactive mechanism, sexual harassment in the workplace will continue to be a growing systemic issue. The exposures of people like Harvey

¹⁷⁷ *Id.*

Weinstein shed light onto the issues targets experience after harassment occurs.¹⁷⁸ Within the first year of the Me Too movement, the EEOC received 14% more complaints.¹⁷⁹ Yet only 15% to 20% of workers who experience sexual harassment end up reporting it.¹⁸⁰ Education and awareness has led to more reporting, and increased scrutiny of companies.

i. OSHA Protection Will Address Many of the Systemic Problems Identified in this Paper

There are four important systemic issues that extending OSHA protection to include sexual harassment will address.

The first is that explicit protection will remove the burden from the target. If the target-employee is retaliated against or leaves the workplace due to the impact of harassment, oftentimes targets are unable to afford (both financially and emotionally) representation to seek justice. One reason why sexual harassment is underreported is because of the barriers in accessing justice, as discussed in this paper. Even the process of going through the EEOC is long and exhausting. With OSHA, an employee or target needs to file a complaint, and OSHA will conduct its own investigation that removes the burden of proof from the employee. OSHA will also provide alternative support to the ninety percent or so of employees who fail to remedy their situation through the EEOC or its state agencies.

The second concern addressed is the paradigm shift from reactive theory to proactive theory. OSHA will not only investigate cases after harm has been done, but proactively inspect worksites, design and model trainings, keep track of data to address trends, and stay on the

¹⁷⁸ Andrew Keshner, *Why Workplace Sexual-Harassment Complaints Keep Climbing*, MARKET WATCH (April 25, 2019), <https://www.marketwatch.com/story/why-workplace-sexual-harassment-complaints-keep-climbing-2019-04-25>.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

forefront to plan for specific federal and state safety rules. This allows us as a country to get ahead of sexual harassment as a workplace problem, just as we do with other workplace safety issues.

The third, and arguably most important, is that OSHA will address the decades-long issue that internal mechanisms within workplaces often fail. They fail the target, the offender, co-workers, and ultimately the organization itself. There are inconsistencies in policies between different workplaces, in addition to inconsistencies in how an individual workplace applies its standards. OSHA will create materials that will provide guidance for employers, resulting in a more likely uniform application to remedy workplace sexual harassment across differing workplaces and industries.

Fourth, OSHA naming sexual harassment as a workplace safety issue—whether as part of workplace violence or its own separate category—will lead to better organization within OSHA itself. OSHA will consistently apply its own rules and regulations in a predictable way for employees and employers. Additionally, it arguably resolves OSHA’s contradicting application of inconsistent citations.

The legal system and OSHA will finally catch up with decades of social science literature that has proven workplace harassment to be a key safety matter.

ii. Concerns and Critiques

One of the largest concerns by labor and employment attorneys is overlap in enforcement. The EEOC can still enforce laws as courts have interpreted them. A solution to this duality in enforcement between the EEOC and OSHA is rulemaking about utilizing audits or hazard assessments as affirmative defenses to civil rights complaints.¹⁸¹ Attorneys at both

¹⁸¹ Kate Tornone, *Should Sexual Harassment Be an OSHA Issue?*, HR DIVE (Nov. 14, 2018), <https://www.hrdiver.com/news/should-sexual-harassment-be-an-osh-issue/542180>.

agencies are confident that a Memorandum of Understanding (MOU) would address any potential conflicts or overlap.¹⁸² Even without an MOU, society is seeing a culture shift in understanding the kinds of impact sexual harassment can have. It is not only a civil rights issue, but also one of health and safety. If OSHA is involved, employers will be asking themselves “what they can do to abate this hazard,” which is something that Title VII is not necessarily focused on.¹⁸³

The EEOC may also state that systemic issues can be addressed through pattern or practice claims.¹⁸⁴ These cases attempt to show that an employer has systematically engaged in discriminatory activities. Title VII allows the EEOC to sue employers for these patterns or practice in discrimination. However, in September of 2020, the EEOC issued an opinion letter agreeing with Seventh Circuit opinions that “Section 707(a) does not create a broad enforcement power for the EEOC to pursue non-discriminatory employment practices that it dislikes – it simply allows the EEOC to pursue multiple violations of Title VII (i.e., unlawful employment practices involving discrimination or retaliation defined in sections 703 and 704) in one consolidated proceeding.”¹⁸⁵ Limiting EEOC authority through procedural requirements will make it increasingly difficult for an agency to address harassment systemically.

Another anticipated concern includes the volume of complaints. Similar to harassment lawsuits, successful causes of action would need to be extreme or egregious for OSHA to issue fines or violations. Reuters found that OSHA investigators were largely disregarding complaints

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Commission Opinion Letter: Section 707*, EEOC (Sept. 3, 2020)

<https://www.eeoc.gov/laws/guidance/commission-opinion-letter-section-707>.

¹⁸⁵ *EEOC v. CVS*, 809 F.3d 335, 341 (7th Cir. 2015).

about the failure to follow COVID-19 protection measures.¹⁸⁶ Increased complaints from particularly vulnerable employers in industries like hospitals and nursing homes were closed by OSHA without any inquiry. In addition, the agency changed its guidelines to weaken reporting requirements because of the influx of data from the pandemic.¹⁸⁷ With experts deeming OSHA's volume of work from the pandemic unmanageable, it is difficult to say whether OSHA could effectively manage sexual harassment as a workplace safety issue consistently.

Finally, OSHA's capacity as an agency is a larger concern. Its failure to protect workers during the pandemic is widely known, but OSHA had ineffective management of claims prior to COVID-19. Public records demonstrate that OSHA failed to adequately carry out its responsibility in investigating claims and enforcing worker safety laws in certain workplaces—specifically meatpacking plants.¹⁸⁸ Existing problems at meatpacking plants were especially amplified during the first few months of the pandemic.¹⁸⁹ OSHA had previously failed to issue citations or address sanitary concerns from workers.¹⁹⁰ One former OSHA official stated OSHA should have done over 20,000 inspections of meatpacking plants over the course of 2019, but instead only conducted 300.¹⁹¹

Further, OSHA covers workplace violence but the extent of what they require of employers is largely undefined. Citations of workplace violations are sporadic and inspections are inconsistent. Congress has responded historically by introducing bills such as HR1309,

¹⁸⁶ Haven Orecchio-Egresitz, *The Top US Workplace Safety Regulator Failed to Protect Workers from Unsafe Practices During the Pandemic, According to Investigation*, INSIDER (Jan. 7, 2021), <https://www.businessinsider.com/osha-failed-protect-workers-unsafe-practices-covid-19-2021-1>.

¹⁸⁷ *Id.*

¹⁸⁸ *Press Release*, Rep Clyburn, SELECT SUBCOMMITTEE ON THE CORONAVIRUS CRISIS, <https://coronavirus.house.gov/news/press-releases/select-subcommittee-launches-investigation-widespread-coronavirus-infections-and>.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

asking OSHA to create standards for prevention of violence for health care and social services workers.

V. CONCLUSION

Several other areas of exploration are suggested by this research. First, concerns about the fluctuation and volume of complaints could be examined with further research comparing historical trends when OSHA identified new workplace safety hazards in the past. This historical data is more likely than the unplanned and colossal events of COVID-19 to predict the potential impacts of naming sexual harassment as a hazard. Second, research initiated by the Obama administration could continue to be tracked. In 2014, a request for information was administered to review stakeholder input on potential workplace violence regulations in different industries.¹⁹² The next review stage that was supposed to occur was in March of 2019, with the Department of Labor engaging with small business stakeholders. For example, one of the largest concerns was in the healthcare industry. However, in 2016 the new administration slowed the process down.¹⁹³ Reviewing the information collected prior to 2016 and understanding how the Biden administration will explore further will be helpful in understanding what role OSHA can play. Third, state activities can be monitored to understand and identify trends. For example, workers compensation cases could be examined in particular states to understand the role that those administrative procedures play. Additionally, organizations like Safe Job Oregon are writing legislation to lay groundwork for states to address a broader array of workplace safety issues.

It would be mistaken not to explore the existing problems with OSHA's capacity, exacerbated by the pandemic. Further analysis of OSHA's internal operations is necessary to consider the adoption of the idea proposed in this thesis.

¹⁹² DOL/OSHA, *Prevention of Workplace Violence in Health Care and Social Assistance* (2018), <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201810&RIN=1218-AD08>.

¹⁹³ *Id.*

It is no secret that sexual harassment in the workplace is an area of growing concern for employers. OSHA could provide guidance and resources for both employers that have not faced liability yet, or those that have and want to look for tools to render their workplaces safe and harassment-free. There are creative ways to implement benefits to both workers who need third-party assistance with things like objective investigations, and to employers who want to address dynamics internally before things escalate to costly lawsuits.

Not only would coverage under OSHA benefit employers and employees, but also to the public. As stated, continuing to hold employers liable after sexual harassment has occurred does not consistently motivate each organization or company to make internal changes. With coverage, OSHA will act like ombudsperson offices and effectuate systemic change over time, increasing cultures of accountability and preventing the harassment in the first place. If company cultures are overlooking or even encouraging sexual harassment, OSHA is an employee's first line of offense. Literature on theories of proactive and reactive conflict resolution mechanisms demonstrate how people will continue to benefit from, and more frequently use, measures that allow them to address a conflict before it escalates to its peak. And while any form of sexual harassment arguably does harm, the earlier we catch it, the less damage it can do. By the time it reaches litigation, extensive damage has already occurred.

Ultimately, sexual harassment is a persistent systemic issue in the American workplace that calls for a solution broader than what currently exists. OSHA coverage reflects the societal change occurring over the last few decades. Including sexual harassment in OSHA's General Duty clause will clear up inconsistency in where workers can seek to address their concerns and help shape the culture of the workplace going forward.

REFERENCES CITED

About OSHA, OSHA, <https://www.osha.gov/aboutosha> (last visited Jan. 15, 2021).

Adia Harvey Wingfield, *Women are Advancing in the Workplace, but Women of Color Still Lag Behind*, BROOKINGS (Oct. 2020), <https://www.brookings.edu/essay/women-are-advancing-in-the-workplace-but-women-of-color-still-lag-behind>.

ALI-ABA COURSE OF STUDY MATERIALS, ADVANCED EMP. L. & LITIG. V. 3, SEXUAL HARASSMENT IN THE WORKPLACE (2002).

Allison Vredenburg & Illene Zackowitz, *Sexual Harassment: An Organizational Safety Issue*, PROCEEDINGS OF HUMAN FACTORS & ERGONOMICS SOC. (Sept. 2002)

Andrew Keshner, *Why Workplace Sexual-Harassment Complaints Keep Climbing*, MARKET WATCH (April 25, 2019), <https://www.marketwatch.com/story/why-workplace-sexual-harassment-complaints-keep-climbing-2019-04-25>.

Ann C. Hodges, *Strategies for Combating Sexual Harassment: The Role of Labor Unions*, 15 TEX. J. WOMEN & THE L. 183 (2006), <https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1228&context=law-faculty-publications>.

Beckhard, R.F., and R.T. Harris, *Organizational Transitions: Managing Complex Change*, MA: Addison-Wesley (1987).

Black Women Aren't Paid Fairly, and that Hits Harder in an Economic Crisis, LEAN IN, <https://leanin.org/data-about-the-gender-pay-gap-for-black-women> (last visited April 1, 2021).

Blair Druham, *Severe or Pervasive: an Analysis of Who, What, and Where Matters When Determining Sexual Harassment*, 66(1) VANDERBILT L. REV. 355 (2013)

Bruce Rolfsen, *Sexual Harassment Isn't a Workplace Safety Issue for OSHA*, BLOOMBERG LAW (March 18, 2018), <https://news.bloomberglaw.com/safety/sexual-harassment-isnt-a-workplace-safety-issue-for-osha>.

Buchanan, Settles, Hall & O'Connor, *A review of organizational strategies for reducing sexual harassment: Insights from the U. S. military*, J. SOC. ISSUES 70, 687–702 (2014).

Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998).

Carly McCann & Donald T. Tomaskovic-Devey, *Most Sexual Harassment at Work Unreported - and Few Benefit Among Those Who Do Report*, 34 (38) ROCHESTER BUS. J., 30 (2018).

CATHARINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 312 (Yale University Press, 1979).

Commission Opinion Letter: Section 707, EEOC (Sept. 3, 2020)
<https://www.eeoc.gov/laws/guidance/commission-opinion-letter-section-707>.

Corbitt v. Home Depot, USA, Inc., 560 U.S. 920 (May 20, 2010).

Diane C. Cady, *Workplace Sexual Harassment*, OR. STATE BAR (Jan. 2020),
https://www.osbar.org/public/legalinfo/1104_WorkplaceSexualHarassment.htm.

DV Johns, *Action Should Follow Words: Assessing the Arbitral Response to Zero-Tolerance Workplace Violence Policies*, OHIO ST. J. DISP. RES. 263-290 (2008-2009).

Economic News Release on Union Membership, U.S. BUREAU OF LABOR STATISTICS (Jan. 22, 2021).

EEOC Investigating Fewer Workplace Discrimination Claims, Cross Law Firm,
<https://www.crosslawfirm.com/blog/2019/06/eeoc-investigating-fewer-workplace-discrimination-claims/> (last visited Nov. 14, 2021).

EEOC v. CVS, 809 F.3d 335, 341 (7th Cir. 2015).

Ellen Pinkos Cobb, *Sexual Harassment Law Evolving Globally*, SHRM (Dec. 3, 2014),
<https://www.shrm.org/resourcesandtools/hr-topics/global-hr/pages/sexual-harassment-law-global.aspx>.

Feldblum & Lipnic, *Select Task Force on the Study of Harassment in the Workplace: Report of the Co-Chairs of the EEOC*, EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf.

GARY NAMIE & RUTH NAMIE, *THE BULLY AT WORK* (2003, rev. ed.).

George Rede, *Aggrieved Oregon Workers, Customers Face Long Waits for Monetary Judgments, Wage Claims*, THE OREGONIAN (Jan. 9, 2019),
https://www.oregonlive.com/business/2015/04/aggrieved_oregon_workers_custo.html.

Guidelines for Preventing Workplace Violence, OSHA,
<https://www.osha.gov/sites/default/files/publications/osha3148.pdf> (last visited Nov. 1, 2021).

Fixing Watches with Sledgehammers: The Questionable Embrace of Employee Sexual Harassment Training by the Legal Profession, 24(1) THE BEN J. ALTHEIMER SYMPOSIUM: THE IMPACT OF SCI. ON L. DECISIONS, 149 (2016).

Frank Dobbin & Alexandra Kalev, *The Promise and Peril of Sexual Harassment Programs*, PNAS 116, 25 (June 3, 2019).

Frank Dobbin & E. Kelly, *How to stop harassment: The professional construction of legal compliance in organizations*, AM. J. SOCIOL. 112, 1203–1243 (2007).

Harvey, M., Heames, J., Richey, R., & Leonard, N., *Bullying: From the Playground to the Boardroom*, 12(4) J. LEADERSHIP & ORGANIZATIONAL STUD. 1, 1–11 (2006).

Haven Orecchio-Egresitz, *The Top US Workplace Safety Regulator Failed to Protect Workers from Unsafe Practices During the Pandemic, According to Investigation*, INSIDER (Jan. 7, 2021), <https://www.businessinsider.com/osha-failed-protect-workers-unsafe-practices-covid-19-2021-1>.

Heather Kleinschmidt, *Reconsidering Severe or Pervasive: Aligning the Standard in Sexual Harassment and Racial Harassment Causes of Action*, 80(4) INDIANA L. J. (BLOOMINGTON) 1119 (2005).

Homecare Workplace Violence, OSHA, https://www.osha.gov/sites/default/files/2018-12/fy10_sh-20861-10_workplaceviolence.pdf (last visited Nov. 13, 2021).

Janet Yellen, *The History of Women's Work and Wages and How It Has Created Success For Us All*, BROOKINGS (May 2020), <https://www.brookings.edu/essay/the-history-of-womens-work-and-wages-and-how-it-has-created-success-for-us-all>.

Jason N. Houle, Jeremy Staff, Jeylan T. Mortimer, Christopher Uggen & Amy Blackstone, *The Impact of Sexual Harassment on Depressive Symptoms During the Early Occupational Career*, 1 SOCIETY & MENTAL HEALTH 2 (2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3227029>.

Jemima Lovatt, *The Cost of Sexual Harassment is Much Higher than You'd Think*, ONE YOUNG WORLD (Feb. 7, 2018), https://medium.com/@OneYoungWorld_/the-cost-of-sexual-harassment-is-much-higher-than-you-d-think-e538cc962c89.

Kate Tornone, *Should Sexual Harassment Be an OSHA Issue?*, HR DIVE (Nov. 14, 2018), <https://www.hrdiver.com/news/should-sexual-harassment-be-an-osha-issue/542180>.

Katherine Leung, *Microaggressions and Sexual Harassment: How the Severe or Pervasive Standard Fails Women of Color*, 23(1) TX. J. CIV. LIBERTIES & CIV. RIGHTS, 79-102 (2017)

Key Findings of the Select Task Force on the Study of Harassment in the Workplace, EEOC (2017), https://www.nsvrc.org/sites/default/files/publications_nsvrc_research-translation_key-findings-select-task-force-study-harassment-in-the-workplace.pdf.

Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1(8) UNIV. OF CHICAGO LEGAL FORUM 139 (1989).

Marcia J. Simmering, *Reactive vs. Proactive Change*, REFERENCE FOR BUS., <https://www.referenceforbusiness.com/management/Pr-Sa/Reactive-vs-Proactive-Change.html> (last visited March 2, 2021)

Margaret Stockdale et al., *Coming to Terms with Zero Tolerance Sexual Harassment Policies*, 4 J. FORENSIC PSYCH. PRAC. 65, 66-67 (2003)

Mary Gormandy White, *What is the Purpose of OSHA?*, https://safety.lovetoknow.com/What_Is_the_Purpose_of_OSHA (last visited May 1, 2021).

Marion Crain, *Women, Labor Unions and Hostile Work Environment Sexual Harassment: The Untold Story*, 4 TEX. J. WOMEN & L. 9 (1995).

Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).

Natalie Dugan, *#TimesUp on individual litigation reform: Combatting sexual harassment through employee-driven action and private regulation*, 53(2) COLUMBIA J. LAW & SOC. PROBLEMS, 247-281 (2020).

Paludi & Barickman, *Sexual Harassment, Work and Education 2* N.Y.: STATE UNIV. N. Y. PRESS (1998).

Press Release, Rep Clyburn, SELECT SUBCOMMITTEE ON THE CORONAVIRUS CRISIS, <https://coronavirus.house.gov/news/press-releases/select-subcommittee-launches-investigation-widespread-coronavirus-infections-and>.

Proactive vs Reactive: Which Approach is Better to Attain Quality, QUALITYZE, <https://www.qualityze.com/proactive-vs-reactive-approach-better-attain-quality> (last visited February 2, 2021).

Progress in Advancing Me Too Workplace Reforms in #20STATESBY2020, NAT'L WOMEN'S L. CTR., <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/07/20-States-By-2020-report.pdf> (last visited Oct. 11, 2020).

Sexual Harassment, EEOC, <https://www.eeoc.gov/sexual-harassment> (last visited November 1, 2021).

Sexual Harassment in Different Countries, WHAT IS HR, <http://www.whatishumanresource.com/sexual-harassment-different-countries> (last visited May 1, 2021).

S. J. Potter, M. M. Moynihan, *Bringing in the bystander in-person prevention program to a U.S. military installation: Results from a pilot study*, Mil. MED. 176, 870–875 (2011).

Smith, *Sexual Harassment Training Should Be Separate for Managers and Rank and File*, Society for Human Resource Management (2017).

Stephen Perry, *Access to Justice in the Employment Jurisdiction: A Perspective from Community Law*, https://www.lexisnexis.com.au/en/COVID19_NZ/blogs-and-articles/access-to-justice-in-the-employment-jurisdiction-a-perspective-from-community-law (last visited Jan. 10, 2021).

Study on Cost, EEOC (2015), <https://www.eeoc.gov/select-task-force-study-harassment-workplace-report-co-chairs-chai-r-feldblum-victoria-lipnic#:~:text=Last%20year%2C%20EEOC%20alone%20recovered,the%20tip%20of%20the%20Iceberg>.

SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* (1991).

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, <http://www.eeoc.gov/laws/statutes/titlevii.cfm> (last visited Oct. 11, 2020).

Turley v. ISG Lackawanna Inc. et al., 1:06-cv-00794 (2018).

Types of Sexual Violence, PEACE OVER VIOLENCE, <https://www.peaceoverviolence.org/i-types-of-sexual-violence> (last visited Feb. 20, 2021).

What is an Organizational Ombudsman?, INT'L OMBUDSMAN ASS'N, <https://www.ombudsassociation.org/what-is-an-organizational-ombuds> (last visited Nov. 13, 2021).

"*What Part of 'Zero' Don't You Understand?": The Arbitration of Sexual Harassment Discipline and 'Zero-Tolerance' Policies*, 36 WILLAMETTE L. REV. 749, 781 (2000).

WILLIAM PETROCELLI & BARBARA KATE REPA, *SEXUAL HARASSMENT ON THE JOB: WHAT IT IS & HOW TO STOP IT* (4th ed. 1998).

Workplace Harassment, U.S. DEPT. OF LABOR, <https://www.dol.gov/agencies/oasam/centers-offices/civil-rights-center/internal/policies/workplace-harassment/2012> (last visited Nov. 1, 2021).

Workplace Justice Newsletter, NAT'L WOMEN'S L. CTR., at 4 (Nov. 2016).

Workplace Violence, OSHA Archives, <https://www.osha.gov/archive/oshinfo/priorities/violence.html> (last visited April 1, 2021).

Workplace Violence, PLC Labor & Employment 7-505-7511, 2 (2014).

Yuki Noguchi, *Sexual Harassment Cases Often Rejected by Courts*, NPR (Nov. 28, 2017, 7:28 AM), <https://www.npr.org/2017/11/28/565743374/sexual-harassment-cases-often-rejected-by-courts>.

Zabkowicz v. West Bend Co., 589 F. Supp. 780, 784, 35 EPD ¶ 34, 766 (E.D. Wis. 1984).