
Article

The Legal Implications of the MeToo Movement

Elizabeth C. Tippet†

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INTRODUCTION

On October 5, 2017, the New York Times broke the Harvey Weinstein story.¹ High profile actresses including Ashley Judd and Rose McGowan accused Weinstein of propositioning and assaulting them while pursuing acting roles.² In years past, Weinstein enjoyed a high level of power and prominence as a Hollywood kingmaker, producing blockbusters like *Pulp Fiction*, *Good Will Hunting*, and *Shakespeare in Love*.³ The Weinstein story kept growing as additional stars described similar experiences.⁴ Weinstein was fired by his own company⁵ on October 8, 2017,

1. Jodi Kantor & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES (Oct. 5, 2017), <https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html>.

2. *Id.*

3. *Id.*

4. *E.g.*, Jacey Fortin, *The Women Who Have Accused Harvey Weinstein*, N.Y. TIMES (Oct. 10, 2017), <https://www.nytimes.com/2017/10/10/us/harvey-weinstein-accusations.html>; Salma Hayek, *Harvey Weinstein Is My Monster Too*, N.Y. TIMES (Dec. 12, 2017), <https://www.nytimes.com/interactive/2017/12/13/opinion/contributors/salma-hayek-harvey-weinstein.html>; Lupita Nyong'o, *Lupita Nyong'o: Speaking Out About Harvey Weinstein*, N.Y. TIMES (Oct. 19, 2017), <https://www.nytimes.com/2017/10/19/opinion/lupita-nyongo-harvey-weinstein.html>.

5. Megan Twohey, *Harvey Weinstein Is Fired After Sexual Harassment Reports*, N.Y. TIMES (Oct. 8, 2017), <https://www.nytimes.com/2017/10/08/business/harvey-weinstein-fired.html>.

which later declared bankruptcy.⁶ He has since been arrested on rape charges.⁷

On October 15, 2017, actress Alyssa Milano asked her Twitter followers to reply with the hashtag #metoo if they had experienced harassment or assault.⁸ Her tweet went viral, and the #metoo hashtag has since been used over twelve million times.⁹ Although Milano's tweet brought global attention to the MeToo movement, it originated from activist Tarana Burke.¹⁰ Burke started the movement in 2007¹¹ and used the term "metoo" to express solidarity with girls and women who experienced sexual assault.¹²

In the weeks and months following the Weinstein revelations, a number of prominent men in media, journalism, and politics were accused of harassment or assault, often by multiple women.¹³ These included television hosts Charlie Rose,¹⁴ Matt

6. Brooks Barnes, *Weinstein Company Files for Bankruptcy and Revokes Nondisclosure Agreements*, N.Y. TIMES (Mar. 19, 2018), <https://www.nytimes.com/2018/03/19/business/weinstein-company-bankruptcy.html>.

7. Benjamin Mueller & Alan Feuer, *Arrested on Rape Charges, Weinstein Posts \$1 Million Bail*, N.Y. TIMES (May 25, 2018), <https://www.nytimes.com/2018/05/25/nyregion/harvey-weinstein-arrested.html>.

8. Sophie Gilbert, *The Movement of #MeToo*, ATLANTIC (Oct. 16, 2017), <https://www.theatlantic.com/entertainment/archive/2017/10/the-movement-of-metoo/542979>.

9. Emma Brockes, *Me Too Founder Tarana Burke: 'You have to Use Your Privilege to Serve Other People'*, GUARDIAN (Jan. 15, 2018), <https://www.theguardian.com/world/2018/jan/15/me-too-founder-tarana-burke-women-sexual-assault>.

10. *Id.*

11. Sandra Garcia, *The Woman Who Created #MeToo Long Before Hashtags*, N.Y. TIMES (Oct. 20, 2017), <https://www.nytimes.com/2017/10/20/us/me-too-movement-tarana-burke.html>.

12. Brockes, *supra* note 9.

13. See, e.g., Dan Corey, *A Growing List of Men Accused of Sexual Misconduct Since Weinstein*, NBC NEWS (Nov. 8, 2017), <https://www.nbcnews.com/storyline/sexual-misconduct/weinstein-here-s-growing-list-men-accused-sexual-misconduct-n816546>.

14. John Koblin & Michael Grynbaum, *Charlie Rose Fired by CBS and PBS After Harassment Allegations*, N.Y. TIMES (Nov. 21, 2017), <https://www.nytimes.com/2017/11/21/business/media/charlie-rose-fired-cbs.html>.

Lauer,¹⁵ and Tavis Smiley;¹⁶ several high ranking hosts at National Public Radio;¹⁷ and Disney producer John Lasseter.¹⁸ All but Lasseter were fired.¹⁹ Actor Kevin Spacey was accused of assaulting a 14-year-old boy.²⁰ Comedian Louis CK was accused of lewd conduct by fellow comedians and coworkers.²¹ Chefs Mario Batali and John Besh were likewise accused of harassment.²² Twenty-five women at Besh's company described a hostile work environment where complaints were ignored.²³ Multiple male models accused prominent photographers Mario Testino and Bruce Weber of sexual misconduct.²⁴

The MeToo movement also reached politicians in federal and state government. Senator Al Franken, Representative Blake Farenthold, and Representative John Conyers resigned in the wake of harassment allegations.²⁵ These accusations revealed an arcane system for handling harassment complaints in Congress,

15. Ellen Gabler et al., *NBC Fires Matt Lauer, the Face of 'Today,'* N.Y. TIMES (Nov. 29, 2017), <https://www.nytimes.com/2017/11/29/business/media/nbc-matt-lauer.html>.

16. Andrew Dalton, *New Witnesses Allege Sexual Misconduct by Tavis Smiley*, ASSOCIATED PRESS (Mar. 23, 2018), <http://www.chicagotribune.com/entertainment/tv/ct-tavis-smiley-sexual-misconduct-allegations-20180323-story.html>.

17. See Camila Domonoske, *Garrison Keillor Accused of 'Inappropriate Behavior,' Minnesota Public Radio Says*, NPR (Nov. 29, 2017), <https://www.npr.org/sections/thetwo-way/2017/11/29/567241644/garrison-keillor-accused-of-inappropriate-behavior-minnesota-public-radio-says>; Patrick Hipes, *NPR's 'On Point' Radio Host Tom Ashbrook Fired*, DEADLINE HOLLYWOOD (Feb. 14, 2018), <https://deadline.com/2018/02/tom-ashbrook-on-point-host-fired-npr-wbur-boston-university-1202288818>; Mike Snider, *NPR News Chief Michael Oreskes Resigns After Sexual Harassment Accusations*, USA TODAY (Nov. 1, 2017), <https://www.usatoday.com/story/money/media/2017/11/01/npr-news-chief-michael-oreskes-resigns-after-sexual-harassment-accusations/821405001>.

18. Steven Zeitchik, *Disney Animation Guru John Lasseter Takes Leave After Sexual Misconduct Allegations*, WASH. POST (Nov. 21, 2017), <https://www.washingtonpost.com/news/business/wp/2017/11/21/disney-animation-guru-john-lasseter-takes-leave-after-sexual-misconduct-allegations>.

19. Dalton, *supra* note 16; Domonoske, *supra* note 17; Gabler, *supra* note 15; Hipes, *supra* note 17; Koblin & Grynbaum, *supra* note 14; Snider, *supra* note 17; Zeitchik, *supra* note 18.

20. Corey, *supra* note 13.

21. *Id.*

22. *Id.*

23. *Id.*

24. Brian Stelter, *Vogue Publisher Drops Bruce Weber and Mario Testino over Misconduct Allegations*, CNN (Jan. 15, 2018), <https://money.cnn.com/2018/01/15/media/mario-testino-bruce-weber-conde-nast/index.html>.

25. Dan Corey, *Here's a List of Political Figures Accused of Sexual Misconduct*, NBC NEWS (Dec. 16, 2017), <https://www.nbcnews.com/storyline/sexual-misconduct/here-s-list-political-figures-accused-sexual-misconduct-n827821>.

where complainants²⁶ were forced to continue working with the harasser during a thirty-day cooling off period.²⁷ Former Judge Roy Moore lost a heavily contested Alabama Senate race after several women accused him of aggressively pursuing them as teenagers.²⁸ Prominent politicians in state politics were likewise accused of harassment.²⁹

The MeToo movement galvanized complaints in other industries.³⁰ Alianza Nacional de Campesinas wrote an open letter of solidarity to women in Hollywood, noting endemic problems of harassment in agriculture.³¹ The New York Times published an exposé of decades of harassment and related litigation in an auto plant.³² MeToo reinvigorated complaints about widespread harassment and assault of hotel workers.³³ It also brought renewed attention to Silicon Valley, where programmer Susan Fowler's accusations of harassment at Uber went viral earlier in 2017.³⁴

26. I generically refer to employees accusing other employees of harassment as "complainants," and on occasion, "plaintiff" in the context of legal disputes. For purposes of reader fluency, I refer to complainants as "victims" in recounting salient events from the MeToo movement or to more clearly distinguish a complainant from the accused employee.

27. Rachael Bade & Elana Schor, *Capitol Hill's Sexual Harrassment Policy 'Toothless,' 'A Joke,'* POLITICO (Oct. 27, 2017), <https://www.politico.com/story/2017/10/27/capitol-hill-sexual-harassment-policies-victims-244224>.

28. Greg Price, *Revenge of #MeToo? How Sexual Assault, Child Molestation Claims Destroyed Roy Moore in Alabama*, NEWSWEEK (Dec. 13, 2017), <https://www.newsweek.com/metoo-alabama-women-vote-jones-746591>.

29. Joel Ebert, *Sexual Harassment Troubles Mount in Statehouses Around the Country*, USA TODAY NETWORK (Nov. 20, 2017), <https://www.usatoday.com/story/news/nation-now/2017/11/20/sexual-harassment-statehouses/882874001>.

30. See, e.g., A. Elaine Lewis, *Who Is at Highest Risk of Sexual Harassment?*, ACLU (Jan. 18, 2018), <https://www.aclu.org/blog/womens-rights/womens-rights-workplace/who-highest-risk-sexual-harassment>.

31. *700,000 Female Farmworkers Say They Stand with Hollywood Actors Against Sexual Assault*, TIME (Nov. 10, 2017), <http://time.com/5018813/farmworkers-solidarity-hollywood-sexual-assault>.

32. See Susan Chira & Catrin Einhorn, *How Tough Is It to Change a Culture of Harassment? Ask Women at Ford*, N.Y. TIMES (Dec. 19, 2017), <https://www.nytimes.com/interactive/2017/12/19/us/ford-chicago-sexual-harassment.html>.

33. See, e.g., Dave Jamieson, *'He Was Masturbating . . . I Felt Like Crying': What Housekeepers Endure to Clean Hotel Rooms*, HUFFINGTON POST (Nov. 18, 2017), https://www.huffingtonpost.com/entry/housekeeper-hotel-sexual-harassment_us_5a0f438ce4b0e97dffed3443.

34. Maya Kosoff, *The Toxic Backlash of Silicon Valley's Boys' Club*, VANITY FAIR (Dec. 7, 2017), <https://www.vanityfair.com/news/2017/12/the-toxic-backlash-of-silicon-valleys-boys-club>.

The MeToo movement also revealed the ways in which the law can be misused to enable and conceal harassment.³⁵ Weinstein successfully covered his tracks for decades using contracts, threats, and a powerful network.³⁶ Weinstein entered into multiple settlement agreements containing non-disclosure and non-disparagement provisions.³⁷ In some cases, these agreements not only prohibited the victim from disparaging Weinstein, but forced her to speak about him in a positive manner if contacted by the press.³⁸ On other occasions, Weinstein threatened to destroy victims' reputations if they spoke out.³⁹ One victim called the police and successfully recorded an apparent admission by Weinstein on tape.⁴⁰ Nevertheless, Weinstein appears to have successfully used his influence to end the investigation.⁴¹

Time Magazine declared the MeToo movement its Person of the Year.⁴² The movement has continued into 2018 and was featured prominently at the Golden Globe awards, where Oprah Winfrey applauded women for sharing their truth, and promised young girls "that a new day is on the horizon."⁴³

Inevitably, the movement leads to the question of what comes next.⁴⁴ The Time's Up Initiative, led by prominent lawyers

35. Kantor & Twohey, *supra* note 1 (providing an example of how Harvey Weinstein misused the law to enable and conceal harassment).

36. *Id.*

37. *Id.*

38. *Times Reporters Describe How a Paper Trail Helped Break the Weinstein Story*, NPR (Nov. 15, 2017), <https://www.npr.org/templates/transcript/transcript.php?storyId=564310240>.

39. Sara Moniuszko & Cara Kelly, *Harvey Weinstein Scandal: A Complete List of the 87 Accusers*, USA TODAY (Oct. 27, 2017), <https://www.usatoday.com/story/life/people/2017/10/27/weinstein-scandal-complete-list-accusers/804663001>.

40. See Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, NEW YORKER (Oct. 10, 2017), <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories>.

41. *See id.*

42. Jonah Bromwich, *The Silence Breakers' Named Time's Person of the Year for 2017*, N.Y. TIMES (Dec. 6, 2017), <https://www.nytimes.com/2017/12/06/business/media/silence-breakers-time-person-of-the-year.html>.

43. Sophie Gilbert & Tori Latham, *Full Transcript: Oprah Winfrey's Speech at the Golden Globes*, ATLANTIC (Jan. 8, 2018), <https://www.theatlantic.com/entertainment/archive/2018/01/full-transcript-oprah-winfreys-speech-at-the-golden-globes/549905>.

44. *See* TIME'S UP, <https://www.timesupnow.com/#ourmission-anchor> (last visited Oct. 22, 2018) (advocating for increased representation of women in positions of power and equal representation, opportunities, benefits, and pay in the wake of the MeToo movement).

and Hollywood power players, including Shonda Rhimes and Eva Longoria, issued a summary of their proposed response.⁴⁵ Anita Hill, who famously testified against Clarence Thomas at his Supreme Court confirmation hearing, is chairing a committee on harassment in media.⁴⁶ A number of states, including New York, New Jersey, Pennsylvania, and California are considering legislation banning certain types of non-disclosure agreements.⁴⁷ Congress is working on changes to its process for handling harassment complaints by congressional employees.⁴⁸ Legislators have also introduced bills restricting the use of arbitration agreements in harassment disputes,⁴⁹ and separately require employers to disclose settlements of harassment and discrimination claims.⁵⁰

This Article describes the potential legal and practical implications of the MeToo movement and evaluates them within the context of past scholarly commentary.

First, the Article provides a summary of harassment law and the respects in which judicial interpretations of harassment law might change in the wake of MeToo. As Sandra Sperino and Suja Thomas argued, judges may update their application of the “severe or pervasive” standard for harassment to reflect modern

45. Lorena Blas, *Hollywood's A-list Women Launch Anti-Harassment Initiative Time's Up*, USA TODAY (Jan. 1, 2018), <https://www.usatoday.com/story/life/people/2018/01/01/hollywood-women-times-up-anti-sexual-harassment-project-reese-wITHERSPOON-shonda-rhimes/994268001>.

46. Cara Buckley, *Anita Hill to Lead Hollywood Commission on Sexual Harassment*, N.Y. TIMES (Dec. 15, 2017), <https://www.nytimes.com/2017/12/15/movies/anita-hill-hollywood-commission-sexual-harassment.html>.

47. S. 820, 2017 Leg., Reg. Sess. (Cal. 2017); S. 999, 2017 Leg., 2017 Sess. (P.A. 2017); Assemb. B. 5287, 217th Leg., Reg. Sess. (N.J. 2017); S. 6382, 2017 Leg., 214th Sess. (N.Y. 2017); Ilyse Schuman & Betsy Cammarata, *Lawmakers Take Aim: Will #MeToo Curb Nondisclosure or Arbitration Agreements?*, LITTLER (Jan. 9, 2018), <https://www.littler.com/publication-press/publication/lawmakers-take-aim-will-metoo-curb-nondisclosure-or-arbitration>.

48. See Leigh Ann Caldwell, *House Unveils Landmark Sexual Harassment Overhaul Bill*, NBC NEWS (Jan. 18, 2018), <https://www.nbcnews.com/politics/congress/house-unveils-landmark-sexual-harassment-overhaul-bill-n838436>.

49. See, e.g., H.R. 4734, 115th Cong. § 402 (2017). For a discussion of the proposed arbitration reforms, see *Written Testimony of Elizabeth Tippet, Associate Professor, University of Oregon School of Law*, EQUAL OPPORTUNITY EMP. COMMISSION (June 11, 2018), https://www.eeoc.gov/eeoc/task_force/harassment/6-11-18.cfm. See generally Jean Sternlight, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where To, #Me-Too?*, 53 HARV. C.R. C.L. (forthcoming 2019).

50. H.R. 4729, 115th Cong. § 2 (2017).

norms rather than rely on dated lower court rulings.⁵¹ Courts may also grow more stringent in their application of the *Fara-gher* defense, which relates to the reasonableness of the employer's efforts to prevent and address discrimination. The Me-Too movement revealed defects in employers' internal compliance systems, which may make judges and juries more receptive to arguments that the employer's efforts were unreasonable.

Next, the Article summarizes legal rules relating to the enforceability of non-disclosure provisions. It then examines how the legislation could affect employer contracting practices. Employers are likely to include more carve-outs when they demand secrecy of employees through confidentiality agreements, social media policies, and in settlement agreements. The proposed legislation will also likely limit, or even preclude, related provisions in settlement agreements that restrict employee speech, like non-disparagement provisions, non-cooperation clauses, and provisions relating to affirmative statements. The legislation will also limit employers' ability to promise secrecy to employees accused of misconduct.

The MeToo movement, particularly when combined with shifts in judicial interpretations and legal reforms, stands to have a lasting effect on employer disciplinary practices. Employers are likely to continue to take a more punitive approach to documented harassment. A more punitive approach will encompass a broader range of meaningful discipline than termination alone, and will likely include demotions, promotion denials, pay cuts, or other loss of status. Employers are also likely to alter executive employment contracts and privacy policies to provide themselves with more latitude to discipline employees for documented harassment, and to disclose those decisions if necessary.

The Article concludes by recommending revisions to employer harassment and discrimination policies. Harassment policies should be more transparent and explain the contextual factors that influence the company's assessment of the severity of policy violation. Antidiscrimination policies should explain that supervisors are entrusted with maintaining the integrity of the company's personnel decisions, which includes refraining from conduct or comments that would cast doubt on their ability to maintain the company's commitment to equal opportunity. In

51. Sandra Sperino & Suja Thomas, *Boss Grab Your Breasts? That's Not (Legally) Harassment*, N.Y. TIMES (Nov. 29, 2017), <https://www.nytimes.com/2017/11/29/opinion/harassment-employees-laws-.html>.

combination, such revisions avoid some of the false dilemmas and confusion that have arisen following the MeToo movement. These changes are also better aligned with the employer's true litigation risks, and basic notions of fairness and trust.

I. SHIFTS IN INTERPRETATIONS OF EXISTING LAW

This Part provides an overview of harassment law and related scholarly commentary. It then examines how courts might alter their application of existing law in the wake of the MeToo movement. In particular, courts may relax their application of the "severe or pervasive" requirement and impose more exacting standards on employers seeking to establish the *Fara-gher/Ellerth* defense.

A. CURRENT LAW

Title VII of the Civil Rights Act contains no explicit reference to harassment. However, the Supreme Court recognized harassment as a form of discrimination in the 1986 decision, *Meritor Savings Bank v. Vinson*.⁵² The *Meritor* decision defined harassment as severe or pervasive conduct so offensive as to alter the terms or conditions of the plaintiff's employment.⁵³ *Meritor* was a sexual harassment case, but its ruling applied to harassment on the basis of other protected categories under Title VII, citing a lower court ruling recognizing harassment on the basis of race.⁵⁴

The Supreme Court elaborated on and refined *Meritor's* definition in subsequent rulings. The 1993 decision, *Harris v. Forklift*, declared that harassment must be both subjectively and objectively offensive to qualify as harassment—meaning the complainant must have been offended by the conduct, and the conduct must be offensive to a reasonable person.⁵⁵ The 1998 decision, *Oncale v. Sundowner*, included a number of refinements to existing law.⁵⁶ It held that harassment must be motivated by the plaintiff's membership in a protected category to qualify as harassment.⁵⁷ The Court also clarified that sexual conduct was not required to prove harassment claims, and reinforced the sta-

52. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66 (1986).

53. *Id.* at 67.

54. *Id.* at 66.

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

56. *See Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79–82 (1998).

57. *Id.* at 80.

tus of harassment claims as a variant of other types of discrimination claims.⁵⁸ *Oncale* further cautioned courts against enforcing Title VII's anti-harassment mandate as a "civility code."⁵⁹ Lastly, it urged courts to consider the context in which the conduct occurred, noting that a "coach smack[ing] [a football player] on the buttocks as he heads onto the field" is different from similar conduct in an office.⁶⁰

Since *Meritor*, the Supreme Court has specified the conditions under which employers will be vicariously liable for harassment. While employers are strictly liable for discrimination and retaliation,⁶¹ harassment claims have produced more uncertainty regarding employer liability. Harassment has been historically viewed as closer to a tort claim, a "frolic or detour" that solely benefits the harasser, rather than employer.⁶² Consequently, courts have been reluctant to hold employers strictly liable. At the same time, courts recognize that a supervisor's harassing acts are enabled by the power delegated to him through the employer.⁶³ This has led courts to develop a complex series of standards governing vicarious liability for harassment.

Vicarious liability for harassment under Title VII depends on whether the putative harasser is a coworker or supervisor.⁶⁴ If the harasser is a coworker, the plaintiff must show that the employer was negligent in its handling of harassment: that the employer knew or should have known about the harassment and failed to act.⁶⁵ If the harasser is a supervisor, the employer is strictly liable when the supervisor took some form of tangible employment action against the plaintiff, like a demotion, firing, or pay cut.⁶⁶ For example, if an employee rebuffs a supervisor's

58. See Steven Wilborn, *Taking Discrimination Seriously: Oncale and the Fate of Exceptionalism in Sexual Harassment Law*, 7 WM. & MARY BILL RTS. J. 677, 678 (1999).

59. *Id.* at 703.

60. *Oncale*, 523 U.S. at 80.

61. Joanna L. Grossman, *The First Bite Is Free: Employer Liability for Sexual Harassment*, 61 PITT. L. REV. 671, 731–32 (2000).

62. *Faragher v. City of Boca Raton*, 524 U.S. 775, 794 (1998).

63. *Id.* at 805.

64. Under the 2013 decision, *Vance v. Ball State University*, 570 U.S. 421, 424–26 (2013), a supervisor is an employee empowered [by the employer] to take tangible employment actions against the victim. Specifically, supervisor status requires "the power to hire, fire, demote, promote, transfer, or discipline an employee." In other words, a supervisor must have formal authority over the harassment victim, not just the informal power to direct their activities.

65. *Faragher*, 524 U.S. at 799 (citing 29 C.F.R. § 1604.11(d) (1997)).

66. *Id.* at 807.

overtures and the supervisor responds by punishing the employee with a demotion, the employer would be strictly liable.

In the absence of a tangible employment action, the employer is presumed liable unless the employer can establish an affirmative defense under the 1998 Supreme Court rulings, *Burlington Industries v. Ellerth* and *Faragher v. City of Boca Raton*⁶⁷ (*Faragher* defense). Employers can establish the *Faragher* defense if (1) the employer took reasonable measures to prevent or redress the harassment, and (2) the plaintiff unreasonably fails to take advantage of those measures.⁶⁸ As originally articulated by the Supreme Court, a plaintiff's claim is preserved if they make a complaint through an employer's proffered internal complaint mechanism. However, some subsequent court of appeals decisions have held that a reasonable response from the employer—even when the employee complains—is sufficient to insulate the employer from liability.⁶⁹

Commentators have criticized harassment law for producing uncertainty over what qualifies as harassment.⁷⁰ David Sherwyn, Michael Heise, and Zev Eigen captured this sentiment when they observed that “[d]ifficulties with determining what type of conduct qualifies as unlawful sexual harassment continue to vex academicians, legal scholars, and practitioners.”⁷¹ Michael Frank devoted an entire law review article to figuring out what the Supreme Court might have meant in *Oncale* when it instructed courts to consider the “social context” in evaluating a harassment claim.⁷²

The flexible nature of the Supreme Court standard for harassment has given lower courts considerable latitude. Scholars

67. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 751–56 (1998); see also *Faragher*, 524 U.S. at 786–810.

68. *Faragher*, 524 U.S. at 807.

69. *Id.* at 807; *Indest v. Freedom Decorating, Inc.*, 164 F.3d 258, 267 (5th Cir. 1999).

70. Michael J. Frank, *The Social Context Variable in Hostile Environment Litigation*, 77 NOTRE DAME L. REV. 437, 442 (2002) (noting the complexity of implementing the Supreme Court's instruction to consider the “social context” in evaluating harassment claims); Melissa K. Hughes, *Through the Looking Glass: Racial Jokes, Social Context, and the Reasonable Person in Hostile Work Environment Analysis*, 76 S. CAL. L. REV. 1437, 1439 (2003) (describing the standard for harassment as “inherently vague”); David Sherwyn et al., *Don't Train Your Employees and Cancel Your “1-800” Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 FORDHAM L. REV. 1265, 1272 (2001).

71. Sherwyn et al., *supra* note 70, at 1272.

72. Frank, *supra* note 70.

have devoted significant attention to these lower court interpretations, criticizing them for framing harassment primarily, or solely in terms of sexual conduct.⁷³ One study found that cases involving “sexualized conduct directed at individual victims” are more successful than those “involving differential but nonsexual conduct and conduct demeaning to women in general.”⁷⁴ Other scholars observed similar patterns in harassment based on race, religion, and age.⁷⁵ Indeed, an empirical study by Pat Chew and Robert Kelley found that judges tended to discount evidence of race-based harassment unless it was “overtly race-linked,” such as a noose or a racial epithet.⁷⁶

Scholars have also criticized the *Faragher* defense. Joanna Grossman argued that strict liability would produce a stronger incentive to prevent harassment claims.⁷⁷ Grossman observed that the *Faragher* defense essentially insulates employers from liability following an initial harassment complaint, such that “the first bite is free.”⁷⁸ Similarly, an empirical study by David Sherwyn, Michael Heise, and Zev Eigen found that courts tended to apply the *Faragher* defense in a manner that was generally

73. Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548, 549 (2001) (discussing how cases that involve “sexualized conduct directed at individual victims” are more successful than those “involving differential but nonsexual conduct and conduct demeaning to women in general”); Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2061 (2003); Vicki Schultz, *Understanding Sexual Harassment Law in Action: What Has Gone Wrong and What We Can Do About It*, 29 T. JEFFERSON L. REV. 1, 5 (2006).

74. Juliano & Schwab, *supra* note 73, at 549; Schultz, *Understanding Sexual Harassment Law*, *supra* note 73, at 16–17.

75. Hughes, *supra* note 70, at 1439 (noting the difficulty of applying harassment standard to race-based context); cf. Judith J. Johnson, *License to Harass Women: Requiring Hostile Environment Sexual Harassment to Be “Severe or Pervasive” Discriminates Among “Terms and Conditions” of Employment*, 62 MD. L. REV. 85, 119–23 (2003) (arguing that “courts tolerate conduct in sexual harassment cases that would not be tolerated in racial harassment cases that are analogously offensive”); cf. Robert J. Gregory, *You Can Call Me a “Bitch” Just Don’t Use the “N-Word”: Some Thoughts on Galloway v. General Motors Service Parts Operations and Rodgers v. Western-Southern Life Insurance Co.*, 46 DEPAUL L. REV. 741, 742 (1997) (arguing that courts resolve ambiguities in favor of plaintiffs claiming race-based harassment but not sex harassment). See generally Pat K. Chew & Robert E. Kelley, *Unwrapping Racial Harassment Law*, 27 BERKELEY J. EMP. & LAB. L. 49 (2006) (discussing patterns in harassment related to race).

76. Chew & Kelley, *supra* note 75, at 106.

77. Joanna L. Grossman, *Supra* note 61, at 733; cf. Sherwyn et al., *supra* note 70, at 1267 (recommending that the defense be revised to “focus exclusively on the employer’s actions”).

78. Grossman, *supra* note 61, at 671.

favorable to employers.⁷⁹ Courts deemed employees to have “unreasonably failed” to make use of the employer’s complaint system if they waited longer than a few months to complain.⁸⁰ Sherwyn, Heise, and Eigen also identified a number of rulings in the employer’s favor even when an employee made a timely complaint.⁸¹ The authors concluded that harassment training had no effect on whether employers successfully asserted the defense.⁸²

B. RELAXING THE SEVERE OR PERVASIVE REQUIREMENT

MeToo may ultimately influence how courts interpret the “severe or pervasive” requirement in harassment law. In a 2003 law review article, Judith Johnson argued that lower courts misused the “severe or pervasive” requirement to “excuse” “egregious conduct that, in many cases, would be criminal or at least would outrage any reasonable person.”⁸³ Sperino and Thomas made this case in a 2017 New York Times op-ed, urging lower courts to reject excessively stringent interpretations of the “severe or pervasive standard.”⁸⁴ Drawing on their book, *Unequal*,⁸⁵ which documented larger trends in the ways courts undermine discrimination law, Sperino and Thomas recounted numerous cases involving highly offensive conduct that the court deemed insufficiently severe or pervasive to proceed to trial.⁸⁶

Sperino and Thomas hypothesized that overly stringent judicial application of the “severe or pervasive” standard may have resulted from outlier decisions in early harassment jurisprudence, written by overwhelmingly older male judges hostile to harassment claims.⁸⁷ These decisions had an outsized influence on later jurisprudence: judges disinclined toward a particular case had a substantial body of law to support their own cramped interpretation. Johnson, by contrast, argued that lower courts were misinterpreting Supreme Court jurisprudence in their overemphasis on the severe or pervasive standard.⁸⁸ Johnson argued that the focus of the inquiry should instead be on whether

79. Sherwyn et al., *supra* note 70, at 1272.

80. *Id.* at 1297.

81. *Id.* at 1295.

82. *Id.* at 1300–01.

83. Johnson, *supra* note 75, at 86.

84. Sperino & Thomas, *supra* note 51.

85. SANDRA F. SPERINO & SUJA A. THOMAS, *UNEQUAL* 30–52 (David Kairys ed., 2017).

86. *Id.* at 34–36.

87. *Id.* at 37.

88. Johnson, *supra* note 75, at 86.

the environment is “objectively hostile or abusive.”⁸⁹ She also found that lower courts tended to limit the plaintiff’s ability to introduce evidence of harassment through unfavorable rulings on the continuing violations doctrine.⁹⁰

Judges of all stripes may be influenced by MeToo in ways that alter their application of the legal rules.⁹¹ MeToo gave a microphone to victims willing to share their experience of harassment. It showcased the lasting impact an act of groping, for example, had on their well-being. These stories provided context for the severity or pervasiveness of the conduct from the victim’s perspective. Over time, judges may update their application of legal standards for severe or pervasive and objectively hostile behavior accordingly.

This narrative shift could also support an alternate explanation for why some judges previously defined severe or pervasive too narrowly.⁹² Supreme Court jurisprudence has emphasized that harassment law is not a civility code, and that harassment should be distinguished from usual workplace interactions.⁹³ Judges may have been overly fearful of treading into civility code territory, which led to stringent rulings on the severe or pervasive standards.⁹⁴ While public debates over MeToo

89. *Id.*

90. *Id.* at 123–29.

91. As Catharine MacKinnon observed in an op-ed, “[s]exual harassment law can grow with #MeToo” and that “changing norms . . . will . . . transform the law as well.” Catharine A. MacKinnon, *#MeToo Has Done What the Law Could Not*, N.Y. TIMES (Feb. 4, 2018), <https://www.nytimes.com/2018/02/04/opinion/metoo-law-legal-system.html>.

92. Additionally, the question of whether judges broadly dismiss cases that should have been sent to a jury is an empirical question that has not yet been answered. Sperino and Thomas’s book cited a few dozen cases, but did not assess whether those questions were the exception rather than the rule. SPERINO & THOMAS, *supra* note 85, at 34–36. The cases might, for example, have represented extreme examples within a broader distribution of case law. Similarly, while Johnson leveled a similar critique against judges for cramped interpretations of the “continuing violations” doctrine that resulted in failed claims, the analysis does not necessarily support the empirical conclusion that those cases are representative of all claims. *See* Johnson, *supra* note 75, at 123–29.

93. *See* *Oncala v. Sundowner Offshore Servs.*, 523 U.S. 75, 80 (1998).

94. *Blomker v. Jewell*, 831 F.3d 1051, 1056–57 (8th Cir. 2016) (“The Supreme Court has cautioned courts to be alert for workplace behavior that does not rise to the level of actionable harassment.”). *Blomker* describes numerous cases involving offensive behavior that did not meet the legal standard. *Id.* at 1057.

have included some hand wringing over whether ambiguous conduct meets colloquial definitions of harassment,⁹⁵ a much larger proportion of high profile MeToo stories involved outrageous conduct that was left unaddressed.⁹⁶ The cost of leaving harassment unaddressed may now be more salient for judges, and perhaps make them less likely to rule for defendants on summary judgment.

The uncertain and flexible nature of the legal standard for harassment, which has produced so much scholarly criticism,⁹⁷ may also liberate judges to move toward a more lenient standard for what qualifies as harassment. Judges may, for example, focus more heavily on larger questions of whether the conduct is objectively hostile or abusive, as Johnson advocated.⁹⁸ Just as courts inclined to rule in the employer's favor have the freedom to rely on cases that take a cramped view of the severe or pervasive standard,⁹⁹ so too do they have the freedom to cite more liberal interpretations in their rulings.

C. MORE RESTRICTIVE *FARAGHER* DEFENSE

In the same way that the MeToo movement shed light on the severe or pervasive standard, it also exposed problems with the way employers implemented their internal processes.¹⁰⁰ Revelations that high-level employees previously kept their jobs despite multiple harassment complaints suggested that employers failed to meaningfully redress the problem. Weinstein served as the case in point, where legal structures like employment agreements, internal complaints procedures, and contracts were used to further conceal Weinstein's misdeeds, rather than fix the problem.¹⁰¹

Both legal scholars and social scientists have devoted considerable attention to evaluating employer practices to prevent and address workplace harassment and discrimination. In a

95. Doreen McAllister, *#MeToo Movement Has Gone Too Far*, Catharine Deneuve Says, NPR: THE TWO-WAY (Jan. 10, 2018), <https://www.npr.org/sections/thetwo-way/2018/01/10/576986585/-metoo-movement-has-gone-too-far-catherine-deneuve-says>.

96. *Post-Weinstein, These Are the Powerful Men Facing Sexual Harassment Allegations*, GLAMOUR (Apr. 27, 2018), <https://www.glamour.com/gallery/post-weinstein-these-are-the-powerful-men-facing-sexual-harassment-allegations>.

97. See *supra* notes 70–72.

98. See Johnson, *supra* note 75, at 86.

99. SPERINO & THOMAS, *supra* note 85.

100. See discussion *infra* Part IV.

101. See *supra* notes 36–41.

2001 law review article, Susan Sturm hailed internal employer processes as the preferred approach for advancing employee rights.¹⁰² Sturm's model contrasted what she characterized as "first generation discrimination," involving overt discrimination and workplace segregation, with "second generation discrimination," involving more subtle and complex patterns of exclusion and bias.¹⁰³ Sturm argued that courts are good at "elaborat[ing] general legal norms" but employers are best positioned to effectuate those norms through internal processes, organizational change, and flexible implementation.¹⁰⁴ From this vantage point, the *Faragher* decision was a welcome development because it "encourage[d] the development of workplace processes that identify the meaning of and possible solutions to the problem of sexual harassment."¹⁰⁵

By contrast, sociologists Frank Dobbin, Erin Kelly, and Lauren Edelman took a much more skeptical stance towards internal processes like harassment policies and complaint procedures.¹⁰⁶ These scholars observed that employers adopted internal mechanisms to address discrimination and harassment long before there was a legal justification for doing so.¹⁰⁷ Dobbin and Kelly argued that the expansion of these processes represented an effort by human resource managers to expand their power and influence in the organization.¹⁰⁸ Edelman argued that these internal processes represent a form of "symbolic compliance" intended to signal the employer's "attention to" legal norms.¹⁰⁹ Symbolic compliance signals to employees, courts, regulatory agencies, and the public that the employer cares about compliance.¹¹⁰ The efficacy of those processes is secondary.

102. Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 564 (2001).

103. *Id.* at 466–69.

104. *Id.* at 522–24.

105. *Id.* at 481.

106. LAUREN B. EDELMAN, *WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS* 101 (2016); Frank Dobbin & Erin L. Kelly, *How to Stop Harassment: Professional Construction of Legal Compliance in Organizations*, 112 AM. J. SOC. 1203, 1203–05 (2007).

107. Dobbin & Kelly, *supra* note 106, at 1203–04.

108. *Id.*

109. EDELMAN, *supra* note 106, at 100–01.

110. *Id.*

Even as MeToo revealed employers' failures, it also revealed courts' failure to hold employers accountable for ineffective processes.¹¹¹ Lauren Edelman and Susan Bisom-Rapp argued that courts have been too lenient with respect to what qualifies as "reasonable measures" to prevent and redress harassment.¹¹² Edelman identified a number of cases in which courts credited employers for the adoption of "reasonable" processes under the *Faragher* defense, despite evidence that the employer's process was flawed or unfair.¹¹³ The Sherwyn, Heise, and Eigen study likewise found that "reasonable measures" appeared to be limited to whether the employer had adopted a credible policy regarding harassment.¹¹⁴

MeToo may also influence how courts and juries evaluate evidence in support of the *Faragher* defense.¹¹⁵ Like the "severe or pervasive" standard, MeToo also made salient the possibility, and even likelihood, that an employer's processes might be inadequate. Popular attention to these defects will likely embolden plaintiffs' lawyers to obtain discovery on those defects¹¹⁶ and to argue forcefully for the relevance of such evidence in discovery disputes.

Challenging the employer's internal processes may also take the form of me too evidence. Me too evidence is a term of art in employment disputes, which refers to evidence that other employees have suffered similar harms at the hands of the same supervisor or in the same department. In the 2008 Supreme

111. *Id.* at 174–77, 180–81.

112. *Id.* at 173; Susan Bisom-Rapp, *Fixing Watches with Sledgehammers: The Questionable Embrace of Employee Sexual Harassment Training by the Legal Profession*, 24 T. JEFFERSON L. REV. 125, 145 (2002); see also Susan Bisom-Rapp, *Sex Harassment Training Must Change: The Case for Legal Incentives for Transformative Education and Prevention*, 71 STAN. L. REV. ONLINE 62, 63, 74–75 (2018).

113. EDELMAN, *supra* note 106, at 173–74, 184–88.

114. Sherwyn et al., *supra* note 70, at 1304. That study was completed in the years immediately following the *Faragher* decision. It may have made sense to impose a relatively lenient standard in the early days of the defense, on the notion that employers needed time to ramp up their internal processes (though of course, they had been largely installed years prior). Now, twenty years later, employers have little excuse for problematic internal structures.

115. It may also influence how courts and juries evaluate evidence of negligence, which is relevant for cases involving coworker harassment.

116. For example, plaintiffs' lawyers could seek statistics suggesting the employer's complaint system was biased, that it responded slowly to harassment complaints, or that it failed to discipline employees for harassment. The plaintiff might also present testimony from employees claiming to have been mistreated in the complaint process.

Court decision *Sprint/United Management Co. v. Mendelsohn*,¹¹⁷ the Supreme Court instructed trial courts to make case-by-case determinations as to the relevance of me too evidence.¹¹⁸ The years to come may see renewed efforts by plaintiffs to use me too evidence to challenge the reasonableness of the employer's response to a complaint.¹¹⁹ Me too evidence may reveal, for example, that other employees experienced harassment in the department over a period of years, which the employer failed to remediate.¹²⁰

Courts may become more demanding with respect to disciplinary actions undertaken by an employer following a documented incident of harassment. Previously, courts did not consider an employer's decision to retain a documented harasser to be fatal to the employer's defense.¹²¹ Courts tended to focus less

117. 552 U.S. 379, 381 (2008).

118. Prior to that decision, some courts recognized a legal doctrine (known as the me too doctrine) categorically barring the use of such evidence. *See generally* Emma Pelkey, *The "Not Me Too" Evidence Doctrine in Employment Law: Courts' Disparate Treatment of "Me Too" Versus "Not Me Too" Evidence in Employment Discrimination Cases*, 92 OR. L. REV. 545 (2013) (discussing how courts analyze and determine the relevance and admissibility of me too evidence compared to not me too evidence in employment discrimination cases).

119. *See, e.g.*, *Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 335–36 (6th Cir. 2008) (permitting "other act" evidence); *Waterson v. Plank Rd. Motel Corp.*, 43 F. Supp. 2d 284, 288 (N.D.N.Y. 1999) (introducing "me too" evidence).

120. *See, e.g.*, *Hawkins*, 517 F.3d at 337–38 (discussing evidence of harassment involving other women); *Hatley v. Hilton Hotels Corp.*, 308 F.3d 473, 475–76 (5th Cir. 2002) (noting that four additional employees in the same position testified about early harassment and the company failed to respond); GERALD E. ROSEN ET AL., RUTTER GRP. PRACTICE GUIDE, 5:336, Westlaw (database updated May 2018) ("Employers should consider a possible disadvantage to asserting the *Ellerth/Faragher* defense: It may open the door for plaintiff to introduce evidence of the employer's prior *mishandling of unrelated incidents* of sexual harassment . . .").

121. *See, e.g.*, *Tutman v. WBBM-TV, Inc./CBS, Inc.*, 209 F.3d 1044, 1049 (7th Cir. 2000) (following racial harassment by supervisor, employer merely gave him a written warning, ordered him to participate in an interpersonal skills training, and offered to rearrange schedules to avoid contact between supervisor and victim; court deemed employer's response reasonable); *Indest v. Freeman Decorating, Inc.*, 164 F.3d 258, 260–61, 267 (5th Cir. 1999) (employer responded to harassment complaint by providing a written and verbal reprimand and promising victim she would not need to work at the same trade shows as harasser, response deemed adequate to satisfy *Faragher* defense); *Savino v. C.P. Hall Co.*, 199 F.3d 925, 936 (7th Cir. 1999) (crediting employer response that "made it much more difficult for Popper to oppress Savino without being observed by others"); *cf. McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1120 (9th Cir. 2004) ("Remedial measures must include some form of disciplinary action which must be 'proportionate to the seriousness of the offense.'" (alteration in original) (citation omitted) (quoting *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991))); *Swenson v. Potter*, 271 F.3d 1184, 1193 (9th Cir. 2001).

on discipline, and more on whether the employer disseminated a policy and attempted to investigate the complaint.¹²² While courts expected employers to undertake some preventative measures, that standard could be satisfied with a stern warning or some effort to separate the complainant from the accused, including offering the complainant a transfer.¹²³ For example, in a Ninth Circuit opinion written by Judge Kozinski (who himself resigned in 2017 following multiple accusations of harassment),¹²⁴ the court noted that an investigation counts as a remedial measure because “[a]n investigation is a warning, not by words but by action.”¹²⁵

Going forward, employers should not expect that superficial disciplinary measures following an investigation will satisfy the *Faragher* defense. First, as I will discuss in greater detail below, employers have already begun taking a more punitive approach with documented harassers, including publicly terminating high level employees and disclosing the reason for the termination. In

122. The Ninth Circuit’s analysis in *Holly D. v. California Institute of Technology* suggests that it views the defense primarily in terms of whether the employer had a harassment policy that “identified contact personnel” and investigation procedures. 339 F.3d 1158, 1177 (9th Cir. 2003). Arguments about an employer’s failure to respond adequately following a harassment complaint were relevant only insofar as they suggested the policy was “unreasonably implemented.” *Id.* This is consistent with Sherwyn, Heise, and Eigen’s findings that the strongest predictor of whether an employer satisfied the affirmative defense was whether it had a policy that it disseminated to employees with a reporting mechanism available. Sherwyn et al., *supra* note 70, at 1283; *see also* *Brenneman v. Famous Dave’s of Am., Inc.*, 507 F.3d 1139, 1145 (8th Cir. 2007) (holding whether the employer exercised reasonable care consists of two components, “prevention and correction,” requiring that “the employer must have exercised reasonable care to prevent sexual harassment . . . [and] promptly corrected any sexual harassment that occurred”).

123. *See, e.g.*, *Andreoli v. Gates*, 482 F.3d 641, 644 (3d Cir. 2007) (“[In cases involving co-worker harassment,] [w]e have found an employer’s actions to be adequate, as a matter of law, where management undertook an investigation of the employee’s complaint within a day . . . spoke to the alleged harasser . . . and warned the harasser that the company does not tolerate any sexual comments or actions.”); *Brenneman*, 507 F.3d at 1145 (holding employer responded adequately when it offered to transfer complainant to another restaurant); *Tutman*, 209 F.3d at 1049 (“[T]he question is not whether the punishment was proportionate to [the supervisor’s] offense but whether [the employer] responded with appropriate remedial action reasonably likely under the circumstances to prevent the conduct from recurring.”); *Indest*, 164 F.3d at 267.

124. Niraj Chokshi, *Federal Judge Alex Kozinski Retires Abruptly After Sexual Harassment Allegations*, N.Y. TIMES (Dec. 18, 2017), <https://www.nytimes.com/2017/12/18/us/alex-kozinski-retires.html>.

125. *Swenson*, 271 F.3d at 1193.

an environment where termination is a common response to substantiated acts of harassment, superficial forms of discipline start to look less reasonable. The MeToo movement has made the costs of ineffective discipline more salient for employers. The continued misconduct of a documented harasser becomes foreseeable, and makes the employer's inaction less reasonable.

Technological changes are likely to accelerate this trend. Previously, notions of "reasonableness" were made in the abstract, without data about how employers made decisions. However, cloud-based ethics and HR management tools are starting to close this information gap.¹²⁶ Cloud-based software used by multiple employers enable the software maker to aggregate practices and generate statistics about how other employers have responded in similar situations.¹²⁷ This information could provide cover for an employer, or undermine the reasonableness of a decision.¹²⁸ If most employers retain an employee after a substantiated complaint of harassment by a subordinate, then the statistics would protect employers by making their decision appear reasonable.¹²⁹ However, once employers begin to shift their behavior towards a more punitive approach, employers that depart from the norm appear unreasonable.

In the MeToo era, plaintiffs' lawyers may place greater emphasis on an employer's faulty practices in arguments before judges and juries. One might readily imagine a jury trial where one of the ultimate issues to be decided is whether the employer behaved negligently¹³⁰ or reasonably in response to harassment.¹³¹ Because MeToo brought so much attention to the failure of employers' compliance measures, a plaintiff's lawyer might

126. See CAROLE SWITZER ET AL., BENCHMARKING (2017), <https://www.convercent.com/resource/converge17/Converge17-Benchmarking.pdf>; NAVEX GLOBAL, 2017 ETHICS & COMPLIANCE TRAINING BENCHMARK REPORT, <https://www.navexglobal.com/en-us/resources/benchmarking-reports/2017-ethics-compliance-training-benchmark-report?RCAssetNumber=2427> (last visited Oct. 22, 2018).

127. See *supra* note 126.

128. While this information tends to be limited to the employers that use the platform, that information could be discoverable if the employer used and consulted the benchmarks in making its own decisions. One might also imagine third party companies making aggregate information available publicly on an annual basis to inform industry leaders and attract new business.

129. Elizabeth C. Tippet, *Adapting to the New Risk Landscape*, HARV. BUS. REV., Feb. 1, 2018, <https://hbr.org/2018/02/adapting-to-the-new-risk-landscape>.

130. A negligence standard applies to coworker harassment. *Faragher v. City of Boca Raton*, 524 U.S. 775, 799 (1998).

131. This would be in connection with the employer's assertion of the *Faragher* defense, involving supervisor harassment. *Id.* at 807.

play up the holes in the employer's system. The lawyer might present statistics about the number of complaints and the employer's disciplinary track record following substantiated complaints. The lawyer might elicit client testimony about mistreatment during the complaint process. Alternatively, the lawyer could cross-examine human resources or managers to suggest the process was biased against complainants. The lawyer might also show clips of the employer's boring harassment training program,¹³² using it to further demonstrate the employer's lack of commitment to addressing harassment. While evidence of this sort was available prior to MeToo, national attention to these issues may make the jury more receptive to them. Judges may also attach more importance to this evidence and be less inclined to grant summary judgment on questions of negligence or reasonableness.

Part IV, below, will return to the question of how employers may alter their disciplinary practices, and related policies, over time. But first, Parts II and III examine the legal tools employers previously used to maintain the secrecy of harassment and discrimination claims, and how legislative reforms may limit their availability.

II. STATES ADDRESS NON-DISCLOSURE AGREEMENTS

Restrictions on an employee's ability to publicly disclose harassment come in two forms: (1) standard employer policies or agreements intended to protect the company's business secrets and overall reputation; and (2) settlement agreements that resolve an employment-related dispute or lawsuit. These two types of restraints are treated quite differently under existing legal rules.

A. EXISTING LAW

With respect to the first category, employees arguably have the right to publicly disclose harassment or discrimination under Title VII of the Civil Rights Act and the National Labor Relations Act, regardless of contrary language in a policy or contract. By contrast, courts are more likely to enforce secrecy provisions in a settlement agreement, on the theory that it promotes dispute resolution.

132. For a content analysis of harassment trainings, see Elizabeth C. Tippett, *Harassment Trainings: A Content Analysis*, 39 BERKELEY J. LAB & EMP. L. (forthcoming 2018).

Title VII broadly protects employees from retaliation for “opposition” to harassment or discrimination in the workplace.¹³³ While such opposition typically consists of internal complaints to the employer, there is some authority for the proposition that more public forms of disclosure are protected. In the Supreme Court decision *Crawford v. Nashville*, an employee sought protection from retaliation after participating in (though not initiating) a company’s internal harassment investigation.¹³⁴ Ruling in the employee’s favor, the Court explained that an employee need not go so far as “writing public letters” or “taking to the streets” to qualify as protected “opposition” under the statute.¹³⁵ This implied that the Court considered these more public forms of opposition to be protected as well. Similarly, a Fifth Circuit decision from 1981 held that public picketing against an employer’s discriminatory practices could qualify as protected opposition.¹³⁶ A 1983 case from the Ninth Circuit held that writing a public letter to the school board complaining about an employer’s practice was also protected under the opposition clause.¹³⁷

However, cases involving public opposition also held that it must be reasonable, and that “excessive” opposition, or opposition that “significantly disrupt[s] the workplace” or the plaintiff’s productivity,¹³⁸ is not protected. This means that an employee’s decision to reveal harassment or discrimination on social media, perhaps through a #metoo post, is subject to some but not unlimited protection.¹³⁹ If an employer decides to punish a #metoo employee under its social media policy, that employee may have a retaliation claim.¹⁴⁰ But the employer may be able to defend the

133. 42 U.S.C. § 2000e-3(a) (2012).

134. 555 U.S. 271, 275 (2008).

135. *Id.* at 276–77.

136. *Payne v. McLemore’s Wholesale & Retail Stores*, 654 F.2d 1130, 1146 (5th Cir. 1981).

137. *EEOC v. Crown Zellerbach Corp.*, 720 F.2d 1008 (9th Cir. 1983).

138. *Id.* at 1015; *Payne*, 654 F.2d at 1143; *Hochstadt v. Worcester Found. for Experimental Biology*, 545 F.2d 222, 231 (1st Cir. 1976).

139. *See Payne v. WS Servs., LLC*, 216 F. Supp. 3d 1304, 1319–20 (W.D. Okla. 2016) (holding rejected applicant, who complained in Facebook posts and wore a homemade sandwich board to protest in public, was not protected due to defamatory comments and disparaging comments unrelated to gender discrimination); *Caplan v. L Brands/Victoria’s Secret Stores, LLC*, 210 F. Supp. 3d 744, 754–55 (W.D. Pa. 2016) (rejecting plaintiff’s Section 1981 retaliation claim because Facebook post containing a picture of a “Ku Klux Klan-reminiscent hooded person” did not “objectively complain[] about . . . race discrimination”).

140. *Emmanuel v. Cushman & Wakefield, Inc.*, No. 1:13-CV-2894-GHW, 2015 WL 5036970, at *2 (S.D.N.Y. Aug. 26, 2015) (considering retaliation claim

case if it can establish the post was unreasonable or excessively disruptive.

An employee's social media posts about harassment or discrimination may be independently protected under Section 7 of the National Labor Relations Act (NLRA). Section 7 protects the right of all employees—even if their workplace is not unionized¹⁴¹—to engage in “concerted action for mutual aid or protection.”¹⁴² During the Obama administration, the National Labor Relations Board (NLRB) took an expansive view of concerted activity, asserting that employers violate Section 7 when they punish employees for social media activity.¹⁴³ The NLRB also opined that overly restrictive social media policies can violate Section 7.¹⁴⁴

For example, the NLRB held that an employer violated Section 7 when it fired employees for Facebook posts discussing how to respond to a coworker's gripes about their job performance.¹⁴⁵ The NLRB reasoned that the coworkers “made common cause” in their protest of the coworker's claims, and “were taking a first

alleging termination a few months after employee complained about pregnancy discrimination on Facebook).

141. Regina Robson, “*Friending*” the NLRB: *The Connection Between Social Media, “Concerted Activities” and Employer Interests*, 31 HOFSTRA LAB. & EMP. L.J. 81, 84 (2013) (noting that almost all of social media policies drawing commentary from the NLRB involved non-union workforces).

142. Murphy Oil USA, Inc., 361 N.L.R.B. 774, 813 (2014); D.R. Horton, Inc., 357 N.L.R.B. 2277, 2277 (2012). However, like in the Title VII context, social media posts can lose protection where their content would raise other legitimate business concerns. For example, in *Richmond District Neighborhood Center*, the Board found that Facebook posts were not protected by Section 7 because they advocated insubordination. 361 N.L.R.B. 833, 834–35 (2014); *see also* Three D, LLC, 361 N.L.R.B. 308, 308 (2014) (“[O]nline employee communications can implicate legitimate employer interests, including the ‘right of employers to maintain discipline in their establishments.’”); Ariana R. Levinson, *Solidarity on Social Media*, 2016 COLUM. BUS. L. REV. 303, 313 (discussing the Board's approach to social media comments); *cf.* NLRB v. Pier Sixty, LLC, 855 F.3d 115, 123–25 (2d Cir. 2017) (holding Facebook post was protected despite use of profanity).

143. *The NLRB and Social Media*, NLRB, <https://www.nlr.gov/news-outreach/fact-sheets/nlr-and-social-media> (last visited Oct. 22, 2018); *see, e.g.,* *Three D*, 361 N.L.R.B. at 308 (holding that a Facebook discussion about employer's failure to properly calculate tax withholding was a protected concerted activity). *But see* Levinson, *supra* note 142, at 307, 310 (arguing that the NLRB decisions were in line with precedent and noting that appellate courts have affirmed the Board's decisions).

144. *See* NLRB, MEMORANDUM GC 15-04, at 20–21 (2015), <https://www.nlr.gov/reports-guidance/general-counsel-memos> (follow “Memo Number” drop down tab; then follow “GC-15xx”; then follow “apply” hyperlink; then follow “GC 15-04” hyperlink).

145. Hispanics United of Buffalo, Inc., 359 N.L.R.B. 368, 369–70 (2012).

step towards taking group action to defend themselves.”¹⁴⁶ The work-related nature of the discussion on matters that affected them jointly brought the activity under the protection of Section 7.¹⁴⁷

A social media post describing harassment or discrimination arguably falls within this expansive frame of protected Section 7 activity. A MeToo post would clearly qualify as work-related. The “metoo” hashtag has frequently been characterized as an expression of solidarity, and the phrase itself suggests a collective cause.¹⁴⁸ The post might not only serve to mobilize others within a workplace who have experienced similar harassment or discrimination, but it might also mobilize those unaffected but nevertheless outraged by the conduct.¹⁴⁹ #MeToo can also be a starting point for workplace mobilization around questions of employer practices with respect to promotion, compensation, or even safety concerns.¹⁵⁰ However, NLRB protection may be fleeting. The Board consists of political appointees, who serve a five-year term appointed by the President.¹⁵¹ As terms run out on Obama appointees to the Board, Trump appointees are likely to

146. *Id.* at 369.

147. *Id.* at 370.

148. See Levinson, *supra* note 142, at 320 (“The fact that posts to social media are intended to be shared by others including coworkers is the underlying rationale for finding that ‘liking’ a coworker’s post is concerted activity. It sets the groundwork for potential future action by raising awareness about the issue and by discussing it . . .”).

149. For example, in one case examined by the NLRB, an employer terminated an employee after she complained about a manager’s sexist remark on Facebook, as well as the treatment of other employees. NLRB, MEMORANDUM OM 12-31, at 19–20 (2012). The NLRB deemed her actions concerted activity, though the reasoning was strongly rooted in her assistance of fellow employees. *Id.*; see Levinson, *supra* note 142, at 319 (“[E]ven in a circumstance where one employee complains to non-coworkers, the employee may be engaging in concerted activity. . . . [T]he employee might post to complain to a government official, a union representative, or the media.”); Robson, *supra* note 141, at 94 (explaining that Board decisions generally “pinned concerted activities, not to the subject matter of the action, but on the existence of affirmative indications of interest from coworkers or a call for group action” (citing *Alleluia Cushion Co.*, 221 N.L.R.B. 999 (1975))).

150. See Robson, *supra* note 141, at 102 (“Where face-to-face communications are limited or absent, however, the number of co-worker ‘friends’ responding to a post, and the content of their messages, appear to affect the determination of whether the action is concerted.”).

151. 29 U.S.C. § 153 (2012); William B. Gould IV, *Politics and the Effect on the National Labor Relations Board’s Adjudicative and Rulemaking Processes*, 64 EMORY L.J. 1501, 1506 (2015).

make more conservative rules, and may take a narrower approach to their interpretation of concerted activity.¹⁵²

While Title VII and the NLRA offer some authority for the proposition that employees may speak notwithstanding a confidentiality agreement or social media policy, those rules don't apply in the case of settlement agreements. Settlement agreements are treated quite differently as a matter of law because they waive rights otherwise protected under Title VII or the NLRA. Courts routinely enforce settlement contracts containing provisions restricting an employee from talking about the dispute or making disparaging statements about the employer.¹⁵³ These agreements do not offend public policy, in the courts' view.¹⁵⁴

Rather, courts assume they are promoting settlement, party autonomy, and the possibility of bringing finality to otherwise

152. See Amy Semet, *Political Decision-Making at the National Labor Relations Board: An Empirical Examination of the Board's Unfair Labor Practice Decisions Through the Clinton and Bush II Years*, 37 BERKELEY J. EMP. & LAB. L. 223, 284 (2016) (empirical study finding that NLRB "appointees . . . act as partisans once on the Board, and this partisanship appears to be magnified if they . . . sit on a panel with other co-partisans"); Josh Eidelson, *Trump's Labor Board Picks Are Scaring Away Unions*, BLOOMBERG (Feb. 14, 2018), <https://www.bloomberg.com/news/articles/2018-02-14/trump-s-nlr-scorned-by-grad-students>.

153. Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867, 869 (2007).

154. See *Gulliver Schs., Inc. v. Snay*, 137 So. 3d 1045, 1046, 1048 (Fla. Dist. Ct. App. 2014) (finding a breach of the confidentiality provision in settlement agreement where the claimant disclosed the settlement to his daughter, who posted about it on Facebook); *Smelkinson Sysco v. Harrell*, 875 A.2d 188, 194–95, 197–99 (Md. Ct. Spec. App. 2005) (enforcing a stipulated damages provision in finding that the violation of a non-disparagement clause constituted a breach of a settlement agreement); *Mathis v. Controlled Temperature, Inc.*, No. 275323, 2008 WL 782634, at *7 (Mich. Ct. App. Mar. 25, 2008) (finding a breach of a settlement agreement when an employee disclosed to her future employer that she "won" a legal dispute with her former employer, "a 'little bit' about how she was harassed by the owner, manager, or her boss," and that she "had some problems with her manager treating her badly"); *Carlini v. Gray Television Grp., Inc.*, No. A-15-1239, 2017 WL 1653624 at *4 (Neb. Ct. App. May 2, 2017), (finding that an employee breached a settlement agreement by violating its non-disclosure provision); cf. *Tujetsch v. Bradley Dental, LLC*, No. 09-C-5568, 2010 WL 5099981, at *2 (N.D. Ill. Dec. 8, 2010) (noting that a non-disclosure provision in a settlement agreement without an exception for lawful court orders and subpoenas would be unenforceable). *But see, e.g., Robinson v. Harrison Transp. Servs., Inc.*, No. 5:15-CV-298-F, 2016 WL 3647616, at *4 (E.D.N.C. June 30, 2016) (withholding court approval of a confidentiality provision in a settlement of an FLSA case); *Goldberg v. Egg Harbor Twp. Sch. Dist.*, No. 11-1228-RBK/KMW, 2011 WL 5554501, at *7 (D.N.J. Nov. 14, 2011) (refusing to enforce a confidentiality provision in a settlement agreement with public employer because public records laws required their disclosure).

rancorous disputes.¹⁵⁵ This line of reasoning accords with a rich body of literature regarding the policy merits of a judicial system that relies heavily on settlements to function. Carrie Menkel-Meadow offers a moral defense of settlement, arguing that settlement better incorporate parties' values and priorities.¹⁵⁶ When parties prefer to settle, the justice system does right by effectuating their intent.¹⁵⁷ Menkel-Meadow supports confidentiality provisions, arguing that parties' preferences should prevail and that it is "antidemocratic and ultimately harmful to our legal and political system to insist that all disputes be publicly aired."¹⁵⁸ Scott Moss evaluates confidential settlements from a law and economics standpoint, observing that confidentiality provisions broadly facilitate settlements by widening the bargaining range.¹⁵⁹ Where employers value confidentiality more than individual employees, their willingness to pay a secrecy premium facilitates settlement where the parties wouldn't otherwise agree.¹⁶⁰

An opposing body of literature questions the public policy implications of settlement.¹⁶¹ In the employment context, Minna

155. See *EEOC v. Northlake Foods, Inc.*, 411 F. Supp. 2d 1366, 1369 (M.D. Fla. 2005) (issuing a protective order precluding the EEOC from disclosing the amount of settlement in a discrimination case); *Hasbrouck v. BankAmerica Hous. Servs.*, 187 F.R.D. 453, 459, 461 (N.D.N.Y. 1999) (in refusing to order disclosure of a confidential settlement of harassment claim, the court noted that "[w]hile protecting the confidentiality of settlement agreements encourages settlement, which is in the public interest, permitting disclosure would discourage settlements, contrary to the public interest," and that "[t]here is a strong public interest in encouraging settlements and in promoting the efficient resolution of conflicts"). *But see* *Waterson v. Plank Road Motel Corp.*, 43 F. Supp. 2d 284, 288 (N.D.N.Y. 1999) (permitting "Me Too" evidence from an employee who had settled a discrimination and harassment claim, despite the non-disclosure provision in the settlement agreement).

156. Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement*, 83 GEO. L.J. 2663, 2669, 2673, 2676–80 (1995).

157. *Id.* at 2692.

158. *Id.* at 2683–84.

159. Moss, *supra* note 153, at 878–79.

160. *Id.* at 879.

161. In *Against Settlement*, Owen M. Fiss argues that settlement undermines the function of the judicial system in a number of respects. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075 (1984). Settlements deprive parties of the fact-finding process of discovery and a judicial decision on the merits. *Id.* at 1085–86. Settlements crimp the development of important precedent. *Id.* at 1087–89. Fiss also argues that settlements exacerbate existing power imbalances, where information asymmetries, resource limitations, and risk aversion lead less powerful parties to settle at a discount. *Id.* at 1076–77. Scholars offer a number of responses to Fiss's claims. See, e.g., Amy J. Cohen, *Revisiting*

Kotkin argues that settlements render discrimination and harassment invisible, because settled claims do not appear on the docket.¹⁶² Kotkin claims that confidentiality provisions are not really a matter of choice for discrimination plaintiffs because “[c]orporate defendants insist on such clauses.”¹⁶³ Ultimately, she argues such settlements are problematic because they impair “the right of the public to know.”¹⁶⁴

B. PROPOSED LEGISLATION

Since the MeToo movement, several states, including Pennsylvania, New York, and California, are considering or have passed prohibitions on certain types of non-disclosure agreements.¹⁶⁵ California is considering multiple bills.¹⁶⁶ New York has already passed one law relating to non-disclosure and is considering a second bill.¹⁶⁷

The proposed bills vary in three important respects. First, they vary in the types of disclosures that cannot be restricted through contract. Second, they vary as to whether they limit all agreements, or only agreements signed under certain conditions. And third, some contain an exception for non-disclosure provisions requested by the victim.

Against Settlement: *Some Reflections on Dispute Resolution and Public Values*, 78 *FORDHAM L. REV.* 1143, 1163–68 (2009) (summarizing ADR literature responding to Fiss’s claim). First, as David Luban observes, it is neither feasible nor desirable for courts to adjudicate every case, and an overload of precedent would likely produce substantial inconsistency in legal rules. David Luban, *Settlements and the Erosion of the Public Realm*, 83 *GEO. L.J.* 2619, 2643–44 (1995). Second, the civil justice system tends to do a poor job of addressing power imbalances. Menkel-Meadow, *supra* note 156, at 2688; *cf.* Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *YALE L.J.* 950, 966–68 (1979).

162. Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 *N.C. L. REV.* 927, 929 (2006).

163. *Id.* at 929.

164. *Id.* at 947.

165. S. 820, 2017–18 Reg. Sess. (Cal. 2018); S. 1300, 2017–18 Reg. Sess. (Cal. 2018); Assemb. B. 3080, 2017–18 Reg. Sess. (Cal. 2018); S. 6382-A, 240th Leg., Reg. Sess. (N.Y. 2017); S. 999, 2017 Gen. Assemb., Reg. Sess. (Pa. 2017). New Jersey considered a bill but it did not pass. S. 5287, 217th Leg., Assemb. (N.J. 2017).

166. Cal. S. 820; Cal. S. 1300; Cal. Assemb. B. 3080.

167. S. 7507-C, 241st Leg., Reg. Sess. (N.Y. 2018); N.Y. S. 6382-A.

Table 1 – Proposed Non-Disclosure Legislation

Bill	Provisions covered	Types of agreements	Exception for victim requests
Cal. S. 820	Provisions that prevent the disclosure of factual information relating to sex-based harassment and sex discrimination claims.	Post-filing settlement agreements	Yes. Settlement amount can also remain confidential.
Cal. Assemb. B. 3080	Prohibitions on disclosing harassment, or opposing any unlawful practice.	Essentially any contracts with contractors or employees	No.
Cal. S. 1300	Non-disparagement provisions that prevent employees from disclosing unlawful conduct, including harassment.	Condition of employment	No.
N.Y. S. 7507-C (KK)(D)	Provisions that prevent the disclosure of the underlying facts and circumstances of a sexual harassment claim.	Settlement agreements	Yes, for mutual non-disclosure, with 21 days to consider, and 7-day revocation period.
N.Y. S. 6382-A	Provisions with the purpose or effect of concealing information relating to a claim of discrimination, non-payment of wages, retaliation, harassment or violation of public policy.	All contracts	No.
Pa. S. 999	Provisions that impair or attempt to impair the ability of a person to report a claim of sexual misconduct.	All contracts	No, but the victim's name and amount of settlement can be confidential.

The two narrowest bills are the proposed California Senate Bill 820, and New York Senate Bill 7507-C, which was passed as part of the state budget.¹⁶⁸ Both are limited to settlement agreements, and, in the case of California Senate Bill 820, only post-filing settlement agreements.¹⁶⁹ Both are also somewhat limited in terms of the claims covered—New York’s is limited to sexual harassment, while California’s is limited to sex-based discrimination and harassment claims.¹⁷⁰ Both also include an exception if the victim requests a secrecy provision.¹⁷¹ Pennsylvania’s proposed bill is somewhat circumscribed.¹⁷² It is limited to claims involving sexual misconduct, but covers all contracts and does not provide for a procedural exception that would allow the victim to request confidentiality.¹⁷³

Both New York and California are also considering broader statutes.¹⁷⁴ California’s Assembly Bill 3080 would prohibit employers from imposing contracts that prevent employees from disclosing “an instance of sexual harassment” or “opposing any unlawful practice.”¹⁷⁵ California’s Senate Bill 1300 would limit non-disparagement agreements entered into as a condition of employment.¹⁷⁶ Similarly, New York’s proposed Senate Bill 6382-A would render unenforceable any contract “which has the purpose or effect of concealing the details relating to a claim of discrimination, non-payment of wages or benefits, retaliation, harassment, or violation of public policy in employment.”¹⁷⁷ The last of these, “violation of public policy in employment,”¹⁷⁸ refers to a common law whistleblower claim that protects employees from retaliation for disclosures that advance a public policy interest articulated by the state courts or legislatures.¹⁷⁹ This co-

168. Cal. S. 820 § 1(a); N.Y. S. 7507-C (KK)(D).

169. Cal. S. 820 § 1(a); N.Y. S. 7507-C (KK)(D).

170. Cal. S. 820 § 1(a); N.Y. S. 7507-C (KK)(D).

171. Cal. S. 820 § 1(b).

172. S. 999, 2017 Gen. Assemb., Reg. Sess. (Pa. 2017).

173. *Id.*

174. Assemb. B. 3080, 2017–18 Reg. Sess. (Cal. 2018); S. 6382-A, 240th Leg., Reg. Sess. (N.Y. 2018).

175. Cal. Assemb. B. 3080 § 3. This bill would not be limited to contracts imposed “as a condition of employment” but also provisions “as a condition of entering into a contractual agreement.” This would seemingly cover any agreement where the disclosure is not optional for the employee. *Id.*

176. S. 1300, 2017–18 Leg. Sess. (Cal. 2018).

177. N.Y. S. 6382-A § 2.

178. *Id.*

179. RESTATEMENT OF EMP’T LAW §§ 5.01–5.03 (AM. LAW INST. 2015).

vers a broad range of whistleblowing, including matters of consumer harm,¹⁸⁰ health and safety,¹⁸¹ criminal conduct,¹⁸² and even environmental harms.¹⁸³ The New York law effectively covers any disclosure an employee might make about unlawful conduct, employment-related or otherwise.

In sum, while Title VII and Section 7 of the NLRA may protect employees who speak out against harassment, those rights can be waived through settlement agreements. A number of states have sought to alter this state of affairs by rendering certain secrecy-related provisions unenforceable. Part III examines how employers are likely to change their practices in response to such legislation.

III. PRACTICES COMPELLED BY LEGISLATIVE CHANGES

The MeToo movement is broadly moving employment practices to a form of forced transparency. Employees who have experienced harassment or discrimination are more likely to speak publicly, forcing employers to respond. In addition, proposed state legislation seeks to limit employers' ability to use contracts to restrain employees from speaking publicly.

If states pass legislation restricting secrecy for harassment or other employment claims, it will limit, though not eliminate, provisions in employer contracts and policies that restrict employee speech. As explained in greater detail below, employers can continue to use some of their existing contract and policy provisions, provided they contain a carve-out for certain types of disclosures. Other types of provisions will need to be narrowed or removed entirely, especially provisions that promise secrecy to an employee accused of misconduct.

In this Section, the Article examines how proposed legislation will limit employers' ability to demand—and promise—confidentiality through their contracts and policies.

180. *Tameny v. Atl. Richfield Co.*, 610 P.2d 1330, 1333 (Cal. 1980).

181. *Hobson v. McLean Hosp. Corp.*, 522 N.E.2d 975, 977 (Mass. 1988); *O'Sullivan v. Mallon*, 390 A.2d 149, 150 (N.J. Super. Ct. Law Div. 1978).

182. *Palmateer v. Int'l Harvester Co.*, 421 N.E.2d 876, 877 (Ill. 1981).

183. *Phipps v. Clark Oil & Refining Corp.*, 408 N.W.2d 569, 570 (Minn. 1987).

A. CARVE-OUTS IN CONFIDENTIALITY AGREEMENTS AND SOCIAL MEDIA POLICIES.

While public debates about secrecy provisions have generally centered on settlement agreements containing non-disclosure provisions, secrecy provisions also appear in standard employee forms and policies, including confidentiality agreements and social media policies.

Employees typically sign some form of confidentiality agreement at the start of their employment.¹⁸⁴ These agreements restrict an employee's ability to disclose the company's confidential information. The term "confidential information" is typically defined as "information related to the company's business," followed by a non-exhaustive list of examples of business information, such as business plans, technical information, and source code.¹⁸⁵ Depending on how the contract is worded,¹⁸⁶ such provisions may not even cover disclosures relating to an employee's experience of harassment or discrimination in the workplace. As a matter of contract interpretation, such experiences may fall outside the definition of confidential information and the employee would be free as a contractual matter to disclose such information.¹⁸⁷

Employers also use policies to restrict employee speech. The growth of social media has led employers to be especially concerned that employees will use it to disparage the company's products or work environment in ways that will impair their brand.¹⁸⁸ Consequently, employers commonly adopt policies that limit how current employees can use social media, even away

184. See, e.g., Joshua Mates, *Tips for Onboarding Employees to Early-Stage Companies*, COOLEYGO, <https://www.cooleygo.com/tips-onboarding-employees-early-stage-companies> (last visited Oct. 22, 2018) ("It is essential that every employee (including founders and other executives) sign a confidentiality and inventions assignment agreement.").

185. M. SCOTT McDONALD & JACQUELINE C. JOHNSON, *UNFAIR COMPETITION AND INTELLECTUAL PROPERTY PROTECTION IN EMPLOYMENT LAW: CONTRACT SOLUTIONS AND LITIGATION GUIDE* 180 (2014).

186. *Id.* at 180–81 (describing variants in contract language).

187. *But see* *Coady v. Harpo, Inc.*, 719 N.E.2d 244, 247 (Ill. App. Ct. 1999) (enforcing a confidentiality agreement that prohibited an employee from disclosing any information "related to or concerning: (a) Ms. [Oprah] Winfrey and/or her business or private life . . . and/or (c) Harpo's employment practices or policies").

188. See, e.g., Elizabeth Allen, Note, *You Can't Say That on Facebook: The NLRA's Opprobriousness Standard and Social Media*, 45 WASH. U. J.L. & POL'Y 195, 209 (2014).

from work.¹⁸⁹ These policies vary but generally require that employees disclaim that they are not speaking on the company's behalf.¹⁹⁰ They also remind employees not to disclose the company's confidential information.¹⁹¹ An aggressive social media policy will attempt to prohibit employees from saying anything disparaging about the company or its product.¹⁹²

189. WILLIAM H. FRANKEL ET AL., CORPORATE COMPLIANCE SERIES: DESIGNING AN EFFECTIVE INTELLECTUAL PROPERTY COMPLIANCE PROGRAM § 4:68 (2017–18 ed. 2017); Daniel Oberdorfer et al., *Policy on Blogging, Social Networking, Tweeting, and Other Public Discourse on the Internet*, WEST'S LEGAL FORMS, EMPLOYMENT § 5.92 (2018).

190. See, e.g., Three D, LLC, 361 N.L.R.B. 308, 316 (2014) (describing a social media policy that required employees to “include a disclaimer that the views you share are yours, and not necessarily the views of the Company”); ADIDAS GRP., ADIDAS GROUP SOCIAL MEDIA GUIDELINES 1 (2016), <https://www.gameplan-a.com/wp-content/uploads/2016/04/adidas-Group-Social-Media-Guidelines.pdf> (requiring employees “make clear that [they] are speaking for [themselves] and not for the Group”); FRANKEL ET AL., *supra* note 189 (“Express only your personal opinions . . . Clearly state that your views do not represent the views of the [name of employer], other employees, members, customers, or suppliers.”); Oberdorfer, *supra* note 189 (“You must explicitly and conspicuously state that the views you are articulating are your own and not the views of the Company. You must not state or imply you are speaking for the Company.”); *Best Buy Social Media Policy*, BEST BUY (July 21, 2016), <http://forums.bestbuy.com/t5/Welcome-News/Best-Buy-Social-Media-Policy/td-p/20492> (“[Y]ou must state that the views expressed are your own.”); *Ford Motor Company's Digital Participation Guidelines*, FORD MOTOR CO., (Aug., 2010), <https://www.scribd.com/doc/36127480/Ford-Social-Media-Guidelines>, (“Make it clear that the views expressed are yours.”).

191. See, e.g., FRANKEL ET AL., *supra* note 189, § 4:67 (“I will not disclose, publish or use, directly or indirectly, any information of the [name of employer] or of any person or firm working in conjunction with [name of employer], unless I receive express authorization from the [name of employer].”); *supra Best Buy Social Media Policy*, *supra* note 190; *IBM Social Computing Guidelines*, IBM, <https://www.ibm.com/blogs/zz/en/guidelines.html> (last visited Sept. 28, 2018).

192. See, e.g., NLRB, OM 11-74, REPORT OF THE ACTING GENERAL COUNSEL CONCERNING SOCIAL MEDIA CASES (2011) (noting that a company violated Section 7 when employer's handbook prohibited “making disparaging remarks when discussing the company or supervisors, and from depicting the company in any media, including but not limited to the internet,” and also prohibited “posting pictures of themselves in any media, including the internet, which depict the company in any way”); FRANKEL ET AL., *supra* note 189 § 4.68 (“Avoid using statements, photographs, video, or audio . . . that disparage customers, members, employees of [name of employer], suppliers . . .”). *But cf.* Christopher P. Calsyn & Moring, LLP, *Employer Social Media Policies: The “Do’s and Don’ts,”* LEXISNEXIS (May 4, 2013), <https://www.lexisnexis.com/communities/corporatecounselnewsletter/b/newsletter/archive/2013/05/04/employer-social-media-policies-the-dos-and-don-ts.aspx> (advising companies not to “include blanket prohibitions on defaming or otherwise damaging the reputation of coworkers, clients or the company”); David Greenhaus, *IT Resources and Communications Systems Policy*, WESTLAW: PRACTICAL LAW (Aug. 28, 2018) (“Re-

Whether employers make changes to these form policies and agreements will depend in part on the breadth of the legislation ultimately passed. Where the law only limits settlement agreements, employers need not make changes to their standard confidentiality agreements and social media policies.¹⁹³

If states pass broader legislation, employers are likely to include carve-outs to their confidentiality agreements and social media policies. The carve-outs might explain, for example, that the term “confidential information” does not include information regarding harassment, discrimination, or other unlawful conduct. Of course, an argument could be made that such carve-outs are not strictly necessary. Depending on the wording of the contract, the term “confidential information” could be interpreted to exclude disclosures of unlawful conduct. Absent state legislation, federal protections essentially create an implied exception to confidentiality agreements and social media policies. Nevertheless, because intellectual property can be so critical to a company’s business, it will not want to risk the enforceability of its confidentiality provision, or the agreement as a whole. Carve-outs will likely be viewed as a prudent measure to ensure the integrity of confidentiality agreements.

Social media policies are likely to include similar carve-outs for provisions in the policy that limit an employee’s speech. However, employers might not want employees to know that they are entirely free to speak out on matters that could be extremely embarrassing to the company or damage their brand. Consequently, employers have an incentive to obscure the nature of the carve-out by using technical language. For example, some employers responded to NLRB decisions regarding concerted activity with vague carve-outs, even as NLRB opinions cautioned that such language would not pass legal muster.¹⁹⁴ Some employers included exceptions in their social media policy for

member that you are also bound by [EMPLOYER NAME]’s policy against [defamation and/or disparagement].”). As discussed in greater detail below, these broad policies may already violate Section 7 of the National Labor Relations Act.

193. Sometimes settlement agreements incorporate these earlier policies by reference. In those situations, the settlement agreement should contain a carve-out for the types of speech restrictions enumerated in the applicable statute.

194. See also *Three D, LLC*, 361 N.L.R.B. 308, 314 (Aug 22, 2014) (scrutinizing social media policies and finding a Section 7 violation where “employees would reasonably interpret it to encompass protected activities”); *Martin Luther Mem’l Home, Inc.*, 343 N.L.R.B. 646, 647 (Nov. 19, 2004) (finding that policies violate Section 7 when “employees would reasonably construe the language to prohibit Section 7 activity”); Levinson, *supra* note 142, at 314, 335 (noting some

“rights under Section 7 of the NLRA,” without explaining what those rights include,¹⁹⁵ or noted that the policy did not apply where prohibited by law.¹⁹⁶ In the context of harassment and discrimination, employers have an incentive to use coded language in their carve-outs, such as exceptions for disclosures “protected by law,” which does not reveal the scope of the carve-out.

B. NARROWER LANGUAGE IN SETTLEMENT AGREEMENTS WITH COMPLAINANTS

Settlement agreements with harassment victims will likewise be affected by the proposed legislation, although the precise effect will depend on the structure of the law. Most of the proposed legislation renders certain restraints unenforceable, whether in connection with litigation or not.¹⁹⁷ By contrast, California’s proposed Senate Bill 820 is an amendment to the Code of Civil Procedure, and its scope is limited to “civil actions” where the pleadings allege sexual assault, sex-based harassment, or sex-based discrimination.¹⁹⁸ Because the statute is limited to post-filing settlements, secrecy-related provisions would still be permitted in settlement agreements signed before a case is filed.

Settlement agreements (often labeled “separation agreements” or “separation and release agreements”) can contain several different types of provisions that might limit an employee’s ability to speak out:

uncertainty over the type of carve-out that would be satisfactory to the NLRB); Robson, *supra* note 141, at 87, 97 (noting Section 7 violations where employers discipline pursuant to an overbroad social media policy).

195. See, e.g., FRANKEL ET AL., *supra* note 189, § 4:67 (providing a form social media policy containing a carve-out: “This provision does not apply to employees’ right to discuss terms and conditions of employment and engage in concerted activities under Section 7 of the National Labor Relations Act”); Oberdorfer, *supra* note 189 (“Nothing in this policy is intended or will be construed to restrict any of your rights under the National Labor Relations Act . . . or your rights to discuss the terms and conditions of your employment.”). *But see Company Social Media Use Guidelines*, WESTLAW: PRACTICAL LAW (2018) (containing a much more specific carve-out for concerted activity, referencing “discussing wages, benefits, or terms and conditions of employment, forming, joining or supporting labor unions, bargaining collectively through representatives of their choosing, raising complaints about working conditions for their and their fellow employees’ mutual aid or protection, or legally required activities”).

196. See Levinson, *supra* note 142, at 334–35.

197. S. 1300, 2017–18 Reg. Sess. (Cal. 2018); Assemb. B. 3080, 2017–18 Reg. Sess. (Cal. 2018); S. 6382-A, 240th Leg., Reg. Sess. (N.Y. 2018); S. 7507-C, 241st Leg., Reg. Sess. (KK)(D) (N.Y. 2018); S. 999, 2017 Gen. Assemb., Reg. Sess. (Pa. 2017).

198. S. 820, 2017–18 Reg. Sess. § 1(a) (Cal. 2018).

Non-disclosure provision. Non-disclosure provisions can prohibit the employee from revealing the amount of the settlement, discussions leading up to the settlement, the fact of the settlement agreement, or even the facts giving rise to the dispute.¹⁹⁹

Non-disparagement provision. Non-disparagement provisions, in their narrow form, only prohibit the employee from engaging in defamation, slander, or libel.²⁰⁰ Broader non-disparagement provisions prohibit the employee from making statements that are harmful to the reputation of the other party to the agreement.²⁰¹

199. See *Voluntary Employment Separation Agreement and Release*, Exhibit 10(u), U.S. SEC. & EXCHANGE COMMISSION, <https://www.sec.gov/Archives/edgar/data/74303/000119312504036954/dex10u.htm> (last visited Oct. 22, 2018); see also *Gulliver Schs., Inc. v. Snay*, 137 So. 3d 1045, 1046 (Fla. Dist. Ct. App. 2014) (referencing the confidentiality provision of a settlement agreement providing that the “plaintiff shall not either directly or indirectly, disclose, discuss or communicate to any entity or person, except his attorneys or other professional advisors or spouse any information whatsoever regarding the existence or terms of this Agreement”); *Wesson v. FMR, LLC*, 34 Mass. L. Rptr. 539, 541 n.4 (Mass. Dist. Ct. 2017) (“The Employee will keep the existence, terms, and amount of this Agreement in strictest confidence and not disclose any information concerning this Agreement to anyone other than her lawyer, her spouse, immediate family members, financial adviser, accountants or as required by law.”); *Mathis v. Controlled Temperature, Inc.*, No. 275323, 2008 WL 782634, at *6 (Mich. Ct. App. 2014) (quoting a settlement agreement providing that “the fact of and terms of this Agreement are strictly confidential and shall not verbally or through disclosure in writing of any kind be communicated . . . to any person or entity by any means”); *Carlini v. Gray Television Grp., Inc.*, No. A-15-1239, 2017 WL 1653624, at *1 (Neb. Ct. App. May 2, 2017) (quoting settlement agreement providing that the “existence of this Agreement, the substance of this Agreement, and the terms of this Agreement shall be kept absolutely and forever confidential”).

200. *Separation Agreement and Mutual Release*, Exhibit 10.27, U.S. SEC. & EXCHANGE COMMISSION (Dec. 28, 2004), https://www.sec.gov/Archives/edgar/data/1096560/000129707705000001/ex10_27.htm.

201. *Mutual Release and Non-Disparagement Agreement*, Exhibit 10.3, U.S. SEC. & EXCHANGE COMMISSION (Jan. 28, 2004), <https://www.sec.gov/Archives/edgar/data/866054/000086605404000014/release.htm>; see also *Smelkinson Sysco v. Harrell*, 875 A.2d 188, 191 (Md. Ct. Spec. App. 2005) (citing a non-disparagement provision stating that “Mr. Harrell agrees not to disparage the Company and the Company agrees not to disparage Mr. Harrell”); *Wesson*, 34 Mass. L. Rptr. at 541 n.3 (noting a non-disparagement provision where an employer promised to deliver signed statements from enumerated managers agreeing “to not make any statements, take any actions, or conduct themselves in any way that adversely affects Employee’s . . . personal or professional reputation or endeavors”); *Mathis*, 2008 WL 782634, at *6 (discussing an agreement providing that “she shall not verbally or in writing by any means to any other person . . . disparage, criticize, condemn, or impugn the reputation or character of CTI, its shareholders, affiliates, agents, officers, directors and/or employees”); *Carlini*, 2017 WL 1653624, at *1 (referencing a settlement agreement providing

Non-cooperation clause. Non-cooperation clauses prohibit parties from cooperating with others in litigation against the company, although they typically include a carve-out for subpoenas or court orders.²⁰²

Affirmative statements. In its more mundane form, a settlement agreement might contain a promise to provide a neutral recommendation.²⁰³ However, the Harvey Weinstein scandal revealed some instances where settlement agreements required victims to make affirmative statements. In one case, Weinstein required one of his victims to sign an attached statement about her work experience, which could be used to undermine her credibility should she later take a contrary public position.²⁰⁴ In another contract, Weinstein apparently required a signatory to say “positive things” if she were ever contacted by the media.²⁰⁵

The proposed legislation will tend to affect the enforceability of all four types of provisions. These statutes reach provisions that prevent the disclosure of information about certain claims, and all the above-listed provisions could have that effect.²⁰⁶ For example, when a victim discloses workplace harassment, it will have a detrimental effect on the employer’s reputation, and thereby breach a broad non-disparagement provision. Enforce-

that the “Employee will not make any disparaging public remarks about the Company or any of its officers, directors, agents, or employees”).

202. See Stephen Gillers, *Speak No Evil: Settlement Agreements Conditioned on Noncooperation Are Illegal and Unethical*, 31 HOFSTRA L. REV. 1, 21 (2002); see also *Smelkinson*, 875 A.2d at 191 (enforcing provision that plaintiff would “neither voluntarily aid nor voluntarily assist in any way third party claims made or pursued against the Company”).

203. See, e.g., *Wesson*, 34 Mass. L. Rptr. at 541 n.3 (noting that in its settlement, an employer agreed to sign a reference document attached to the agreement); *Mathis*, 2008 WL 782634, at *11 (discussing a settlement agreement providing that “upon request, it shall provide a neutral reference for Mathis’ [sic] future employment, confirming the dates and positions of her employment with CTI only”).

204. Terry Gross, *Times’ Reporters Describe How a Paper Trail Helped Break the Weinstein Story*, NPR (Nov. 15, 2017), <https://www.npr.org/2017/11/15/564310240/times-reporters-describe-how-a-paper-trail-helped-break-the-weinstein-story>.

205. *Id.*

206. S. 820, 2017–18 Reg. Sess. (Cal. 2018) (“prevents the disclosure of factual information”); Assemb. B. 3080, 2017–18 Reg. Sess. (Cal. 2018) (“prohibiting . . . from disclosing”); S. 6382-A, 240th Leg., Reg. Sess. (N.Y. 2017) (“purpose or effect of concealing”); S. 999, 2017 Gen. Assemb., Reg. Sess. (Pa. 2017) (“suppresses or attempts to suppress”); cf. S. 1300, 2017–18 Reg. Sess. (Cal. 2018) (limited to non-disparagement agreements).

ment of that non-disparagement provision would prevent an employee from disclosing the facts of her case, and would therefore be unenforceable as written.

The legislation may even affect the enforceability of narrow non-disparagement provisions, which prohibit only statements that qualify as defamation, libel, or slander. As a technical matter, these provisions do not restrict a victim from making truthful statements about the company or its employees. An employee who speaks out is subject to liability for defamation, libel, and slander regardless of whether the employee agrees to refrain from doing so in a contract. However, it is not difficult to imagine how such a provision would make an employee fearful of speaking and in that respect, prevent or suppress an employee's disclosure of facts relating to her case. Consequently, it is possible such provisions would likewise be declared unenforceable as written.

Likewise, a non-cooperation agreement could prevent a victim from disclosing harassment to another employee considering suing the employer, which also has the effect of concealing the facts. Compelled statements could also have the effect of concealment, where the victim worries it will be used to impeach her credibility, or where a forced positive statement falsely suggests the absence of misconduct.

Speech-restricting provisions may be salvageable in some states through carve-outs or clarifying language. For example, a non-disparagement provision might be salvageable with a carve-out stating that nothing in the agreement should be interpreted to limit an employee's ability to disclose harassment, or other protected claims enumerated in the statute.

By contrast, non-cooperation clauses and affirmative statement clauses rest on somewhat shakier ground. Even before the MeToo movement, commentators have questioned the legality of such clauses. Although non-cooperation clauses typically contain an exception for subpoenas, critics note that such exceptions nevertheless hamper the civil justice system by making past litigants unavailable as voluntary witnesses. Jon Bauer argues that attorneys should not permit clients to sign such clauses because they violate attorney ethics rules, which prohibit attorneys from actions "prejudicial to the administration of justice."²⁰⁷ Stephen

207. Jon Bauer, *Buying Witness Silence: Evidence-Suppressing Settlements and Lawyers' Ethics*, 87 OR. L. REV. 481, 481 (2008). *But see* Smelkinson, 875 A.2d at 191 (enforcing non-cooperation provision).

Gillers went further, arguing that lawyers commit obstruction of justice when they request non-cooperation clauses.²⁰⁸

While an employer's promise to provide the victim with a truthful recommendation letter would not necessarily run afoul of the statutory restrictions, provisions requiring victims to make affirmative statements would be problematic. Requiring an employee to make an affirmative statement implies that it is contrary to what the victim would otherwise say, and therefore may be inaccurate or misleading.²⁰⁹ Such provisions would consequently be suspect under the proposed legislation, with the exception of pre-filing agreements under California's Senate Bill 820.²¹⁰

In summary, while employers will still be able to demand some speech restrictions through settlement agreements, those restrictions will be substantially limited.

The legislation may also have some unintended effects, as it relates to the victim's ability to request secrecy of the employer. For broader legislation without an express exception for victim requests, non-disclosure provisions may need to include a carve out allowing the employer to disclose facts relating to the case. Similarly, broad non-disparagement provisions in the victim's favor may need to include a carve out allowing the employer to disclose truthful facts. By contrast, narrow non-disparagement provisions might be enforceable to protect the victim, since they wouldn't operate to conceal the misconduct.

The possibility that this legislation might restrict a victim's ability to request secrecy from the employer implicates larger policy debates raised in the literature.²¹¹ Prominent plaintiff's

208. Gillers, *supra* note 202, at 21–22.

209. These provisions are, however, exceptionally rare.

210. It might also be permissible if requested by the victim under California S. 820 and New York S. 7507C, but such statements would likely need to be mutual for them to be credibly interpreted as requested by the victim. *See* S. 820, 1999 Leg. (Cal. 1999); S. 7505-C, 24th Leg., Reg. Sess. (N.Y. 2018).

211. In addition, Scott Moss's analytical framework would predict that the New York, Pennsylvania, and New Jersey approach may have distributive implications for plaintiffs and make such cases more difficult to settle overall. *See* Moss, *supra* note 153, at 880. In a regime where employers value secrecy more than employees, employees are able to extract a higher settlement than they otherwise would as a result of settlement. *Id.* at 879–80. Removing that option may mean lower settlements for plaintiffs, or in some cases no settlement. *Id.* at 889. Nevertheless, lower settlement rates may be preferred as a matter of public policy. The premium plaintiffs have received in the past for confidential settlements could be characterized as a “negative externality” in economic terms, because the promise of confidentiality comes at the expense of future victims who could have benefited from the information. MeToo is a case in point,

lawyer Gloria Allred argued that some plaintiffs prefer secrecy and their preferences should be honored.²¹² As Carrie Menkel-Meadow argued, parties should be able choose, since the dispute belongs to them.²¹³ However, as Minna Kotkin argues, the choice is illusory; if employers are allowed to ask for these provisions, they will.²¹⁴ Indeed, the California statute would appear to allow the victim to “request” a mutual non-disclosure provision, which could potentially be susceptible to employer manipulation.

The legislation may also have an unintended effect with respect to parties’ bargaining strategy. Scott Moss’s law and economics analysis is instructive. As he observed, a California rule that restricts secret settlements post-filing, but permits them on a pre-filing basis, would push employers towards early settlement, which would save litigation costs overall.²¹⁵ While such an approach would generally promote settlement, it also undermines the transparency-related goals that motivated the legislation in the first place. This approach is also likely to create an adverse selection problem, where employers have an incentive to settle the most egregious cases before they are revealed in litigation.²¹⁶ If California legislators intended to expose the worst abuses of settlement agreements, Senate Bill 820 is unlikely to achieve that result. After all, cases that have been filed with a court are already part of the public record, providing some notice to current and future employees about sexual harassment or discrimination. By contrast, Harvey Weinstein was able to conceal his conduct by settling cases as quickly as possible on a pre-filing

as the high-profile harassers identified in 2017 were revealed to have harassed multiple victims. Corey, *supra* note 13. In this view, prohibitions on pre- or post-filing provisions correct the negative externality, and essentially force employers to address the risk that the accused employee may engage in similar misconduct in the future.

212. James Rufus Koren, *Weinstein Scandal Puts Nondisclosure Agreements in the Spotlight*, L.A. TIMES (Oct. 23, 2017), <http://www.latimes.com/business/la-fi-weinstein-nondisclosure-agreements-20171023-story.html>.

213. See Menkel-Meadow, *supra* note 156, at 2694.

214. See Kotkin, *supra* note 162, at 929–30.

215. Moss, *supra* note 153, at 886, 889.

216. See Zev Eigen & David Sherwyn, *Deferring for Justice: How Administrative Agencies Can Solve the Employment Dispute Quagmire by Endorsing an Improved Arbitration System*, 26 CORNELL J.L. & POL’Y 217, 261 (2016) (“[E]mployers settle cases with bad facts at early stages.”); Jennifer B. Shinall, *The Substantially Impaired Sex: Uncovering the Gendered Nature of Disability Discrimination*, 101 MINN. L. REV. 1099, 1116 (2017) (“[E]mployers have a financial incentive to settle the most egregious discrimination claims before a lawsuit is filed . . .”).

basis.²¹⁷ A California SB 820-type rule would enable future Harvey Weinstens to continue in that pattern, unless they happen to encounter a plaintiff who refuses to settle pre-filing.

If the ultimate purpose of legislation is to expose misconduct that had previously been concealed, California would come closer to doing so through a rule that prohibited all such agreements (pre-filing or otherwise), or through a rule that only prohibits secrecy for *pre-filing* settlements. A pre-filing rule would permit secrecy provisions in settlements after a case has been filed. That would enable both parties to use the restrictions to protect their reputations, while satisfying the public interest in having some record of a claim. Indeed, in recent months, victims have used non-disparagement and non-disclosure agreements to their advantage, arguing that harassers violated those provisions when they suggested that the claimant's lawsuit lacked merit.²¹⁸ Even before the MeToo movement, victims periodically sued to enforce non-disparagement and non-disclosure provisions.²¹⁹

Another option might be to draft asymmetric legislation that would allow the victim to restrain the employer from discussing her case without her prior consent, but that would prohibit the employer from demanding secrecy from the victim. Such an option would give the victim elective secrecy—the victim need not keep the information secret at a later date but would be assured that the employer would keep such information confidential. If the victim chooses to speak out at a later date, courts could treat

217. Gross, *supra* note 204.

218. Gene Maddaus, *Two More Accusers Sue Bill O'Reilly for Defamation*, VARIETY (Dec. 20, 2017), <http://variety.com/2017/biz/news/bill-oreilly-defamation-more-accusers-1202646279>.

219. See, e.g., *Tomson v. Stephan*, 696 F. Supp. 1407, 1407 (D. Kan. 1988) (alleging breach of confidentiality provision when defendant asserted publicly that the claim was totally unfounded). In *Tomson*, the claimant ultimately survived summary judgment based on a separate “false light” publicity claim, which challenged the defendant's public assertions that her claim was totally unfounded. *Id.* at 1412–13; see also *Welsh v. City of S.F.*, No. C-93-3722, 1995 WL 714350, at *1 (N.D. Cal. Nov. 27, 1995) (alleging defamation against police chief for calling her harassment lawsuit “absolutely absurd” and “false and malicious”); *Wesson v. FMR, LLC*, 34 Mass. L. Rptr. 539, 541 (Mass. Dist. Ct. 2017) (employee sued for breach of settlement provisions relating to providing an employment reference); *Halco v. Davey*, 919 A.2d 626, 628 (Me. 2007) (employee stated cognizable breach of contract claim based on non-disclosure and non-disparagement provision when sheriff publicly stated that the county “had a really good case”). But see *Mathis v. Controlled Temperature Inc.*, No. 275323, 2008 WL 782634, at *6–7 (Mich. Ct. App. Mar. 25, 2008) (finding breach of non-disparagement provision of settlement agreement where the plaintiff told a prospective employer that she had been harassed and that she won her dispute).

such speech as a waiver of the employer's promise of confidentiality, which would enable the company to respond in the event of a public relations crisis.

C. NO MORE PROMISES OF SECRECY TO THE ACCUSED EMPLOYEE

Perhaps the most significant, and underexamined, effect of the legislation will be in limiting employers' ability to make secrecy-related promises to employees accused of harassment. This may result in broader policies where employers refuse to make secrecy-related promises to any departing executive. On those occasions where employers agree to enter into such provisions, they will likely be substantially narrowed or include carve outs commensurate with the scope of the statute.

While media coverage of settlement agreements has focused almost exclusively on harassment victims, it is also quite common for departing executives to enter into settlement agreements with employers. Executives entitled to severance under their executive employment contracts often include provisions requiring them to sign a release to receive that severance.²²⁰ In addition, employees accused of harassment or other misconduct sometimes threaten to sue their employers for claims such as

220. See, e.g., Richard Harroch, *Negotiating Employment Agreements: Checklist of 14 Key Issues*, FORBES (Nov. 11, 2013), <https://www.forbes.com/sites/allbusiness/2013/11/11/negotiating-employment-agreements-checklist-of-14-key-issues/#667fd60d24c6> (advising that executives should be required to sign a release in order to receive severance); Idexx Laboratories, *Form of Executive Employment Agreement*, U.S. SEC. & EXCHANGE COMMISSION, https://www.sec.gov/Archives/edgar/data/874716/000087471607000002/exh10_5formemploygmt.htm (last visited Oct. 22, 2018) (requiring executive to sign a release to receive severance); Midstates Petroleum Company, Inc., *Form of Executive Employment Agreement*, U.S. SEC. & EXCHANGE COMMISSION, <https://www.sec.gov/Archives/edgar/data/1533924/000119312512018816/d248475dex107.htm>(same); Symantec Corp., *Executive Employment Agreement*, U.S. SEC. & EXCHANGE COMMISSION, <https://www.sec.gov/Archives/edgar/data/849399/000119312512366711/d394740dex1001.htm> (last visited Oct. 22, 2018) (same).

defamation,²²¹ privacy violations,²²² or breach of contract.²²³ Even if these claims lack merit,²²⁴ the employer may nevertheless enter into some form of settlement agreement in order to eliminate the risk of any subsequent lawsuit.²²⁵

221. *Meyerson v. Harrah's E. Chi. Casino*, 67 F. App'x 967, 968 (7th Cir. 2003) (affirming summary judgment against defamation claim by accused, because "truth is a complete defense to defamation"); *Welsh*, 1995 WL 714350, at *9 (statements alleged to be defamatory covered by the litigation privilege); *Rudebeck v. Paulson*, 612 N.W.2d 450, 454 (Minn. Ct. App. 2000) (manager's defamation claim in response to harassment lawsuit unviable due to qualified privilege).

222. *Smith v. Ark. La. Gas Co.*, 645 So. 2d 785, 791 (2d Cir. 1994) (qualified privilege applies to privacy claims, including false light and "unreasonable public disclosure of embarrassing private facts" where "an employer who undertakes an investigation of employee misconduct is protected by a qualified or conditional privilege when making a statement in good faith, on a subject in which the employer has an interest or duty, to persons having a corresponding interest or duty"); *Lloyd v. Quorum Health Res., LLC*, 77 P.3d 993, 1001 (Kan. Ct. App. 2003) (quoting *Dominguez v. Davidson*, 974 P.2d 112 (Kan. 1999) (noting that elements of false light are: "(1) publication of some kind must be made to a third party; (2) the publication must falsely represent the person; and (3) that representation must be highly offensive to a reasonable person"). The court in *Lloyd* also noted that defamation and false light claims are similar in that "truth and privilege are defenses available in both causes of action." *Id.* at 1002.

223. *Wong v. Digitas Inc.*, No. 3:13-CV-00731, 2015 WL 59188, at *3, *7 (D. Conn. Jan. 5, 2015) (harassment procedures in anti-harassment policy did not create an exception to the employment-at-will doctrine that would require the employer to interview the accused before terminating him); *Carlton v. Dr. Pepper Snapple Grp., Inc.*, 228 Cal. App. 4th 1200, 1210–11 (Cal. Ct. App. 2014) (breach of contract claim brought by accused employee properly dismissed because he failed to identify contractual promises that were breached); *see also Martin v. Baer*, 928 F.2d 1067, 1072–73 (11th Cir. 1991) (affirming summary judgment claim against accused employee alleging breach of contract and infliction of emotional distress, which were eventually dismissed on the basis that harassment policy did not create an implied duty to those accused of harassment and the absence of intentional conduct on the part of the employer); *Orr v. Meristar Vt. Beverage Corp.*, No. 2003-143, 2003 WL 25745111, at *2 (Vt. Aug. 2003) (affirming summary judgment on breach of contract claim brought by accused).

224. *See, e.g., Welsh*, 1995 WL, 714350 at *4 (accused filed counterclaim against harassment plaintiff for defamation, but lost on summary judgment for failing to exhaust administrative remedy); *Rudebeck v. Ford Motor Co.*, 612 N.W.2d 450, 454 (Minn. Ct. App. 2000) (manager sued employer and complainant for defamation in response to employee's harassment lawsuit); *Rausman v. Baugh*, 248 A.D.2d 8, 10 (N.Y. App. Div. 1998) (supervisor terminated for harassment brought defamation claim against complainant and the employer).

225. For example, accused harassers may have valid claims for indemnification under state law. *See, e.g., CAL. LAB. CODE* § 2802(a) (West 2016) (providing for indemnification for "all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties"); *Rudebeck*, 612 N.W.2d at 455 (quoting Del. Ch. Code § 145(c), noting that Delaware Chancery Code provides for "mandatory indemnification for any person who is a party

While settlement agreements are typically drafted to consist almost exclusively of promises in the employer's favor, attorneys for departing executives commonly request that certain promises be made mutual. These include three of the four types of provisions previously discussed: non-disclosure provisions, non-disparagement provisions, and promises to make affirmative statements.²²⁶

While employers may have previously been somewhat receptive to such requests, they would no longer be feasible under the proposed legislation. First, a provision where the employer promises not to disclose information about the accused in connection with a harassment claim would not be enforceable under any of the proposed statutes. Such a provision would clearly prevent or suppress disclosures relating to the harassment.

Similarly, a broad non-disparagement provision would prevent or have the effect of concealing the employer's ability to speak about the misconduct, which would violate the statute. Narrow non-disparagement provisions are difficult to assess where they restrain employers. In theory, employers ought to understand that a promise not to defame the employee does not preclude them from disclosing truthful information. Nevertheless, as to accused employees, employers might be fearful that repeating or conveying information from the victim could expose them to liability and therefore restrict them from speaking. If so, such a provision could have the "effect of" concealment, violating the proposed New York law.²²⁷

Employers are also likely to be reluctant to provide positive recommendation letters as part of a settlement with an accused harasser. A letter that contains positive information about the accused, while omitting information about the accusations, may have the effect of concealing misconduct.

These same factors might limit an employer's willingness to make secrecy-related promises to any executive in the course of negotiating settlement and release agreements upon their departure. Even if an individual has not been accused of misconduct, the employer might later learn of accusations against that employee. At that later point in time, those provisions would

to a lawsuit by reason of the fact that he is or was a director, officer, employee or agent of the corporation" where the director or officer "has been successful on the merits or otherwise in the defense of any action").

226. Non-cooperation clauses are not something that a company would be willing to make mutual.

227. S. 6382A, 2017 S., Reg. Sess (N.Y. 2017).

serve to prevent disclosures of misconduct, in violation of the rule. To avoid this problem, employers may prefer to avoid secrecy promises in these agreements altogether, or to include carve outs for disclosures relating to claims specified in the statute.

IV. VOLUNTARY CHANGES TO DISCIPLINARY PRACTICES

Employers are likely to make substantial changes to their practices beyond those compelled by law. The MeToo movement produced a substantial shift in the risks associated with harassment claims.²²⁸ Before MeToo, harassment was viewed as a risk that employers could largely contain. Harassment is not a new legal risk; employers now have some thirty years of experience in dealing with harassment claims. Consequently,²²⁹ harassment claims were routine enough to be viewed as a cost of doing business, which did not demand substantial scrutiny or revision of their practices. In addition, employers could mitigate the risk of a large lawsuit through Employment Practices Liability Insurance, which can cover both the fees and the settlement or judgment associated with harassment claims.²³⁰

MeToo altered this calculus considerably because employees suddenly felt free to air their experiences of harassment publicly. This imposed reputational costs overlooked in prior decision making by employers. The risk of bad publicity is less manageable, and potentially far greater, than the risk of litigation. First,

228. Jena McGregor, *Fear and Panic in the H.R. Department as Sexual Harassment Allegations Multiply*, WASH. POST (Nov. 30, 2017), <https://www.washingtonpost.com/news/on-leadership/wp/2017/11/30/fear-and-panic-in-the-h-r-department-as-sexual-harassment-allegations-multiply> (quoting H.R. consultant, who stated: “The playbook for H.R., when it comes to sexual harassment, is a 25- to 30-year-old playbook,” in which “[e]mployees made a complaint, H.R. took time to investigate, and the matter generally stayed private until it could be resolved”).

229. *Id.*

230. See, e.g., HISCOX LTD., THE 2017 HISCOX GUIDE TO EMPLOYEE LAWSUITS HANDBOOK, 1, 6 (2017), <https://www.hiscox.com/documents/2017-Hiscox-Guide-to-Employee-Lawsuits.pdf> (among employment charges that resulted in defense and settlement, average cost was \$160,000; insured company’s out-of-pocket cost in connection with those charges was \$50,000); *EPLI Claims Reach Tipping Point Amid Anti-Sexual Harassment Movement*, MYNEWMARKETS.COM (Feb. 21, 2018), <https://www.mynewmarkets.com/articles/183182/epli-claims-reach-tipping-point-amid-anti-sexual-harassment-movement> (noting “[t]he insurance industry is expecting a wave of employment practices liability insurance (EPLI) claims to roll in following the recent storm of sexual harassment allegations,” and that EPLI policies will most likely cover such claims).

public grievances are not confined to the statute of limitations, which require plaintiffs to file with the EEOC less than a year after the discrimination occurred.²³¹ Employees might complain publicly about harassment that occurred years or even decades prior. Second, public complaints are not subject to the legal constraints that tend to cabin an employer's liability. The court of public opinion is not so concerned about whether the conduct met the formal legal requirements for severe or pervasive conduct or whether the employer's response was legally reasonable. MeToo revealed the chasm between public expectations and legal realities, portraying employer practices as unfair, and employees' treatment as outrageous.²³²

Social media makes brands precarious at a time when brand and reputation represent a substantial part of a company's value. In some cases, the brand may be most of a company's value. The Weinstein company filed for bankruptcy.²³³ Wynn Resorts lost \$2 billion in stock value after its founder and chief executive faced harassment accusations.²³⁴ Venerable media brands, including NBC, PBS, NPR, and CBS have seen their public image tarnished. In recent months, public revelations have shifted from accusations involving celebrities to those involving previously unknown executives at well-known companies and non-profits like Nike, Bank of America, Humane Society, the New York City Ballet, and Monster Energy.²³⁵

231. The filing deadline depends on whether a state or local agency enforces a similar law, in which case the usual 180-day deadline is extended to 300 days. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, <https://www.eeoc.gov/employees/timeliness.cfm> (last visited Oct. 22, 2018).

232. MeToo is a variation of what scholars have been saying for some time—albeit in much more theoretical fashion—that employers have not done right by victims, and the law has not done enough to help. Scholars, however, assumed the law would lead in fixing the problem, and there was at least some reason to think that might be the case. Catharine MacKinnon has argued that judicial opinions recognizing harassment predated and indeed altered cultural shifts and changing norms around harassment. See Catharine MacKinnon, *The Logic of Experience: Reflections on the Development of Sexual Harassment Law*, 90 GEO. L.J. 813, 817 (2002). But MeToo produced a different course of events, where changing cultural norms act directly on employer practices, with or without changing legal rules.

233. Barnes, *supra* note 6.

234. John Foley, *Wynn Resorts' Slide Shows Sexual Misconduct Is a Financial Risk*, N.Y. TIMES (Jan. 26, 2018), <https://www.nytimes.com/2018/01/26/business/dealbook/steve-wynn-sexual-misconduct.html>.

235. Sarah Almukhtar et al., *After Weinstein: 68 Men Accused of Sexual Misconduct and Their Fall from Power*, N.Y. TIMES (Feb. 8, 2018), <https://www.nytimes.com/interactive/2017/11/10/us/men-accused-sexual-misconduct-weinstein.html>; Julie Creswell et al., *At Nike, Revolt Led by Women Leads to*

Harassment, previously viewed as a contained liability, has morphed into a bet-the-company risk.²³⁶

This shift imposes a form of forced transparency on employers, where they must presume that misconduct might make its way to the public stage and they will have to defend their approach to an angry public. Legal reforms will exacerbate concerns about bad publicity as employers can no longer contain victims through contracts and policies.

Within this environment, employers are also likely to face heightened legal risks. The MeToo movement may embolden more complainants to come forward about their experiences of harassment, which increases the number of potential lawsuits employers face. If courts ultimately relax the standard for severe or pervasive harassment and demand more of employers attempting to establish the *Faragher* defense, employers face greater potential liability. These risks put pressure on employers to identify ways to limit their exposure to future claims.

Employers are now changing their practices, and will likely continue to do so, as explained in greater detail below. Employers have already proven more willing to terminate documented harassers.²³⁷ This newfound willingness to terminate will also open up alternate avenues for meaningful discipline that employers previously avoided, such as demotions, promotion denials, and substantial pay cuts. Employers may also revise their privacy policies, and draft broader definitions of “cause” in their executive employment agreements. While investigation processes have been the subject of some criticism during the MeToo movement, those critiques conflate the employer’s processes with the results-oriented approach employers previously took to discipline.

Exodus of Male Executives, N.Y. TIMES (Apr. 18, 2018), <https://www.nytimes.com/2018/04/28/business/nike-women.html>; Emily Peck, *Monster Energy Vice President Accused of Sexual Harassment Resigns*, HUFFINGTON POST (Jan. 31, 2018), https://www.huffingtonpost.com/entry/monster-energy-john-kenneally-resigns_us_5a722351e4b05253b275370a; Jessica Silver-Greenberg & Matthew Goldstein, *Bank of America Executive Departs After Misconduct Claim*, N.Y. TIMES (Jan. 19, 2018), <https://www.nytimes.com/2018/01/19/business/bank-of-america-sexual-misconduct-omeed-malik.html>.

236. McGregor, *supra* note 228 (human resources consultant characterizing employers as “worried these meteorites [complaints] could be coming . . . but they have no idea how to protect their house”).

237. *Id.*; Elisabeth Ponsot, *All the Media Men Held to a Higher Standard than Trump, Starting with Billy Bush*, QZ (Nov. 29, 2017), <https://qz.com/1141014/matt-lauer-to-charlie-rose-all-the-media-men-held-to-a-higher-sexual-misconduct-standard-than-donald-trump>.

A. INVESTIGATIONS ARE NOT THE PROBLEM

The MeToo crisis subjected employer complaint and investigation processes to scrutiny on several different fronts. One form of scrutiny, generally characterized as the due process critique, worries that employers are rushing to judgment and failing to investigate harassment complaints with sufficient care.²³⁸ This critique was often invoked in connection with the Matt Lauer scandal, where NBC terminated Lauer within a few days of when it first received a formal employee complaint.²³⁹

A second critique takes the opposite position: that employer investigations serve only to paper over a file by documenting weaknesses in the employee's claim to protect from a future harassment lawsuit.²⁴⁰ In this view, the employer was not taking an even-handed view of the complainant's allegations, but instead trying to game the facts in its favor. A third line of attack argued that employees don't use internal complaint systems because they don't trust them.²⁴¹ Critics thus advocated for processes that employees find more trustworthy.²⁴²

238. Constance Grady, *Are Men Accused of Harassment Being Denied Their Due Process? Or Are the Victims?*, VOX (Jan. 8, 2018), <https://www.vox.com/culture/2018/1/6/16855434/weinstein-reckoning-sexual-harassment-due-process-daphne-merkin-keillor-franken>.

239. See Christine Emba, *The Due Process Assault Freak-Out Is a Fever Dream*, WASH. POST (Dec. 1, 2017), https://www.washingtonpost.com/opinions/the-due-process-assault-freak-out-is-a-fever-dream/2017/12/01/8f14cd80-d6d5-11e7-a986-d0a9770d9a3e_story.html.

240. Noam Scheiber & Julie Cresswell, *Sexual Harassment Cases Show the Ineffectiveness of Going to H.R.*, N.Y. TIMES (Dec. 12, 2017), <https://www.nytimes.com/2017/12/12/business/sexual-harassment-human-resources.html>; Tovia Smith, *When It Comes to Sexual Harassment Claims, Whose Side Is HR Really On?*, NPR (Nov. 15, 2017), <https://www.npr.org/2017/11/15/564032999/when-it-comes-to-sexual-harassment-claims-whose-side-is-hr-really-on>.

241. Danny Crichton, *HR Has Lost the Trust of Employees. Here Is Who Has It Now*, TECH CRUNCH (Feb. 10, 2018), <https://techcrunch.com/2018/02/10/hr-has-lost-the-trust-of-employees-here-is-who-has-it-now>.

242. In response, a number of third-party complaint handlers have popped up following MeToo, claiming to provide impartial information collection and investigation for employers. Elizabeth Dwoskin & Jena McGregor, *Sexual Harassment Inc.: How the #MeToo Movement Is Sparking a Wave of Start-ups*, WASH. POST (Jan. 5, 2018), <https://www.washingtonpost.com/news/on-leadership/wp/2018/01/05/sexual-harassment-inc-how-the-metoo-movement-is-sparking-a-wave-of-startups>. A 2012 proposal by Ian Ayres and Cait Unkovic to use "information escrows" to gather employee complaints has also received considerable attention. Ian Ayres & Cait Unkovic, *Information Escrows*, 111 MICH. L. REV. 145, 147 (2012); see also Conor Friedersdorf, *How to Identify Serial Harassers in the Workplace*, ATLANTIC (Nov. 28, 2017), <https://www.theatlantic.com/politics/archive/2017/11/whisper-networks-20/546311>. Their sys-

Contrary to both the first and second critique, employers are quite capable at getting to the bottom of the factual issues and can do so quite efficiently. It is their refusal to act on what they know that made the process appear flawed, and eroded trust in the system.

Employers have always been quite careful about their investigation practices, and are likely to remain so.²⁴³ The due process critique suggests a lack of familiarity with the speed and efficiency of harassment investigations.²⁴⁴ Many harassment investigations are relatively straightforward. The employer interviews the complainant and the accused, as well as any other witnesses that either party identifies as having relevant information about the alleged harassment.²⁴⁵ If any of the interviewees identify relevant written evidence—such as e-mails or text

tem would involve a third party that promises to maintain the secrecy of information provided unless enumerated conditions have been met, for example, if two or more people complain about the same person. Ayres & Unkovic, *supra*, at 147. An information escrow, they argue, would avoid the “first-mover disadvantage,” a reluctance on the part of harassment victims to be the first person to complain. *Id.*

These technological solutions, however, represent a solution to the wrong problem. They presume the problem is the employers’ failure to conduct a proper investigation (either too favorable to the complainant or to the accused), which then distorts their judgment at the end. But the problem never was the way employers collected information. It was what employers did with the information—or more to the point, failed to do—once it had already been gathered.

243. Employers benefit from a qualified privilege from defamation for statements made in connection with an investigation. However, that privilege may be unavailable if the employer “makes allegations without investigation or identifying the source of complaints.” *Rudebeck v. Paulson*, 612 N.W.2d 450, 454 (Minn. Ct. App. 2000).

244. See Rachel Arnow-Richman, *Of Power and Process: Handling Harassers in an At-Will World*, 128 YALE L.J. F. 85, 87 (2018) (observing that “harassers arguably get more due process than at-will employees . . . owing to their employers’ efforts to protect themselves from victims’ lawsuits”).

245. See, e.g., Sabrina Dunlap & Heather Sussman, *Investigating Sexual Harassment Complaints: Procedures and Guidelines*, in DRAFTING EMPLOYMENT DOCUMENTS IN MASSACHUSETTS, at exhibit 15B (Michael Rosen ed., 2016) (“WHO to Interview: [c]omplainant, [a]lleged harasser, [w]itnesses, [a]ny persons whom complainant and/or alleged harasser identify as persons with knowledge, [a]ny persons whom company believes may have knowledge.”); Merrick Rossein, *First Prong of Affirmative Defense: Preventing or Correcting Harassment*, in EMPLOYMENT DISCRIMINATION LAW & LITIGATION § 5:27 (2018) (“Investigations generally are conducted when the target of harassment, the alleged harasser, and any witnesses are interviewed without the presence of a coworker or representative.”).

messages—the employer will collect those as well.²⁴⁶ The company will then decide which facts are disputed, and if they are disputed, which witness was most credible in their account.²⁴⁷ If the investigation only involves a few witnesses and a small quantity of documents, an employer could easily get to the bottom of the matter reasonably quickly.

Employers are unlikely to start cutting corners on their investigations in the MeToo era. Conducting a defensible investigation has always formed part of successfully asserting the *Farragher* defense, and therefore will remain part of the playbook for defending against claims brought by the victim. Employers also tend to be thorough in their investigations to protect against claims brought by the accused. A flimsy or incomplete investigation risks producing factual errors. In an environment where employers might feel compelled to disclose the results of their investigation, a diligent process and a high degree of certainty about the accuracy of the results, protects against potential defamation and false light claims.²⁴⁸ In other words, robust investigation practices will remain a good investment for employers.

The second critique—that employers document the investigation in a way that favors their interests—is accurate, but less consequential than it seems. Employers essentially conduct two investigations at once. One is the documented version that tells a story most favorable to the employer. The second is an unofficial, undocumented, and unflinching assessment of the problem for purpose of accurately gauging potential liability. This is the version that human resources tells to the legal department or outside counsel over the phone. It is also the version upon which the employer makes a decision.²⁴⁹

246. See Dunlap & Sussman, *supra* note 245, at exhibit 15B; McGregor, *supra* note 228 (reporting that “[w]ith clear evidence more often available in the form of e-mails, texts or other electronic posts . . . the days of he-said, she-said have essentially been eliminated by technology” because “somebody’s got a screenshot somewhere”).

247. See David Benck & Tessa Thrasher Hughes, *Employment/Labor Law*, 20 ACCA DOCKET no. 3, 72, 82–83 (Mar. 2002) (“The investigator should review the statements provided by the complainant, the alleged harasser, and the witnesses and assess the veracity of all concerned.”); Buchanan Ingersoll, *How to Conduct a Harassment Investigation*, 9 PA. EMP. L. LETTER, no. 11, 2 (1999).

248. See *infra* notes 252–56.

249. It is true that the paper record does not fairly portray the plaintiff’s claims in the event of subsequent litigation. However, should the case proceed to litigation, the plaintiff can construct their own account through the discovery process, and portray the employer’s records as biased.

Ultimately, the flaw in employer processes has not been the investigation process but results-oriented decision making that tends to favor inaction. Before MeToo, employers had strong business incentives to take nonpunitive responses to harassment, particularly where the harasser was perceived as valuable to the business.²⁵⁰ This disciplinary failure led victims to lose confidence in the employer's complaint process, and made employees reluctant to complain. By contrast, in an environment where companies hold employees accountable for harassment, complainants are more likely to view the employer as an honest broker and consequently make use of the internal processes available to them.

B. THREAT OF TERMINATION MAKES OTHER TYPES OF DISCIPLINE POSSIBLE

As previously noted, in the MeToo era, employers seem more willing to terminate high-level harassers following an investigation. Terminating the harasser serves several purposes. First, it prevents other employees in the workplace from being affected. Second, it removes constraints on the victim's career, which might otherwise be compromised through a continued reporting relationship to the harasser or a transfer to another department. Third, it mollifies the victim, making them less likely to publicly complain about harassment. Lastly, it provides a defensible story about the employer's response if the harassment is later publicly disclosed.

Once termination becomes a common response to harassment, it also makes other meaningful forms of discipline—like a demotion or promotion denial—possible.

This argument seems counterintuitive, but it aligns with theory and practice from the field of negotiation. In the negotiation context, the value of a proposed agreement is measured in terms of the harasser's best alternative to a negotiated agreement (BATNA).²⁵¹ In a pre-MeToo context, executives assumed that their employer would be reluctant to terminate them, and would almost certainly not disclose their termination publicly, because it would be too costly to the employer's reputation. Executives also knew that they might be difficult to replace, and

250. Arnow-Richman, *supra* note 244, at 87 (“We need greater institutional accountability for the conduct of the those at the top of the workplace hierarchy, alongside greater protection for the rank-and-file.”).

251. ROGER FISHER & WILLIAM URY, *GETTING TO YES* 99 (Bruce Patton ed., 3d ed. 2011).

that the loss of revenue associated with their talent would be salient. If the company imposed discipline that the executive would find unpalatable, the executive could always leave to work for a competitor. In negotiation terms, the executive's BATNA was quite good. Even though companies did not negotiate explicitly with employees over the terms of their discipline, they would have chosen a form of discipline that was preferable to the executive's BATNA. So, the companies would select superficial forms of discipline, like training, or a letter in the harasser's personnel file.

The MeToo movement altered the balance of power between highly positioned harassers and companies. Executives now know that the employer would seriously consider termination, and may even do so publicly, for all of the reasons previously described. Executives also know that if they quit, their prospects for reemployment may not be as good as they once were, since companies may perform more due diligence regarding whether the executive had been accused of misconduct. The executive's BATNA is substantially worse. This gives the company a lot more latitude to impose serious discipline. The company knows that the executive is unlikely to quit. While the company could simply terminate the employee, it now has the flexibility to impose other forms of meaningful discipline, like a demotion, loss of supervisory responsibility, promotion denial, pay cut, transfer to an undesirable location, or a zero on their annual performance review.

Depending on the context, these intermediate forms of discipline might be appropriate. For example, a demotion or transfer for the accused might make it possible for the victim to continue on the preexisting career path with minimal disruption. It may also reduce the harasser's power and status, which will cabin the harasser's opportunity to harass others. And, depending on the context, an intermediate form of discipline might be proportional to the misconduct and support a defensible narrative should the harassment later become public.

C. WARNINGS IN PRIVACY POLICIES THAT DISCIPLINARY DECISIONS MAY BE DISCLOSED

MeToo also altered employers' willingness to publicly disclose a decision to terminate a documented harasser following an investigation. Employers previously treated personnel files as sacrosanct and attempted to avoid public terminations of high-level employees at any cost. High-level executives accused of

misconduct who were effectively terminated were given the option to resign in public. Part of this was in the company's financial interests; revealing employee misconduct would reflect poorly on the company. Employers were also worried about litigious former executives who might threaten a defamation claim²⁵² or even a "false light" invasion of privacy claim.²⁵³ Me-Too changed this calculus because the allegations of harassment were in many cases already public or soon to be made public. In this context, a public disclosure of employee discipline did not produce a public scandal so much as mitigate it.

Crises have a way of focusing a company's attention on policies and contracts that created risks associated with its preferred course of action. One such source of risk is its policy around privacy. Employee privacy is a flexible concept that derives from a combination of reasonable employee expectations,

252. For a statement to be defamatory it must be "communicated to someone other than the plaintiff, it must be false, and it must tend to harm the plaintiff's reputation and to lower him or her in the estimation of the community." *Lewis v. Equitable Life Assurance, Soc'y*, 389 N.W.2d 876, 886 (Minn. 1986). However, employers can assert a qualified privilege. *Id.* at 889–90. Where an employer can establish qualified privilege, the plaintiff must show "bad faith, actual malice, or abuse of the privilege through excess publication." *Garziano v. E.I. Du Pont De Nemours & Co.*, 818 F.2d 380, 388 (5th Cir. 1987). Where "management honestly and sincerely believed [the complainant's] allegations of sexual harassment . . . there [was] insufficient evidence in the record to support the allegations of malice or bad faith." *Id.* at 390 (employer's internal bulletin about sexual harassment was subject to a qualified privilege). In that case, the court reasoned that: "Co-workers have a legitimate interest in the reasons a fellow employee was discharged. Of course, employees have a strong interest in not being fired. An employer also has an interest in maintaining employee morale and protecting its business interests." *Id.* at 387 (citations omitted); *see also* *Turner v. Wells*, 198 F. Supp. 3d 1355, 1371–72, 1380 (S.D. Fla. 2016) (holding that a law firm's public investigation findings and conclusions not actionable defamation because statements were not false or were pure opinion); *Ludlow v. Nw. Univ.*, 79 F. Supp. 3d 824, 829 (N.D. Ill. 2015) (dismissing false light and defamation claims, because university's statements were "substantially true" or not "highly offensive"); *Bisso v. De Freest*, 251 A.D.2d 953, 953 (N.Y. App. Div. 1998) (qualified privilege protected employer's statement to other employees that accused had been terminated for harassment).

253. "False light" is a related privacy claim—which refers to publicity that places an individual in a false light that "would be highly offensive to a reasonable person" and in "reckless disregard as to the falsity of the publicized matter." *Tomson v. Stephan*, 696 F. Supp. 1407, 1410 (D. Kan. 1988); *see also* *Lloyd v. Quorum Health Res., LLC*, 31 Kan. App. 2d 943, 954 (Kan. Ct. App. 2003) (quoting *Dominguez v. Davidson*, 266 Kan. 926, 937 (1999) (noting that elements of false light are: "(1) publication of some kind must be made to a third party; (2) the publication must falsely represent the person; and (3) that representation must be highly offensive to a reasonable person").

and employer behavior and promises that bolster or undermine those expectations.²⁵⁴

Employees sometimes assert false light privacy claims, which requires them to prove that the company engaged in publicity that “falsely represent[s] the person” and is “highly offensive to a reasonable person.”²⁵⁵ However, employers have a qualified privilege if they investigate the claim and the statement was made in good faith to persons with an interest or duty in the subject matter.²⁵⁶ The best protection against such a claim, as previously noted, is a diligent investigation that produces a high degree of certainty as to the accuracy of the findings. Employers are also likely to remain restrained about public comments because they will need to explain why the public had an interest in the findings to avail themselves of the qualified privilege.

Nevertheless, on the rare occasion where employers decide to make a public disclosure (or even an internal disclosure that may find its way to social media), revisions to the privacy policy provide a marginal benefit. In privacy cases generally, questions of the offensiveness of an intrusion will depend in part on expectations of privacy. These expectations are influenced by the employer’s conduct.²⁵⁷

An employer’s policies and practices regarding personnel files and personnel information is somewhat relevant to whether an employee can establish a privacy claim in connection with public disclosure of that personnel information. Historically, employers were extremely reluctant to disclose anything in an employee’s personnel file,²⁵⁸ particularly findings of misconduct and discipline resulting from those findings. This secrecy extended

254. See *Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611, 621–23 (3d Cir. 1992).

255. See *Lloyd*, 31 Kan. App. 2d at 954; *supra* note 253.

256. *Smith v. Ark. La. Gas Co.*, 645 So. 2d 785, 791 (2d Cir. 1994) (qualified privilege applies to privacy claims, including false light and “unreasonable public disclosure of embarrassing private facts” where “an employer who undertakes an investigation of employee misconduct is protected by a qualified or conditional privilege when making a statement in good faith, on a subject in which the employer has an interest or duty, to persons having a corresponding interest or duty”).

257. *O’Connor v. Ortega*, 480 U.S. 709, 710 (1987) (where employer provided employee with the only key to certain physical locations, which were not typically accessed by others, employee more likely to have a reasonable expectation of privacy in that location).

258. Thomas Wilson & Corey Devine, *Privacy in the Employment Relationship*, PRACTICAL LAW LABOR & EMPLOYMENT (2018) (“Personnel records should be maintained in a secure location, such as a locked file cabinet or password-protected electronic files. They should be made available only to individuals with a legitimate business need to access the files.”).

even to the victim who complained of harassment in the first place, who might never learn whether the accused employee received any discipline at all. This practice might theoretically bolster an employee's claim that they had a reasonable expectation of privacy in that information, and that disclosing such information was highly offensive.²⁵⁹

Employer policies rarely make promises that all personnel information will be kept confidential. They have not, however, sought to disclaim those expectations either. By contrast, employers have been quite thorough in disclaiming employee rights to privacy in several other types of information, which they tend to update as technology develops.²⁶⁰ For example, employee privacy policies (often called "computer use policies") frequently disclaim any right to privacy of any information on a company-

259. I use the term "theoretically" because there are very few cases in the private sector alleging pure "invasion of privacy" claims based on disciplinary disclosures, as opposed to claims for defamation or false light publicity, where truth is an absolute defense. *McNemar v. Disney Store, Inc.*, 91 F.3d 610, 622 (3d Cir. 1996) (no invasion of privacy claim where store manager told employee's relatives that the plaintiff resigned because of his health, and where "an unidentified store employee [told a friend of the plaintiff] who already knew that he was HIV-positive"); *Magdaluyo v. MGM Grand Hotel LLC*, Case No. 2:14-cv-01806, 2017 WL 736875, at *4 (D. Nev. Feb. 24, 2017) (no cognizable invasion of privacy claim based on allegations that employer spread rumors about him); *cf. Allen v. Verizon Wireless*, No. 3:12-cv-482, 2013 WL 2467923, at *8 (D. Conn. June 6, 2013) (cognizable privacy allegations based on unauthorized access to FMLA certification and contact with plaintiff's doctor). The analysis herein draws upon other types of privacy cases from the employment context; public employees have additional privacy-related protections under the Fourth Amendment. *See, e.g., O'Connor*, 480 U.S. at 709; *Borse*, 963 F.2d at 618.

260. *See, e.g., Greenhaus, supra* note 192 (policy prohibiting harassment on computer systems, and disclaiming any expectation of privacy in any "message, file, data, document, facsimile, telephone conversation, social media post, conversation, or any other kind or form of information or communication transmitted to, received, or printed from, or stored or recorded on the company's electronic information and communications systems").

owned computer, on the employee's internet usage on that computer, or on company e-mail.²⁶¹ Employers may also reveal various forms of surveillance through their privacy policies.²⁶² However, employers have not yet included personnel files, misconduct, and discipline in the list of information for which employees should not expect to have a right to privacy.²⁶³

The strength of privacy claims based on public disclosures of discipline is somewhat unknown, since such practices used to be quite uncommon. However, MeToo revealed that protecting a company's reputation may require it to publicly disclose disciplinary or termination decisions, and investigation results. Employers may also feel greater pressure to disclose such information to others within the organization, for example, to disclose the information to leadership to make them aware of a potential scandal. After MeToo, employers may also decide that it is in their best interests to disclose disciplinary decisions to the victim.²⁶⁴

261. Cecil A. Lynn III, *Enforcement of Employer Computer Privacy Policies*, A.B.A., https://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2008/ac2008/070.authcheckdam.pdf (last visited Oct. 22, 2018); Sindy J. Policy, *A Sample Company Policy on E-mail and Internet Usage*, A.B.A., <https://apps.americanbar.org/buslaw/blt/ndpolicy1.html> (last visited Oct. 22, 2018); Jeanne Sahadi, *Can Your Employer See Everything You Do on Your Company Phone?*, CNN MONEY (Aug. 27, 2015), <http://money.cnn.com/2015/08/27/pf/using-smartphones-from-work/index.html>.

262. Stephen P. Pepe et al., *Corporate Policy on Employee Privacy and Electronic Technology*, in CORPORATE COMPLIANCE SERIES: DESIGNING AN EFFECTIVE FAIR HIRING AND TERMINATION COMPLIANCE PROGRAM § 4:25 (9th ed. 2018) (providing a sample policy that states: "In the past, some employees have assumed that information accessed through or stored on the computer they use at work, or generated as part of [name of corporation]'s electronic mail, instant messaging, text messaging or voice mail systems was private. That assumption is incorrect").

263. See PG&E CODE OF CONDUCT 1, 34 (2018), http://www.pgecorp.com/aboutus/pdfs/PGE_EmployeeCodeConduct_MECH_Digital_AltLinks.pdf (noting that employees have "no expectation of privacy" in using a PG&E work space, computer, telephone, or other system); Greenhaus, *supra* note 192 (containing no reference to personnel files in the IT Resources and Communications Systems Policy); Pepe, *supra* note 262 (containing no disclaimer regarding personnel files).

264. See *Bisso v. De Freest*, 251 A.D.2d 953, 953 (N.Y. App. Div. 1998) (holding that a statement made at a staff meeting was protected by qualified privilege because "employees [had] worked with plaintiff" and "had a legitimate interest in knowing that [a] serious sanction had been imposed for violation of a workplace rule"); RESTATEMENT OF EMP'T. LAW § 6.02, cmt. c (AM. LAW INST. 2014) (stating that qualified privilege applies to statements made to "employer's own employees and agents" and that "not all jurisdictions recognize intra-employer or intra-corporate communications as publications for purposes of defamation law"). For example, in *Smith v. Arkansas Louisiana Gas Co.*, a number

Consequently, employers may add disclaimers in their privacy policies providing that employees do not have a right to privacy based on their own misconduct, and that employers reserve the right to disclose investigation results and discipline.²⁶⁵

D. BROADER DEFINITIONS OF “CAUSE” IN EXECUTIVE EMPLOYMENT CONTRACTS

The background rule under American law is employment-at-will, where employees can be terminated at any time for any reason or no reason, with or without notice.²⁶⁶ Most employees are subject to the at-will rule, and if they have a contract, it incorporates the presumption of at-will employment.²⁶⁷ However, high level executives are more likely to have employment agreements with individually negotiated terms.²⁶⁸ These executives in many cases remain at-will, in the sense that employers do not place any restriction on their ability to fire even an executive at

of employees complained about abusive language and harassing behavior by a mid-level department manager. 645 So.2d 785, 791 (La. Ct. App. 1994). Following an investigation, the manager was demoted. *Id.* A handful of managers were informed of the demotion, as well as thirty to thirty-five other personnel who worked in the accused manager’s facility. *Id.* The court held that the disclosures were made in good faith because the company had “reason to believe they were truthful” as a result of their investigation. *Id.*

265. *But see* Denver Policeman’s Protective Ass’n v. Lichtenstein, 660 F.2d 432, 436 (10th Cir. 1981) (determining that a discovery order for the disclosure of personnel files in litigation did not contravene a right to privacy); Holland, Hart LLP, *Montana Supreme Court Stresses Right of Privacy in Employment Records*, 18 MONT. EMP. L. LETTER no. 11, 4 (Dec. 2013) (“Employees in Montana have a reasonable expectation of privacy in their personnel files.”).

266. *See* RESTATEMENT (THIRD) OF EMP’T. LAW § 2.01 (AM. LAW INST. 2013).

267. *Foley v. Interactive Data Corp.*, 765 P.2d 373, 376 (Cal. 1988).

268. *Arnow-Richman*, *supra* note 244, at 92.

a moment's notice.²⁶⁹ However, such agreements can impose substantial severance payments for terminations other than for cause.²⁷⁰

The combination of stock and severance can cost a company millions of dollars. One famous case involved former Hewlett Packard CEO Mark Hurd, who was terminated in connection with a harassment scandal, and nevertheless walked away with a severance package valued at \$34.5 million.²⁷¹ Although shareholders sued over the payout, arguing that the termination met the definition for a "cause" termination, the Board evidently did not feel sufficiently confident in a "cause" finding to send Hurd packing without severance.²⁷²

"Cause" definitions can vary, depending on past practice and the amount of power wielded by the executive.²⁷³ For those with the most bargaining leverage, cause can be defined quite nar-

269. This is somewhat equivalent to at-will employment in the sense that the employer can terminate the employee without notice as long as it is willing to provide severance pay in lieu of notice. *Agreement: Executive Employment Agreement*, SOC'Y FOR HUM. RESOURCE MGMT. (May 17, 2016), <https://webcache.googleusercontent.com/search?q=cache:yzj-XCQMwNsJ:https://www.shrm.org/resourcesandtools/tools-and-samples/hr-forms/pages/executiveemploymentagreement.aspx> (providing a form agreement which contains a three year employment term, subject to a notice period to be specified by contracting parties, and severance pay in lieu of notice provision). *But see Executive Employment Contract Between Geovic, Inc. & Gary Morris* (Apr. 17, 2006), U.S. SEC. & EXCHANGE COMMISSION, <https://www.sec.gov/Archives/edgar/data/1398005/000102189007000084/geovicform10ex1011.htm> (stating that the company must provide thirty days' notice and severance if the executive is terminated for reasons other than cause); *Key Executive Employment Contract: Allen v. Ambrose* (Mar. 10, 2003), U.S. SEC. & EXCHANGE COMMISSION, <https://www.sec.gov/Archives/edgar/data/1030219/000103221003000497/dex1015.htm> (providing for sixty days' notice, approval by a majority of the board, severance, and payment for unexercised stock options in the event of termination without cause).

270. *See, e.g., Executive Employment Contract with Barry Berlin* (Dec. 15, 2011), <https://www.sec.gov/Archives/edgar/data/908311/000119312512501007/d454051dex102.htm> (providing for "termination pay in an amount equal to 2.99 times the average of the last three years compensation" if the agreement is terminated by the company for any reason other than cause); *Form of Executive Employment Agreement - John P. Foley*, U.S. SEC. & EXCHANGE COMMISSION, <https://www.sec.gov/Archives/edgar/data/1533924/000119312512018816/d248475dex107.htm> (providing for bonus payments and twelve months of severance in the event of termination without cause).

271. Mary Thompson, *HP CEO Hurd's Severance Pay Could Hit \$40 Million: Experts*, CNBC (Aug. 9, 2010), <https://www.cnbc.com/id/38624369>.

272. *Id.*

273. *See also* Arnow-Richman, *supra* note 244, at 92–93 (noting that "egregious harassment could fall within some" definitions of cause but not others).

rowly, consisting of gross negligence, bankruptcy, death, physical or mental incapacity, *conviction* of a felony or gross misdemeanor, or willful fraud or misconduct that materially damages the company.²⁷⁴ As applied to a harassment case, a company bound by a contract of this sort would need to show that the harassment resulted in “material[] damage” to the company in order to qualify as cause. If the harassment hasn’t yet been made public, it may not have yet done material damage, thus giving rise to a dispute over the contract terms. A risk averse company might respond by providing a partial or full severance payout in exchange for a release of all claims under the contract.

Other types of contract provisions can give rise to disputes over whether an executive is entitled to severance. For example, some contract provisions provide that a company may not terminate the executive for a violation of company policy without a certain period of notice and an opportunity for the executive to “cure” the violation, “if curable.”²⁷⁵ Such language would give rise to a dispute over whether harassing conduct is in fact “curable.”²⁷⁶ The executive’s lawyer might argue that harassment is curable, through coaching and training, and a promise not to engage in further misconduct. For its part, the company would argue that it is not curable, since the harassment has already occurred and the executive cannot undo or fix the misconduct. However, the question of curability would likely be sufficiently

274. See, e.g., *Executive Employment Contract between Geovic, Inc. & Gary Morris*, *supra* note 269 (stating that conviction of a crime, among other conditions, is cause for termination); *Key Executive Employment Contract: Allen v. Ambrose*, *supra* note 269 (defining cause to include a willful breach of the agreement and gross negligence); see also Bryan Sullivan, *Kevin Spacey and Harvey Weinstein Employment Agreements Say a Lot About Hollywood*, FORBES (Nov. 15, 2017), <https://www.forbes.com/sites/legalentertainment/2017/11/15/kevin-spacey-and-harvey-weinstein-employment-agreements-say-a-lot-about-hollywood/#4e3ba40f573c> (stating that Weinstein’s contract specified that harassment would trigger a fine).

275. See, e.g., *Executive Employment Contract between Geovic, Inc. & Gary Morris*, *supra* note 269 (stating that the employee has a right to notice and twenty-one days to cure in the event of conduct “that has damaged or will likely damage the reputation or standing of the company”); Erik Sherman, *Harvey Weinstein’s Ultimate Enabler Is His Employment Contract, Says a New Report*, INC. (Oct. 13, 2017), <https://www.inc.com/erik-herman/harvey-weinsteins-ultimate-enabler-is-his-employment-contract-says-a-new-report.html> (stating that Weinstein’s contract provided that harm which resulted from harassment would be “cured” each time he paid a fine).

276. See Arnow-Richman, *supra* note 244, at 94 (discussing harassment case involving a dispute over curability).

contested that the company may be tempted to settle a dispute of this sort, again in exchange for partial or full severance.²⁷⁷

Going forward, companies will likely draft their contracts in a way that avoids these costs in the event of harassment. This could be readily accomplished by defining cause to include “a determination by the company, in its sole discretion, that executive has violated the company’s policy against harassment, discrimination, or retaliation.” Moreover, corporate boards and insurance companies may push for broader definitions of cause to ensure that decisions will not be skewed by the financial penalties of termination.

In summary, employers are likely to take more punitive approaches to harassment, and to alter their policies and contracts to provide them with the latitude to carry out that discipline.

V. FIXING HARASSMENT & DISCRIMINATION POLICIES

This Part argues that broadly drafted harassment policies contributed to some of the harms revealed by the MeToo movement. Broadly worded policies gave employers the discretion to enforce their policies selectively, in some cases applying it strictly to address the risk of future discrimination claims, and in other cases declining to intervene if the conduct did not meet the legal definition of harassment. Because employees were never informed of the way employers applied the harassment policy, the policies themselves have become suspect, leading some to question whether employers should apply a zero tolerance harassment policy.²⁷⁸

This Part recommends that employers revise their harassment and discrimination policies to be more transparent, which will also better align with employers’ true litigation risk, and actual decisionmaking. Harassment policies should be revised to provide more information on the types of factors that influence employer judgments on the severity of the policy violation. Discrimination policies should be revised to explain that supervisors

277. Even with narrow definitions of cause such as these, companies could still technically fire the executive for harassment without notice. However, doing so could be quite costly.

278. Allen Smith, *#MeToo Postings About Bosses Merit Discussions with HR*, SOC’Y FOR HUM. RESOURCE MGMT. (Nov. 20, 2017), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/metoo-postings-about-managers.aspx> (referencing “zero-tolerance sexual harassment policies”).

occupy a position of trust with respect to maintaining and implementing the company's policy of equal employment opportunity. When supervisors make disparaging or harassing comments based on an employee's membership in a protected category, the policy should explain that it is a breach of that duty of trust, which the company takes seriously. This revision aligns with a company's discrimination-related risks, and frames the problem in an intuitive way that parallels company ethics policies.

A. THE PROBLEM WITH HARASSMENT POLICIES

Harassment policies may have contributed to the problems that gave rise to the MeToo movement in ways that employers do not recognize. Legal scholar Vicki Schultz has been especially critical of harassment policies. In a famous 2003 article, *The Sanitized Workplace*, Vicki Schultz argued that employers tended to portray and define harassment primarily in terms of sexual conduct.²⁷⁹ Schultz examined scores of employer harassment policies and found that they relied heavily on the EEOC's 1980 guidelines, which focused on sexual conduct, rather than definitions based on Supreme Court jurisprudence.²⁸⁰ Schultz also observed that these policies prohibited a wide range of sexual conduct that might not legally qualify as harassment.²⁸¹ Schultz argued that employers have an interest in defining harassment as a matter of boorish male behavior²⁸² to avoid addressing the more challenging question of providing meaningful equal employment opportunity in the workplace.²⁸³

Broadly worded policies provide a number of benefits for employers. First, they give employers considerable flexibility. Where a broad swath of conduct technically violated the harassment policy, it gave employers the freedom to punish violations depending on the context of the harassment and the employer's willingness to punish or protect the harasser based on business preferences. Second, broad policies also enable employers to intervene before the conduct rises to the level of severe or pervasive conduct.

279. Vicki Schultz, *The Sanitized Workplace*, *supra* note 73, at 2065.

280. *Id.*

281. *Id.*

282. *Id.* at 2067.

283. *Id.*; *see also* Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L.J.F. 22, 43 (2018) ("Highlighting sexual harms . . . can also lead victims to underreport nonsexual acts of sex—and gender—based hostility.").

Third, broad harassment policies help to limit the employer's discrimination-related liability. Suppose, for example, that a supervisor makes a derogatory comment about a subordinate's protected status such as their race or gender. Unless the comment is an epithet or slur, it will not give rise to a harassment claim. It also will not give rise to a discrimination claim, because that would require an adverse employment action, like a termination, demotion, or difference in pay.²⁸⁴ However, the comment could be extremely damaging for the employer if the employee is later fired, demoted, or denied a promotion. A single comment could represent smoking gun evidence of the supervisor's discriminatory intent when they later fire the employee.²⁸⁵ Thus, broadly worded policies help employers guard against comments that might later get the employer in trouble.

However, broad harassment policies impose hidden costs. Both the policies and related training²⁸⁶ routinely encourage employees to report any policy violation to the company. Victims then assume that companies would punish all policy violations, when in fact employers discipline selectively and proportionally. This information gap leads victims to feel surprised and be-

284. See, e.g., *Jones v. Spherion Atl. Enter., LLC* 493 F. App'x 6, 9 (11th Cir. 2012); *Mitchell v. Vanderbilt Univ.*, 389 F.3d 177, 181 (6th Cir. 2004); *Herrnreiter v. Chi. Hous. Auth.*, 315 F.3d 742, 744 (7th Cir. 2002).

285. See, e.g., *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 456 (2006) (stating that a supervisor's use of the word boy to refer to African American employee could be used as evidence of discriminatory animus); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989) (noting that employer's statements that plaintiff should act more femininely was evidence of sex stereotyping); *Felix v. Boeing Co.*, 229 F.3d 1157, 1157 (9th Cir. 2000) (stating that a supervisor's past derogatory statements regarding Latinos including saying "why would I want another one of them?" was evidence of discrimination); *Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1189–90 (11th Cir. 1997) (providing several cases containing direct evidence of discrimination); *Miles v. M.N.C. Corp.*, 750 F.2d 867, 874 (11th Cir. 1985) (stating that a plant manager's statement that "half of them weren't worth a shit," with reference to black women, was direct evidence of discriminatory motive); *Lilly v. Flagstar Enter., Inc.*, No. CIV. A. 00-D-1313-E, 2001 WL 849537, at *2 (M.D. Ala. July 26, 2001) (denying summary judgment in sex discrimination claim where supervisor previously made comments like "pregnant women are lazy" and that he "hates to terminate males" because "they are heads of their household"); see also *Silver v. N. Shore Univ. Hosp.*, 490 F. Supp. 2d 354, 362–63 (S.D.N.Y. 2007) (discussing the case law on stray remarks); *Belgrave v. City of New York*, No. 95-0CV-1507 (JG), 1999 WL 692034, at *29 (E.D.N.Y. Aug. 31, 1999) ("Even stray remarks in the workplace by persons who are not involved in the pertinent decision making process . . . may suffice to present a prima facie case provided those remarks evidence invidious discrimination.").

286. Tippet, *supra* note 132.

trayed when an apparent violation of the harassment policy produces no discipline. The employer's inaction then erodes the credibility of the employer's system, and makes other victims less likely to complain.

Broad harassment policies are not very persuasive. Beyond the employer's failure to enforce them, policies that prohibit wide swaths of conduct in an undifferentiated manner start to resemble civility codes. Employees know implicitly that not all of the prohibited conduct is equally problematic, which can lead them to bristle at the employer's attempt to control their behavior and question the validity of the legal rules.

In addition, overly broad harassment policies are likely to produce avoidance behaviors that discriminate against underrepresented groups.²⁸⁷ The supervisor may decide that the best way to avoid inadvertently violating the policy is to avoid contact with those who might accuse them of harassment. For example, a supervisor might exclude female subordinates from business lunches, networking events, or client development opportunities. This then limits the employee's opportunity for advancement—the supervisor is less familiar with her skill and potential and she receives less coaching and advice. The employee's client base may also suffer, which may limit her compensation or prospect for promotion. Consequently, widespread avoidance behaviors could give rise to a class action claim for discrimination.²⁸⁸

287. Nikki Graf, *Sexual Harassment at Work in the Era of #MeToo*, PEW RES. CTR. (Apr. 4, 2018), <http://www.pewsocialtrends.org/2018/04/04/sexual-harassment-at-work-in-the-era-of-metoo> (stating that half of respondents believe MeToo has made it more difficult for men to know how to interact with women in the workplace); see also Vicki Schulz, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN. L. REV. ONLINE 17, 35 (2018) ("Fear of being accused of harassment for benign comments or interactions can also encourage higher-ups to exclude or avoid women."); Tippett, *supra* note 132 (noting avoidance related risks when harassment trainings make harassment law appear complex and fail to discuss the importance of inclusion).

288. Where avoidance works to the overall disadvantage of employees on the basis of gender, or other protected category, it could serve as the basis for a lucrative class action claim. *Velez v. Novartis Pharm. Corp.*, No. 04 Civ. 09194(CM), 2010 WL 4877852, at *1 (S.D.N.Y. Nov. 30, 2010) (involving 5,600 female sales employees suing their employer for unequal pay and promotion practices); Grant McCool & Jonathan Stempel, *Novartis in \$175 Million Gender Bias Settlement*, REUTERS (July 14, 2017), <https://www.reuters.com/article/us-novartis-settlement/novartis-in-175-million-gender-bias-settlement-idUSTRE66D57Z20100714> (discussing the same). Although this case did not explicitly involve a failure to mentor female employees, mentorship from men would have been necessary to climb up the ranks of a sales organization that

In the media, harassment and discrimination tend to be placed on opposite sides of a continuum.²⁸⁹ On one end, sexual harassment rules are underenforced but men are less fearful of interacting with women.²⁹⁰ On the other end, sexual harassment is strictly enforced and men hide from women.²⁹¹ Within this frame, the question becomes where to find the balance between opposing rights. The frame falsely assumes that workplaces unconstrained by harassment rules will do a better job of advancing women and other underrepresented groups.

The other end of this false dichotomy is to double down on preexisting policies by implementing a zero tolerance rule for harassment.²⁹² Zero tolerance is an ambiguous term. It might mean that employees will not avoid punishment for their first offense. Zero tolerance might also mean that all violations of the harassment policy will be treated as equally severe. However, this will prove extremely difficult to implement over time. The employer will inevitably be confronted with the dilemma of how to respond to relatively mild allegations of harassment. Employers must then choose between an excessively punitive approach—where punishment exceeds even what the victim might have preferred—and unofficial departures from the zero tolerance policy.

was largely dominated by men. In addition, the same theory and legal claims at issue in the Novartis case could be readily applied to a context where men, especially highly placed men, stop mentoring women.

289. Compare Clare Cain Miller, *Unintended Consequences of Sexual Harassment Scandal*, N.Y. TIMES (Oct. 9, 2017), <https://www.nytimes.com/2017/10/09/upshot/as-sexual-harassment-scandals-spook-men-it-can-backfire-for-women.html> (describing avoidance behaviors as a result of harassment fears), with *223 Women Speak Out Against Sexual Harassment in National Security Field*, CBS NEWS (Jan. 30, 2018), <https://www.cbsnews.com/news/223-women-say-theyre-survivors-of-sexual-harassment-in-national-security-field> (women describe rampant harassment in national security realm).

290. Tolerating harassment does not necessarily work to the advantage of women in the workplace. Many of the industries where harassment was revealed to be most rampant or most tolerated were industries that were male dominated or where men occupied the top rungs of the organization. While male fears around harassment may disadvantage women, tolerating harassment is no fix.

291. Schultz, *supra* note 283, at 60 (noting that “sex segregation is a cause of—and not a solution to—sexual harassment”).

292. Jonathan Brock et al., *What Exactly Is Zero Tolerance on Sexual Harassment?*, BOST. GLOBE (Jan. 2 2018), <https://www.bostonglobe.com/opinion/2018/01/02/what-exactly-zero-tolerance-sexual-harassment/3mKqMjzMD1l3UZqgWoXu7N/story.html>; Erin Gloria Ryan, *When #MeToo Becomes #YouToo*, DAILY BEAST (Dec. 27, 2017), <https://www.thedailybeast.com/when-metoo-becomes-youtoo>.

B. THE PROBLEM WITH DISCRIMINATION POLICIES

Discrimination policies tend to be drafted to mirror legal rules. They prohibit employment decisions that are based on an employee's membership in a protected category. Unlike harassment policies, they do not provide space for an employer to intervene before an actual discrimination claim arises. This produces two big gaps with respect to advancing equal employment opportunity in the workplace. First, it does not address the denial of smaller workplace opportunities that could add up over time. Consider, for example, the story of Susan Fowler's viral complaints at Uber.²⁹³ Although they included claims of harassment—in particular a proposition from her supervisor—they also included numerous examples of low level discrimination—a leather jacket denied to female engineers, a transfer denial that may have been partly motivated by discrimination.²⁹⁴ Human resources proved unresponsive, and apparently suggested that Fowler herself may have been the source of the problem.²⁹⁵ While it might be easy to attribute Fowler's story to the culture at Uber, her experience with human resources may have reflected a crimped discrimination policy that overlooked discrimination that did not yet exceed the legal threshold.

Second, current discrimination policies fail to capture discriminatory comments unaccompanied by an adverse employment action. As previously noted, this leaves the employer exposed if the same supervisor later denies a promotion to the affected employee or terminates their employment.

C. A BETTER APPROACH

Ultimately, it is a mistake to assume the problem is an inherent conflict between harassment and discrimination law, where one must be chosen at the expense of another. Rather, the problem is the gap between employers' actual practice, and their stated policy. Employers need to be more transparent about how their harassment policies are applied, and the contextual factors that influence their decisionmaking. They should also stop using harassment policies as a pretext to reduce discrimination-related liability, and instead craft broader discrimination policies.

293. *Reflecting on One Very, Very Strange Year at Uber*, SUSAN FOWLER (Feb. 19, 2017), <https://www.susanjowler.com/blog/2017/2/19/reflecting-on-one-very-strange-year-at-uber> (discussing harassment and discrimination experienced at Uber).

294. *Id.*

295. *Id.*

This will bring both policies closer to employer practices, and better advance the broader goals of both harassment and discrimination law. These changes will also render the policies more credible and persuasive to employees.

A more transparent harassment policy could still define harassment relatively broadly. (See Appendix.) However, this policy would also explain the contextual factors²⁹⁶ that influence its judgments when applying the policy and meting out punishment. The company could explain, for example, that harassment by supervisors, and especially high ranking employees, will be treated as proportionally more serious,²⁹⁷ given the ways in which power differences can limit the victim's ability to engage in self-help measures. It could also explain that violence, assault, and threats of violence will be presumed to be extremely serious as an employment matter,²⁹⁸ and may result in a call to the police. Serious misconduct should include hostile acts that could be

296. *Oncale v. Sundowner Offshore Servs. Inc.*, 523 U.S. 75, 81–82 (1998) (stating that “the real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed” and judging those behaviors requires “common sense, and an appropriate sensitivity to social context”).

297. *Boyer-Liberto v. Fountainbleau Corp.*, 786 F.3d 264, 280 (4th Cir. 2015) (accepting argument that supervisor's use of a racial slur along with “explicit, angry threats . . . to terminate [plaintiff's] employment” was especially threatening); *Quantock v. Shared Mktg. Servs., Inc.*, 312 F.3d 899, 904 (7th Cir. 2002) (holding that repeated propositions from boss met the standard for a sexual harassment claim); *Brooks v. City of San Mateo*, 229 F.3d 917, 926 n.9 (9th Cir. 2000) (stating that a coworker groping another coworker is insufficient to satisfy the severe or pervasive standard, but assault by supervisor may well be sufficient); *Draper v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1108, 1111 (9th Cir. 1998) (discussing how repeated comments from a supervisor could satisfy a harassment claim); *Venter v. City of Delphi*, 123 F.3d 956, 976 (7th Cir. 1997) (holding that persistent proselytizing by a supervisor made the working environment hostile and abusive); *Robles v. Agreserves, Inc.*, 158 F. Supp. 3d 952, 984 (E.D. Cal. 2016) (holding that repeated comments denigrating religion by foreman were sufficiently severe and pervasive to constitute harassment).

298. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993) (opining that the severity or pervasiveness of conduct depend upon “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance”); *Fuller v. Idaho Dept. of Corr.*, 865 F.3d 1154, 1162–64 (9th Cir. 2017) (holding that sexual assault coupled with the agency's internal endorsements of such actions created a hostile work environment); *Cherry v. Shaw Coastal, Inc.*, 668 F.3d 182, 184 (5th Cir. 2012) (“Deliberate and unwanted touching of intimate body parts can constitute severe sexual harassment.”); *Ellison v. Brady*, 924 F.2d 872, 880 (9th Cir. 1991) (stating that a gradual escalation of conduct, including increasingly disturbing letters may be considered sexual harassment).

experienced as threatening to employees on the basis of gender, race, religion, national origin, disability, and other protected categories. This might include for example, epithets and slurs, as well as symbolic acts like a noose, blackface, swastikas, vandalism, or maliciously damaging an employee's property or car.²⁹⁹ The company could also explain factors that may influence its determination of the severity or frequency³⁰⁰ of the conduct, such as the work environment and surroundings, whether the conduct was humiliating or degrading,³⁰¹ and disregarding attempts by the victim or others to stop or avoid the conduct. Employers could reserve the right to terminate employees for serious incidents of misconduct not specifically enumerated in the policy, in their sole discretion. The employer could also consult employees in crafting the language to ensure that it is consistent with their assessments of proportionality.

This approach brings employer policies regarding discipline more in line with the actual legal standards for evaluating harassment claims. The legal standards offer the benefit of being

299. See, e.g., *Boyer-Liberto*, 786 F.3d at 280 (holding that racial slurs could create a hostile work environment); *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 316 (4th Cir. 2008) (referring to coworker as "Taliban," "towel head," and asking "are you on our side or are you on the Taliban's side" constituted harassment); *Tademy v. Union Pac. Corp.*, 614 F.3d 1132, 1132 (10th Cir. 2008) (holding that a noose incident and racial epithets created a hostile work environment); *Vance v. S. Bell Tel. & Tel. Co.*, 863 F.2d 1503, 1510 (11th Cir. 1989) (holding that hanging a noose over an employee's workstation created a hostile and abusive work environment); *Snell v. Suffolk County*, 782 F.2d 1094, 1098 (2d Cir. 1986) (finding that posting a photo of a noose, posting KKK information, and locking coworkers out of the bathroom created a hostile work environment); *Collins v. Exec. Airlines, Inc.*, 934 F. Supp. 1378, 1381 (S.D. Fla. 1996) (exposing an employee to a noose and blackface created a hostile work environment); *Garcez v. Freightliner Corp.*, 72 P.3d 78, 85–86 (Or. Ct. App. 2003) (holding that a coworker's use of racial epithets and property destruction created a hostile work environment).

300. *Freeman v. Dal-Tile Corp.*, 750 F.3d 413, 417, 422 (4th Cir. 2014) (finding that a coworker's frequent gender-derogatory language, sexual comments, and racial comments constituted harassment); *Reeves v. C.H. Robinson Worldwide*, 594 F.3d 798, 804, 811 (11th Cir. 2010) (holding that a "substantial corpus of gender-derogatory language" used nearly every day by coworkers created an abusive work environment); *Feingold v. New York*, 366 F.3d 138, 150–51 (2d Cir. 2004) (stating that routine anti-Semitic remarks by coworkers created a hostile work environment).

301. *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 22 (1993); *Turley v. ISG Lackawanna, Inc.*, 774 F.3d 140, 146 (2d Cir. 2014) (finding that a "steadily intensifying drumbeat of racial insults, intimidation, and degradation over a period of more than three years" constituted harassment); *Drapeer*, 147 F.3d at 1105–06 (finding that repeated comments from a supervisor over a two year period, including one over a loudspeaker, created a hostile work environment).

proportional and contextual, and the result of decades of consideration. These contextual factors likely appeal to employees' innate sense of justice and proportionality. Second, it brings the policy closer to how employers actually evaluate harassment complaints.³⁰² While employers might prohibit everything on paper, and the paper trail might minimize the severity of the conduct, the actual standard they use for imposing discipline looks closer to the legal standard. This will continue to be true even in a broader context where employers take a more punitive approach than in the past. Articulating those standards makes the employer's policy more transparent, which serves the expectations of both victims and the accused.

A more transparent harassment policy will, upon close inspection, reveal that less serious incidents of harassment—like comments about an employee's membership in a protected category—do not represent the most serious forms of harassment. While these comments could be harassment, they should be handled within the context of a broader discrimination policy.

Discrimination policies present an opportunity to explain the significance of such comments in a way that will be meaningful to employees. The policy could explain, for example, that supervisors occupy a position of trust in the organization.³⁰³ (See Appendix.) They are entrusted with providing opportunities for advancement equally among those who report to them, without regard to their membership in a protected category. It is analogous to an employee entrusted to handle large sums of money on

302. Of course, articulating the circumstances that influence disciplinary decisions is not without risk; specifically mentioning some types of misconduct necessarily leaves others out. While including a disclaimer is helpful, there is nevertheless a risk of a breach of implied-in-fact contract claim if the employer departs from its articulated standard.

303. RESTATEMENT (THIRD) OF EMP'T LAW § 8.01 (AM. LAW INST. 2015) ("Employees in a position of trust and confidence with their employer owe a fiduciary duty of loyalty to the employer in matters related to their employment."); RESTATEMENT (THIRD) OF AGENCY § 8.01 (AM. LAW INST. 2006) ("An agent has a duty to the principal to use care in acting on the principal's behalf."); Lyman P.Q. Johnson & David Millon, *Recalling Why Corporate Officers Are Fiduciaries*, 46 WM. & MARY L. REV. 1597, 1628–30 (discussing the fiduciary duties of corporate officers); Joseph T. Walsh, *The Fiduciary Foundation of Corporate Law*, 27 J. CORP. L. 333, 333 (2002) ("The fiduciary concept . . . had its origin in the law of trusts, where its literal meaning—faithfulness—correctly described the duty of responsibility owed by one who held title, but not ownership, to property of another.").

the employer's behalf, which imposes special responsibilities regarding how that money should be handled.³⁰⁴ Part of upholding that trust means devoting care and attention to how they distribute formal and informal opportunities for advancement. It also means refraining from making comments or engaging in conduct that would cast doubt on their impartiality. When a supervisor makes denigrating comments about a subordinate's gender, race, or religion, it suggests they are not giving everyone an equal shot. The same is true if they do nothing to address discriminatory comments on the part of an employee's coworkers. Where a supervisor violates that duty of trust, it is proper for the employer to discipline them, which may even mean removing them from their decisionmaking role.

Framing discrimination as a breach of trust also aligns with the way companies structure their code of ethics and conflict of interest policies.³⁰⁵ Employees that represent the company with respect to third parties have a special duty of trust to maintain the company's image and project the employer's values with respect to honesty and integrity. Employees intuitively understand that paying a bribe to a government official, no matter how small, could be extremely damaging to the company's legal interests and integrity.³⁰⁶ Likewise, employees also understand the notion that dishonest conduct, for example a false claim for reimbursement or misuse of the company's credit card, is extremely problematic not just because of the amount of money at

304. RESTATEMENT (SECOND) OF TRS. § 174 (AM. LAW INST. 1959) ("The trustee is under a duty to the beneficiary in administering the trust to exercise such care and skill as a man of ordinary prudence would exercise in dealing with his own property."); John Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 656 (1995) (discussing the duty of prudent administration).

305. ORACLE CODE OF ETHICS AND BUSINESS CONDUCT (2017), www.oracle.com/us/corporate/investor-relations/cebc-176732.pdf ("The term 'conflict of interest' describes any circumstance that could cast doubt on your ability to act in Oracle's best interests and to exercise sound business judgment unclouded by personal interest or divided loyalties."); *Code of Ethics and Business Conduct*, SOC'Y FOR HUM. RESOURCE MGMT. (Jun. 18, 2018), https://webcache.googleusercontent.com/search?q=cache:wvBF8ZAmctgJ:https://www.shrm.org/resourcesandtools/tools-and-samples/policies/pages/cms_014093.aspx ("We must avoid any relationship or activity that might impair, or even appear to impair, our ability to make objective and fair decisions when performing our jobs.").

306. *The Kraft Heinz Company Employee Code of Conduct*, KRAFTHEINZ (Aug. 19, 2015), www.kraftheinzcompany.com/ethics_and_compliance/code-of-conduct.html ("We are strictly prohibited from directly or indirectly giving, offering, promising, or authorizing anything of value—no matter how small—to any government official or agency . . . or any other individual to corruptly secure a business advantage.").

issue, but because it raises serious questions about future conduct. The same is true in the discrimination context.

Although codes of conduct often reference discrimination and harassment, they tend not to be framed in terms of integrity and breach of a duty of trust. Instead, discrimination is characterized as something the company “doesn’t” do.³⁰⁷ Likewise, harassment is framed as disrespectful,³⁰⁸ or as a productivity drag due to decreased interpersonal trust.³⁰⁹ Instead, codes of conduct should explain that a supervisor’s discriminatory conduct casts doubt on their ability to make future employment decisions. If that supervisor is later permitted to decide which employees to promote, for example, that comment could qualify as a smoking gun of the supervisor’s discriminatory intent. The policy should explain that it is therefore proper for the employer to intervene before the supervisor’s decision is tainted by the discriminatory comment. That intervention need not necessarily be excessively punitive when compared to the conduct at issue. But it should be adequate to remove any doubt as to the fairness of later employment decisions relating to the employees affected by the comment.

Such a policy would help limit an employer’s liability. But it also places the conduct within its correct context. The employer

307. ORACLE, *supra* note 305 (“The term ‘conflict of interest’ describes any circumstance that could cast doubt on your ability to act in Oracle’s best interests and to exercise sound business judgment unclouded by personal interest or divided loyalties”); *Code of Ethics and Business Conduct*, SOC’Y FOR HUM. RESOURCE MGMT., *supra* note 305 (“[Company name] is an equal employment/affirmative action employer and is committed to providing a workplace that is free of discrimination of all types from abuse, offensive or harassing behavior.”).

308. PG&E, *supra* note 263 (“Conduct yourself in a professional manner and treat others with respect, fairness and dignity.”); KRAFTHEINZ, *supra* note 306 (“Keep interactions with your fellow employees professional and respectful.”); *Code of Conduct*, VERIZON, <https://www.verizon.com/about/sites/default/files/Verizon-Code-of-Conduct.pdf> (last visited Oct. 22, 2018) (“We know it is critical that we respect everyone at every level of our business. We champion diversity, embrace individuality and listen carefully when others speak.”).

309. *Code of Ethics and Business Conduct*, SOC’Y FOR HUM. RESOURCE MGMT., *supra* note 305 (“We all deserve to work in an environment where we are treated with dignity and respect. [Company name] is committed to creating such an environment because it brings out the full potential in each of us, which, in turn, contributes directly to our business success.”); OWENS CORNING, OWENS CORNING CODE OF CONDUCT, https://dcpd6wotaa0mb.cloudfront.net/owenscorning.com/assets/sustainability/Owens_Corning_Code_of_Conduct-d77192c66ff4c26dd9a5c0de973be65332700c676cb4f9334fc687564f237c34.pdf (“We depend on each other’s knowledge and support, so it is especially important to treat our fellow employees with respect and dignity. Harassing behavior creates an uncomfortable workplace where people don’t trust each other—which keeps us from reaching our goals.”).

is not intervening out of concern for overly sensitive employees, nor is it seeking to regulate speech. Instead, it is protecting the integrity of the decisionmaking process for all employees.

CONCLUSION

The MeToo movement is still unfolding, and may yet lead to even broader changes than those currently described here. These include examinations of pay equity, paid leave, and discrimination against those with caregiving responsibilities. It may also lead to additional innovations in employee practices, fueled by a tech industry ready to test new approaches with real time analytics.

Employer practices will continue to be negotiated and revised. Because prior systems of interlocking employment policies and practices were so entrenched, changing one policy or practice inevitably affects the implementation of others. Shifting cultural expectations may also produce a backlash, which will likewise demand an employer response.

Legal rules will both lead and follow changes in employer practices. Restrictions on settlement agreements will change contracting practices, employer litigation, and settlement strategies. On the other hand, if legislators fail to act, employers will likely seize the opportunity to expand social media policies and their use of arbitration agreements.

Nevertheless, disruption can be fruitful. Ultimately, the MeToo movement injects democracy into the workplace, by pushing employers toward transparency and accountability. Without secrecy for cover, employers must finally show their work, and figure out what it means in practice to provide everyone with an equal opportunity to succeed.

APPENDIX – MODEL POLICIES

HARASSMENT POLICY

Federal and state law protects an employee’s right to work in an environment that is free of harassment. Under the law, the term “harassment” means offensive comments or conduct directed at an employee because of their membership in a protected category, like their gender, race, color, religion, national origin, disability, age, or veteran status. State law also protects employees against harassment based on [insert additional state law protections].³¹⁰

To satisfy the legal standard for harassment, the offensive conduct must be so severe or frequent that it has the effect of altering the employee’s work environment. In other words, the work environment would need to be very bad for someone to win a court case.

A very bad work environment is a low bar. We hold ourselves—and you—to higher standards. We strive to create a work environment where employees can focus on their job, without being pigeonholed, judged based on stereotypes, or constantly reminded that they are different. Our workplace also prioritizes inclusion, where everyone has a chance to make important work connections, gain valuable experience, and take on challenging opportunities.

Our policy prohibits harassing conduct, even if it is not severe or frequent enough to meet the legal standard. Don’t make jokes or comments that mock or denigrate others based on their background or status. Don’t post derogatory or demeaning material in your physical workspace, on your computer, or over email (and consider how your behavior online might bleed into the workplace). Offensive physical contact, leering, and blocking other people’s movement are also unacceptable.

When assessing your own behavior, consider how your comments—along with comments from others—might add up over time. For example, a few casual comments to a pregnant woman about her size might seem isolated to you. But if everyone does it, that means she’s hearing a constant stream of comments, to the exclusion of work-related discussions or enjoyable small talk unrelated to her appearance. The same thing goes for casual comments motivated by someone’s religion, race or disability, for

310. Brackets refer to information for the employer to complete.

example. Constantly reminding someone that you are hyper-focused on how they are different is probably not going to help them succeed in the workplace.

Sexual conduct may violate the harassment policy, especially when it involves employees in authority positions. Employees deserve to be able to focus on their job, without having to fend off the advances of others they can't readily avoid. Employees also shouldn't have to worry about the awkwardness of how their boss will respond to being rebuffed. Or whether their supervisor views them as an object, instead of recognizing their productivity and potential. Sexual conduct can also be a form of harassment where it is used to marginalize or punish others, even those of the same gender.

If you have experienced harassment, please do not suffer in silence. Reporting the behavior enables us to help put a stop to the behavior, and ensure that others are not affected as well. You can report harassment to [your supervisor, human resources . . . insert other reporting options].

We investigate reports of harassment we receive, unless the complainant requests that we do not investigate. (The absence of an investigation may limit our ability to respond. Consequently, we may independently decide to investigate harassment involving allegations of serious or widespread harassment.) Investigations usually consist of interviewing the complainant, the person accused of harassment, and any others identified as witnesses. We may also collect relevant documents, like emails or text messages. In cases involving violence, assault, rape, or threats of violence, we may also contact law enforcement.

If we determine a harassment complaint is substantiated, we will then decide how to stop the conduct, as well as hold the employee who violated the policy accountable. Our disciplinary decisions generally reflect the seriousness of the policy violation.

A minor violation of the harassment policy might mean talking with the employee about his or her behavior and why it is a problem. More serious violations of the policy could mean immediate termination, or other serious forms of discipline that reduce the employee's rank, responsibilities, compensation, or performance evaluation.

Some of the factors that tend to bear upon the seriousness of a harassment claim include: (1) whether the harassment involved physical contact; (2) whether the conduct involved epithets or slurs; (3) whether the conduct involved symbolically offensive or threatening acts, such as swastikas or a noose; (4)

whether the conduct involved vandalism or damage to property; (5) whether the conduct was humiliating or degrading; (6) whether the conduct limited the victim's access to work opportunities or tools needed to perform his/her job; (7) the physical environment in which the harassment occurred; (8) the social context in which the harassment occurred; (9) whether the conduct was repeated.

As with all disciplinary matters, we ultimately reserve the discretion to decide whether and how to discipline employees. Common sense, fairness, and business exigencies may dictate that we make decisions regarding harassment not specifically set forth in this policy.

DISCRIMINATION POLICY

Under federal and state law, employees have the right to equal opportunity when it comes to important employment decisions like hiring, promotion, pay, or termination decisions. That means that these decisions cannot be motivated by an employee's gender, race, religion, national origin, age, disability, color or veteran status. State law also protects employees on the basis of [insert state law protections].

However, we hold ourselves to a higher standard than the legal rules require. We expect supervisors to show a high degree of integrity in distributing both formal and informal workplace opportunities. This means taking care to ensure equal opportunity in areas like networking opportunities, challenging assignments, training opportunities, mentoring, client engagement, and other similar opportunities that affect an employee's career trajectory over time.

In our company, supervisors hold a special position of trust to maintain the integrity of these employment decisions. They breach that duty of trust when they engage in conduct or comments that raise serious questions about their ability or willingness to provide opportunities on an equal basis. In particular, derogatory or demeaning comments about an employee's religion, disability, gender, age, race or other legally protected status, suggest that supervisor cannot be trusted to provide a level playing field. Other harassing behavior by a supervisor may raise similar questions about the supervisor's integrity regarding the discrimination policy. In other words, even a minor violation of the company's harassment policy by a supervisor may be a serious violation of the company's discrimination policy.

If you have experienced discrimination, or have questions about the integrity of the decisionmaking process, please let us know. Reporting at an early stage can help us fix the process and restore trust before the stakes get even higher. You can contact human resources [insert any other reporting options].

We will then investigate the situation, which generally consists of interviewing you, interviewing the supervisor, and reviewing relevant documents, including documents bearing on the decision-making process, if any. If a complaint is substantiated, we will then assess how to remediate the situation, address the supervisor's breach of trust (if applicable), and improve the decisionmaking process.

RETALIATION POLICY

Employees perform a valuable service to the company by bringing important information to our attention through [their supervisor or to HR].³¹¹ We also recognize that it takes courage to formally report harassment, discrimination or other unlawful conduct.

Encouraging employees to use and trust our complaint system demands that supervisors and coworkers support those who have used the complaint system. Retaliation against another employee for using our complaint system is strictly prohibited.

311. This language should parallel earlier language about how to report a harassment complaint.